ABSTRACT

INTRODUCTION:

Today an agreement between two parties is often embodied in a standardized document, which has been specially drafted. Such standard form contracts probably account for more than 90% of all contracts made today. If a person goes to market to purchase a cell phone or wants to get his cell phone repaired, he gets a bill or receipt. On its reverse side it contains a list of written terms and conditions. If a person wants buy an airplane ticket through Internet, he pays for the ticket by entering his credit card number in the seller’s form. On the bottom of the page there is a request to accept the seller’s standard terms and two buttons one marked “I accept” and the other “I do not accept”. If he wants to buy the ticket, he is bound to accept the terms and conditions of the seller without even seeing or reading it. These transactions are ordinary and routine in our daily life and aim at purchasing a simple product or service.

Freedom of contract stands for the idea that co-ordinations and co-operation for common purposes is best achieved in a given society by allowing individuals to make their significant decisions by entering into enforceable agreements based on freely given consent. The notion of freedom of contract is one of the basic principle of the law of contract. This notion entitles everybody to conclude a contract with a freely chosen person and allows one to freely determine the terms of the contract without arbitrary or unreasonable legal restrictions. In other words, each person should be free to decide whether, with whom, and on what terms to conclude a contract.
Freedom of contract is not a creation of modern contract law. Its roots can be found in the social, economic and political philosophies of the sixteenth and seventeenth centuries, in attempts to define basic human rights. Liberty exists only where a person is free to act unrestricted by external legal or social impediments. John Stuart Mill, too, considered freedom of contract as being part of the general freedom of action. In his opinion, the function of the law was to ensure that contractual intentions were carried out. Finally, the notion of freedom of contract and action became widespread in conjunction with the doctrine of *laissez faire* in the nineteenth century. In a *laissez faire* market place individuals interact freely and without governmental restrictions. In this system of natural liberty, freedom of contract was considered to be vital for the continuance of trade and industry.

From the sixteenth to the beginning of the twentieth century, the notion of freedom of contract was almost unrestricted. However economic growth in Europe and the aggregation of the capital within fewer hands as well as the growing use of standard form contracts enabled powerful contracting parties to impose contractual terms upon weaker parties. Thus consumers often became subjected to oppressive contract terms by trade and industry. Due to superior position of most of the sellers, freedom of contract for the consumers existed only theoretically. In practice, the notion of freedom of contract became a fiction, though it still remains the basic principle of the law of contract both in the United Kingdom and in India. According to J.S. Mill, it did not matter that one contracting party had bargained from a position of economic inferiority. Nor did it matter that the superior party had imposed unconscionable provisions upon the inferior party.
The roots of consumer protection can be found in the nineteenth century. The industrial revolution, which led to mass production and the increase of business transactions between sellers and consumers, as well as the development of *laissez faire* philosophy, which relied on self-regulation of the market and sought to remove every restriction of trade or competition, gave rise to an abuse of the superior business positions by the sellers and oppressive contract terms for consumers. As a result, modern contract law have been developed in order to protect the weaker consumer by placing limitations on the notion of freedom of contract.

Freedom of contract and consumer protection illustrate different policies present in the law of contract. Thereby the principle of social control over private decisions opposes the notion of freedom of contract. In this context, government activities have been directed at protecting the consumer's interest. In protecting the consumer, the Government have remained careful in keeping the notion of freedom of contract intact.

A standard form contract is an agreement between two parties that contains pre-drawn terms and is used by a business entity or firm in transaction with consumers. The contract is used to supply mass demands for goods and services. Generally the will of the party in superior bargaining position dominates the transaction. The consumer is required to accept contractual terms without negotiations notwithstanding some particulars. Often the consumer accepts harsh, oppressive and one-sided terms without understanding or even knowing it. Often this position exists as the one party to the contract is in strong bargaining position, whereas the consumer has little choice other than to accept the terms contained in the standard form contract. Clearly an unequal situation exists.
Furthermore the development of the Internet transaction has given standard term contracts an increased importance. The extensive use of standard form contracts reflect today's underlying economic realities and are evidence of their economic necessity. Standard form contracts are the consequence of mass production and play an integral part to it. Although advantage and disadvantage do exist in their usage.

On the one hand, standard form contracts fulfill an important efficiency role in society. Standard form contracts facilitate the functioning of modern society which is dependent on the mass production of goods. Generally, mass production can be characterized by high specialization, division of labour and the production of large amounts of standardized products. As a result it provides very inexpensive products. However, the extreme specialization of the functions of modern life require the formation of detailed contracts on an almost daily basis. In this context standard form contracts provide information about the transaction and enforce order by setting out the terms and conditions of transaction in writing. They ensure low transaction cost, through being mass-produced like the goods and services, which they regulate. Increased transaction cost in individually negotiated contracts would lead to an increase in the price of the product, thus depriving many consumers the opportunity to enter into the transaction. Therefore standard form contracts ensure an efficient delivery of mass-produced products and benefit the consumer. Additionally, they assure uniformity and quality of the transactions. Pre-drawn terms are often better adapted to the special needs of the particular bargain as sales persons and consumers are neither able and in some cases not permitted to set out their own terms and conditions.
For the above some reasons it can be said that standard form contracts serve a useful purpose in enabling parties to conclude their negotiations efficiently and without unnecessary cost. However, the benefits received by the consumers in this regard are not without their disadvantages.

The use of standard form contracts often results in unjust harsh, oppressive and one-sided terms to the detriment of the party in weaker bargaining position. There exists a high potential for abusing standard form contract terms as the party in the stronger bargaining position does not allow the consumer to negotiate over the terms of the contract because of the simple reason that the terms of the contract are pre-drafted and pre-drawn. Often the consumer does not read the standard form contract terms. This may occur due to the small print and the complicated legal language in which the document is written. Oppressive, harsh, unreasonable and one-sided terms can therefore easily escape the notice of the consumer. In this context terms governing warranty, damages, attorney’s fees, refund and repair, indemnification, risk of loss and waiver of rights have a particular potential for abuse.

By using standard form contracts an economic disparity arises whereby the party in stronger bargaining position gains advantages and the consumer disadvantages. In effect, standard form contracts institutionalize the disparity. An example of this disparity is that the risk-transaction-failure is allocated to the economically weaker consumer. Unequal standard form contracts terms constitute a costless benefit for the party in the stronger bargaining position. Practically, if the party in stronger bargaining position fails to take this advantage of these benefits, his competitors will take that. These competitive pressures have been in existence for a substantial duration. This has resulted in a situation
whereby consumers do not even notice the unfairness contained in the standard form contract terms anymore. Consumers, do not read or necessarily understand the terms contained in the standard form contract.

As a result the importance of standard form contracts in modern business life and the potential for abuse, policing mechanism are necessary to balance the advantages of standard form contracts and their negative “side-effects.”

Selection of Topic:

Business and commercial organizations enter into numerous contracts with its customer, clients and consumers everyday due to enormous increase in the volume of business. When a large number of contracts have got to be entered into by giant and leviathan size commercial organization, it is practically not possible for these commercial entities to draft and prepare a separate agreement for each of its customer or clients. It is also not possible for them to negotiate over the terms and conditions of the agreement with their customers. To save time and for the purpose convenience it was felt necessary to draft and prepare an agreement in standard form. Nowadays the use of these standard form contracts are very common in every business, trade and industry. Thus the purpose for selecting this topic for research is to critically analyse its importance and its misuse by stipulating harsh, oppressive and one-sided excluding and limiting terms in it by the party in the stronger bargaining position.

Statement of Research Problem and Hypothesis:

Standard form contracts are very common due to its usefulness. Contractual terms are set out in standard forms which are nowadays used for all contracts of some kind. Such standard terms are often settled by a
trade or business association for the use of its members for contracting with its customers. In standard form contracts, generally the terms of the contract are pre-drafted by one of the parties and the other party having inferior bargaining position is supposed to sign on the dotted line without having any opportunity to get the terms changed or altered to suit his needs. The party in inferior bargaining position has no time to read the terms of the contract then the party in superior bargaining position taking undue advantage of the situation stipulates such terms in the contract which suits him most either by limiting his liability or excluding his liability under the contract.

The research problem of our research work is to study about the legislative steps taken by the Legislature till date to curb the menace of excluding and limiting terms in standard form contracts and to ascertain as to how far the courts in India and in other countries including the United Kingdom tried to strike a balance between the right of freedom of contract and the restriction thereon to prevent misuse and menace of unfair, arbitrary, harsh, oppressive and one-sided exclusion and exemption clause in consumer contracts especially those which are in standard form.

Objectives of the Study:

The enforcement of the standard form contracts in general is justified by the assumption that both the parties have adopted the standard form contract. This fictional consent is consistent with the objective character of law of contract in general. Freedom of contract entitles everybody to conclude a contract with a freely chosen person and freely determine the provisions of the contract without arbitrary or unreasonable legal restrictions. In this regard, judicial enforcement of contracts derives
from the notion of freedom of contract. Accordingly, all contracts generally are enforceable. This feature of the law of contract is expressed in the Latin maxim, *pacta sunt servanda* (contracts are to be kept). The effect of this maxim is inexistence in both United Kingdom and India. It requires the enforcement of contractual obligations created in circumstances, which are consistent with freedom of contract.

The main object of the present study is to examine the use and the misuse of the standard form contracts in India and also to analyse that whether the present statutory provisions relating to contract are sufficient to meet any situation and are capable to do justice, or there is dearth and scarcity of the statutory provisions in this field, and if so to make suitable suggestions in this regard.

**Research Methodology:**

The present study is based on the doctrinal method. An effort is made to study the case laws enunciated by the Supreme Court of India and various High Courts of India and as well as of the United Kingdom and to ascertain the attitude and the judicial response of the courts regarding the principles of the law of contract and its interpretation in relation to standard form contracts. The present study is designed to examine the role of the judiciary and to study the judicial response in India in relation to standard form contracts. Apart from the case law study, the materials relied on are the Reports of the Law Commissions, Discussion Paper and the statutory provisions relating to commercial law in India and of other countries especially of the United Kingdom and the United States of America.

**Presentation of Study:**

To cover all aspects, the entire work is arranged in six chapters.
Chapter I deals with the meaning, definition, nature and the scope of the standard form contracts. It also discusses other aspects of standard form contracts the usefulness and the misuse of the standard form contracts.

In Chapter II the researcher has discussed different types of excluding and limiting terms, meaning of exemption clauses, law regarding exemption clauses and principles of construction of exemption clauses. It also discusses the principle and circumstances of fundamental term and fundamental breach of contract.

In Chapter III he has made an effort to survey the statutory provisions in India in the field of law of contract and also the other provisions who could deal the problems created by the standard form contracts. This chapter also analyses the statutory provisions in the other countries in relation to the law to deal with unfair terms in contracts especially of United Kingdom and United States of America.

In Chapter IV he has endeavoured to discuss and analyse the Reports of the Law Commission of India and the recommendations contained in it to enact laws to deal the problem of unfair terms. An attempt has been made to analyse the Reports very minutely.

Chapter V deals with judicial protection and treatments. In this chapter an effort is made to study and analyse the case law enunciated by the English Courts and the Supreme Court of India and also the judgments of different High courts of India. For Indian cases only those cases have taken up for study where the contractual document is in standard form, and its term creates the “cause of action.”

Last Chapter VI deals with conclusion and suggestions. In this chapter the researcher has made an effort to recapitulate the chief points
of the discussion discussed earlier along with a few suggestions in the light of the present position.

The common law subject to some restrictions based on public policy, permits persons to make whatever contractual bargains they please and will enforce those bargains. Standard form contracts drafted by the big commercial organization contains numerous clauses printed in minuscule characters which the individual do not in fact read and if he did, he would be incapable to understand it, in most of the cases, and if he understood, he would be not in a position to negotiate over the terms or get it changed to suit his requirement. In consequence the judges in the U.K. tried to apply and adapt the doctrines of common law so as to do justice. An unfair, irrational and unconscionable clause in a contract is regarded as unjust and amenable to judicial review at common law. Lord Denning in John Lee & Son V. Railway Executive (1949) 2 All ER 581, while interpreting and analysing a term in a contract observed that "... above all there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused. "He reiterated his same view in the case of Gillespie and Co. Ltd. V. Roy Bowles Transport Ltd. (1973) 1 All ER 193, while construing an indemnity clause in a contract and questioned that are the courts to permit party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable and said,

"When it gets to this point, I would say, as I said many year ago … there is the vigilance of the common law while allowing freedom of contract, watches to see that it is not abused. It will not allow the party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so."
Denning L.J. in Spurling V. Bradshaw (1956, All ER 121 at 125) stated that,

"Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

What the parties to the contract meant to say or write is a question of construction of the words used having regard to the tenor of the agreement and to the surrounding circumstances. However, a number of rules of construction have been developed to assist the courts to ascertain the meaning of the words and phrases in various circumstances. The "Contra proferentem" rule is the principle whereby the words or terms of a written contract are construed more strictly, forcibly and narrowly against the party putting forward the contractual document. This rule of construction had been applied by the common law courts where there was doubt or ambiguity in the phrases used in the contractual document. The courts in cases of doubts or ambiguity resolved against the party who put it forward and in favour of the other party.

Earlier the courts in the United Kingdom decided the cases of breaches on the basis of construction of contract, but later some judges went beyond the construction approach and held that a party who had committed a "fundamental breach" or "breach of a fundamental term" could not rely on an exclusion clause no matter how widely it was worded. Denning L.J. in Karsales (Harrow) Ltd. V. Wallis (1956, 2 All ER 866) said that if a party to the contract is guilty of a breach of those obligation in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.
Over the years, however, exemption and exclusion clauses have become wider and wider, giving the powerful party greater protection against contractual liability, for what would normally be a breach of his contract. The court's respect for the principle of "freedom of contract" has limited their ability adequately to control such clauses, and the statutory intervention is the only way to deal satisfactorily with what is widely recognized as a real problem. In the United Kingdom various legislative measures have been taken for the welfare of the consumers. The Unfair Contract Terms Act, 1977 and Unfair Terms in Consumer Contracts Regulations, 1999 are very important legislations in the field of law of contract.

The Constitution of India provides social and economic justice for all the citizens of India. It protects freedom of profession, occupation, trade and business. If also provides that in economic system there should not be concentration of wealth and resources in the hands of a few persons. Article 39 of the Constitution of India provides for certain principles of policy to be followed by the State. Article 39 (b) says that the State shall in particular, direct its policy toward securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 39 (c) of the Constitution of India also provides that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. The problem which needs to be examined is that what principles have been developed by the courts in interpreting and applying the constitutional and other statutory provisions in relation to freedom of contract and misuse of standard form contract through harsh, oppressive, unfair, unreasonable arbitrary and one-sided exemption and exclusion clauses in the garb of free consent.
Yet another principle laid down by the courts is that the term of the contract must be reasonable and should not be opposed to public policy. In Lilly White V. Munnuswami, (A.I.R. 1966 Mad. 13) the Madras High Court held that a term which is prima facie opposed both to public policy and to the fundamental principles of the law of contract cannot be enforced by a court merely because it is printed on the reverse of a bill and there is a tacit acceptance of the term when the bill was received by the customer.

There is also a practice in many business concerns which deal in the supply of goods or rendering services, that they have contracts or order forms in standard form in which there is found a so called term of the contract which is an incomplete sentence in minuscule character written at the foot or on the top of a bill or order form that is “subject to (name of place) jurisdiction.” This type of practice is also very common in the contracts of transportation of goods. By this they try to avoid jurisdiction to adjudicate the matter by a particular court, which it otherwise possesses and try to vest jurisdiction in a court of their choice. The Supreme Court in Hakam Singh V. M/s Gammon India Ltd. (A.I.R. 1971 S.C. 740) laid down the principle regarding this and said that it is not open to the parties by agreement to confer by their agreement jurisdiction on a court which it does not possess under the Code of Civil Procedure. But where two courts or more have jurisdiction under the Code of Civil Procedure to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. Such an agreement does not contravene section 28 of the Indian Contract Act, 1872.

But Justice M.P. Thakkar of Gujarat High Court (as he then was) sounded a note of caution regarding this practice of excluding the
jurisdiction of a court which it possesses otherwise under the Code of Civil Procedure, in the case of Snehalkumar Sarabhai V. M/s Economic Transport Organization (A.I.R. 1975, Guj. 72) and observed,

“A new approach to this question deserved to be made, for, the ouster clause is calculated to operate as a engine of oppression and as a means to defeat the ends of justice.”

The principle laid down by the Apex Court in Hakam Singh’s case was reiterated in a number of cases later on. Recently in Harshad Chiman Lal V. D.L.F. Universal Ltd. (A.I.R. 2005 S.C. 4446) the Supreme Court said that it is not open to the parties to confer jurisdiction by their agreement on a court which it does not possesses under the Code of Civil Procedure. The parties can restrict their choice by a specific agreement to anyone of the two or more courts only in cases where the selected court otherwise possesses the jurisdiction under the Code of Civil Procedure.

Thus the established legal position is that the parties by their agreement are not permitted to totally exclude the jurisdiction of civil court which has been created by statute. But the parties may by their agreement restrict their choice to one or more such courts which otherwise possesses territorial jurisdiction under the Code of Civil Procedure. The parties cannot vest jurisdiction in a court which it does not have under the Code of Civil Procedure. Where several courts have territorial jurisdiction in respect of suit, parties may by their agreement confine themselves to anyone of such civil courts and such an agreement is not violative of section 28 of the Indian Contract Act, 1872.

In Central Inland Water Transport Corporation Ltd. V. Brojo Nath Ganguly (A.I.R. 1986 S.C. 1571) the Hon’ble Supreme Court for the first time considered the principle of unconscionability outside the purview of
section 16 of the Indian Contract Act, 1872 and tried to broaden its limits. The Court discussed unconscionability, distributive justice and inequality of bargaining power. The court also explained the concept of unreasonableness. Justice D.P. Madon (as he then was) when speaking for the Bench in this case asked a question,

"Under which head would an unconscionable bargain fall?"

To this question he answered himself and said,

"If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void."

The Apex Court earlier in Gherulal Prakash V. Mahadeodos Maiya (A.I.R. 1959, S.C. 782) observed that the doctrine of public policy is governed by precedents, its principles have been crystallized under the different heads and though it was permissible to expound and apply them to different situations it could be applied only to clear and undeniable cases of harm to the public. Although theoretically it was permissible to evolve a new head of public policy in exceptional circumstances such a course would be inadvisable in the interest of stability of society.

The Supreme Court in State of Rajasthan V. Basant Nahata (A.I.R. 2005, S.C. 3401) again took the discussion regarding "public policy" out of the confines of statute to the general area and observed that the public policy is not capable of being given a precise definition. What is "opposed to public policy" would be a matter depending upon the nature of the transaction. The pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept as to what is for public good or in the public interest or what would be injurious or harmful to the public good or the public interest at the
relevant point of time as contra-distinguished from the policy of a particular government.

Conclusion:

The different High Courts and the Supreme Court of India apart from some Sections of Indian Contract Act, 1872 such as Sections 16, 23, 27 and 28 the Courts have invoked Article 14, 16, 19 and 21 of the Constitution of India to strike down certain unreasonable terms of the contract entered into by the Government, its instrumentalities, Public Sector Undertakings and Statutory Bodies which are “State” within the meaning of Article 12 of the Constitution of India. The High Courts and the Supreme Court of India exercised the power of judicial review given to it by the Articles 226 and 32 of the Constitution of India to strike down arbitrary and unreasonable clauses in contracts entered into by the Government and its instrumentalities with the individuals, and have confined and restricted the area of exercising this power only in cases when it was felt necessary to strike down a clause, in public service employment, as being unreasonable arbitrary and unfair. The courts are not inclined and are reluctant to extend this principle to strike down unfair and unreasonable clauses in commercial contracts. There is no law in India which can deal to curb the menace of unfair terms mostly found in standard form contracts. The courts refrained from interfering in commercial contracts. Though the courts are willing to do the needful for the consumers who have inferior or no bargaining power at all who suffer in the hands of commercial organization but due to dearth of statutes in this field the courts are toothless and hence helpless and thus unable to help individuals in inferior bargaining position.
The Law Commission of India in its 103rd Report on "Unfair Terms in Contract", 1984 observed, that the entire basis of a contract, that it was freely and voluntarily entered into by parties with equal bargaining power, completely falls to the ground when it is practically impossible for one of the parties not to accept the offered terms."

The Law Commission further said that, "the net result is that the Indian Contract Act, 1872, as it stands today cannot come to the protection of the consumer when dealing with big business. Further, the ad hoc solutions given by courts in response to their innate sense of justice without reference to a proper yardstick in the form of a specific provision of statute law or known legal principle of law only produce uncertainty and ambiguity."


The Law Commission again in its 199th Report on Unfair (Procedural and Substantive) Terms in Contract, 2006 while agreeing with the observation and suggestion given in its 103rd Report in 1984 opined that the provisions of the Indian Contract Act, 1872 and other laws are not sufficient to meet the problems of today. The Law Commission observed that there is need to protect consumers and particularly to grant protection from the disadvantages of extensive introduction of standard terms of contracts which are one-sided and it has become necessary to evolve general principles regulating unfairness in contracts. The Law Commission prepared a draft of the Proposed Bill on
"Unfair (Procedural and Substantive) Terms in Contract Bill 2006" and recommended for its enactment.

Suggestions:

The researcher finds that the recommendation of the Law Commission of India whether it were in 103\textsuperscript{rd} Report or in 199\textsuperscript{th} Report, 2006, fell into deaf years of the Government. Central Government did not pay any heed to the recommendations of the Law Commission. Government’s lackadaisical approach is responsible for the non-implementation of the recommendations of the Laws Commission. Governments are more keen to pass and enact those laws and ordinances for which they are getting political mileage or increase in vote bank tally of the political party to which that particular Government belongs.

The researcher’s humble suggestions are that the recommendations of the Law Commission of India should be implemented by the Government of India at the earliest.

Secondly, till the recommendations of the Law Commission is not implemented, the court should be more susceptible to pain felt by consumers by these unfair, unreasonable, arbitrary, harsh, oppressive, irrational and one-sided excluding and limiting terms in standard form contracts which are giving undue advantage to parties who have superior bargaining power and only disadvantages to the party who is in a inferior bargaining position.

Thirdly there should also be an office of “Fair Trading” on the British pattern in each revenue district of India to deal and curb the menace of unfair and unconscionable excluding, exempting and limiting terms usually contained in standard form contracts.