Chapter 5

QUALITY CONTROL BY IMPLYING TERMS IN CONTRACTS

In a contract for sale and supply of goods, prior to the actual agreement, many statements are exchanged between the parties. Statements made during pre-contractual negotiations have varying degrees of significance to the parties. The importance of such statements will depend on whether those statements become an essential term of the contract or not. The effect of the statement in enabling a party to enjoy the benefit of the negotiation may also depend on whether the statement is treated as a condition or a warranty. A close examination of the nature of the statements in achieving the benefit of the sale or supply contract is made considering its importance in promoting product quality.

The terms of the sales contract are often negotiated by the parties. But some important matters relating to the sale may be left out by them believing that negotiations on those matters are unnecessary. But unless such terms are read into the contract the outcome will be unpredictable. The right of a person to sell the goods or that the goods are free from encumbrances or hazards are not generally stated but presumed by both the parties. When a conflict arises, the non-incorporation of such a term arrests utmost importance. It is necessary to examine whether the courts or legislature can supplement such terms in the absence of express statements made by parties on those matters. An affirmative answer in this regard may lead to substitution of a contract by court or legislature for the one made by the parties. But if the answer
is in the negative, it may lead to absurd results leaving the benefit of the contract to one party alone.

The meaning and scope of the terms often implied by law in sales contracts require a close scrutiny. The recent tendency appears to be to expand the meaning of the implied terms for promoting consumer interest. The adoption of the concept of 'satisfactory quality' instead of 'merchantable quality' is an indication of the growing concern of the legislature to promote quality of consumer goods. These aspects are examined to assess the role of implied terms in achieving quality control.

Exclusion of implied terms is widely used by traders as a method to overcome the judicial and legislative initiatives and efforts for promotion of product quality. Realising the danger of such clauses in a contract for sale and supply of goods, several measures are adopted to contain the rigour of exclusion clauses. An analysis of these measures is made to assess the status of exemption clauses in contracts of sale.

Representations in Contract of Sale

During the course of the bargaining leading to the conclusion of a binding agreement, the contracting parties may make statements or give assurances calculated to induce the other to enter into the contract. The other party may believe that those facts would render the proposed bargain to his advantage. Such undertakings and promises contained in a contract are known as terms of the contract. In a dispute between the parties, the court may have to decide whether the statements or assurances formed part of the contract or was merely a representation.

Representations may induce the party to whom it is made to enter into the contract. But unless it becomes a term of the contract, he may not get any remedy.
Representations will become terms of the contract by its express incorporation. It may also become part of the contract by incorporating a different document in the contract.1

**Representations and Terms of Contract**

Representations made before the conclusion of the contract may become a term of the contract. When the representation has become a term of the contract, the aggrieved party can base his claim under it. However, the right of the injured to treat the contract as terminated is dependant upon the nature of the term and the magnitude of the breach. The injured is always entitled to recover damages resulting from the breach of the term. The object of awarding damages for breach of the term in most cases is to protect the plaintiff's expectation interest.² This is done by putting him into a position as if the contract had been performed.

Representations found in documentary form but not in the contract itself are not considered as statements inducing contract. They are not terms of the contract also. But it is possible that these representations may confer rights on third parties who relied on those statements.³ The dividing line between a term of the contract and a mere representation is not practically easy to draw.⁴

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¹ For example, the terms in a charter party agreement is incorporated into a contract of bill of lading by providing a term 'all liabilities under the bill of lading will be as per charter party'. See Stewart C.Boyd, Andrews S.Burrows and David Foxton (Eds.), Scrutton on Charter Parties and Bills of Lading, Sweet & Maxwell, London (1996).


³ Stewart C.Boyd et al; supra n. 1 at p.111.

Classification of Contractual Terms

Once it has been established that a statement forms a term of the contract, the question is whether all the terms are equally binding? It was always open to the judiciary to determine whether a term is a condition or a warranty. Until the statutory prescription of condition and warranty came in, the common law courts through the interpretative technique classified contractual terms into three broad categories. They are (i) conditions, (ii) warranties and (iii) innominate or indeterminate terms5. According to the court, if the parties regard them as essential, it is a condition6. Breach of a condition enables the innocent party to treat himself as discharged from the obligations and also to sue for damages. If they did not regard it as essential, but only as subsidiary, it is a warranty.7 Breach of a warranty can only give rise to an action for damages for breach.8 Innominate terms were never been treated as either conditions or warranties. They lie in between and when an obligation of this kind is broken liability is dependant on the seriousness of the breach9.

In China Pacific v. Food Corporation of India10, the cargo on a stranded ship was unloaded and stored for its safe presentation. There was no contract whatsoever about meeting the expenses thus incurred and who will bear it. The House of Lords held that the owners of the cargo were liable to pay for the expenses of unloading and

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5 For a brief account of these terminologies, see Stewart C.Boyd et.a., supra n. 1 at pp. 88-107. See also, P.S.Atiyah, An Introduction to the Law of Contract, Clarendon Press, Oxford (1992), pp.186-88.
8 See the Sale of Goods Act, 1930, ss.12 (2) and (3). Also see, Dansons Ltd. v. Bonnin [1922] 2 A.C. 413; Bettini v. Gye, (1876) 1 Q.B.D.183; (These cases give excellent explanations of the distinction between ‘condition’ and ‘warranty’. See also Anson’s Law of Contract, supra n. 5 at p.125 and Guest A.G., (Ed.), Chitty on Contracts, Sweet & Maxwell, London (1977) Vol. I. p.319.
9 See Stewart C.Boyd et.al, supra n. 1 at p. 88.
storing, although the parties had not entered into any contract for this purpose. The court assumed the existence of a 'bailment' which enabled the court to impose a sort of 'implied' obligation to pay even in the absence of an express contract.

Similarly, if a person professes to act as an agent of a principal, it is assumed that he impliedly warrants of having his principal's authority to act on his behalf. If it turns out that he has no such authority, the other party who suffered loss can hold the agent liable on this implied warranty. This principle was evolved in the famous decision of Collen v. Wright. In this case, the defendant acted as the agent of a third party during the negotiation of a lease agreement with the plaintiff. The terms were agreed upon and the plaintiff started occupation of the property. The third party, who was in fact the principal, claimed that the agent had exceeded his authority and ultimately the plaintiff had to vacate the property. The court held that the plaintiff is entitled to seek reimbursement of his losses against the agent who must be taken to have warranted that he had the principal's authority to grant the lease.

A slightly different but similar is the 'request principle' formulated by courts. This principle holds that a person may be held liable to another where he has requested the other to do some act for him and having been done in pursuance of the request, suffered loss. Sheffield Corporation v. Barclay is one such case. Here, the defendants had accepted from a client, certain share certificates of Sheffield Corporation. These certificates, though unknown to the defendants, were stolen. The defendants presented the certificates to the company for transfer, and later on getting transferred, sold it to a third party. The Corporation was held liable to the original

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owner and also to the bonafide purchaser from the defendants. The Sheffield Corporation sued the defendants claiming that they are responsible for the loss since they had started it by sending the stolen certificate for transfer in their name. The Court held that the company is entitled to recover because the defendants can be taken to have impliedly agreed to indemnify the company against any loss when they sent the certificate. They may also be taken to have impliedly warranted the certificate to be genuine and not stolen.

A more recent example of an implication of the kind is provided by the decision of the House of Lords in Harvela Investments Ltd. V. Royal Trust Company of Canada Ltd. Here, a trustee who was negotiating for the sale of shares invited two bidders to make sealed bids stating the highest prices. One bidder offered a specified amount and the other offered a specific sum or ‘a sum higher than the other bidder’. The question before the court was whether the last bid was valid or such a bid, by implication, to be ruled out. It was held that there was a necessary implication in the original invitation that such bids could not be made.

In cases of informal property transactions, collateral contracts, and situations of special relationship between parties, courts on many occasions

14 For example, see Eves v. Eves, [1975] 3 All E.R. 768 (C.A.); Tanner v. Tanner, [1975] 3 All E.R. 776 (C.A.). In the latter case, Lord Denning M.R., openly admitted that the function of the court was to imply or impose a contract on the parties.
15 For examples, see Charnock v. Liverpool Corporation, [1968] 3 All E.R. 473 (C.A.). In this case the plaintiffs’ damaged car was sought to be repaired by the insurance company of the plaintiffs, with the defendant. When there was inordinate delay in rendering the repairs, the court said that the plaintiff is entitled to sue the defendant under an implied contract to do the work in a reasonable time.
16 For instance, see Seeger v. Copydex Ltd., [1967] 3 All E.R. 415 (C.A.). In this case, there was prolonged negotiations between the parties based on a patent use which ultimately failed. When the defendants started working on an alleged invention of the plaintiff, the court held that there is a breach of confidence and the plaintiff is entitled to succeed.
formulated rules, which kept the parties binding. The belief that courts do not make contracts for the parties is stated to be a mere dogmatic proposition that is misleading.

It can be seen that the courts can and do imply many terms into the contract to give business efficacy to the transaction. Terms usually and invariably implied by courts in contracts of sale and supply of goods have received statutory recognition. The implied terms in a contract of sale enumerated in the Sale of Goods Act are nothing but the principles recognized by common law discussed above.

**Conditions and Warranties**

The obligations created in a contract are not of equal importance. Some terms go directly into the core of the contract that its non-performance may frustrate the very purpose of making the contract. Others may not be so important and its non-performance may not have such impact. The former terms are called 'conditions' and the latter are known as 'warranties'. The term 'condition' has been defined as a stipulation 'essential to the main purpose of the contract, the breach of which gives rise to a right to repudiate the contract.' The term 'warranty' has been defined as a 'stipulation collateral to the main purpose of the contract', breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as

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18 *Id.* at p.96.

19 This principle of 'business efficacy' has been laid down by Mackinnon L.J. in the famous case *The Moorcock*, (1989) 14 P.D.64.

20 The Sale of Goods Act, 1930, s. 12 (2).
Whether a stipulation in a contract of sale of goods amounts to a condition or a warranty depends upon the construction of the contract.

A stipulation mentioned in the contract as a 'condition' may amount to a 'warranty' and vice-versa, under the facts and circumstances of each case. In *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Ltd.*, the court considered this issue in detail and held that if the breach went to the root of the contract, the other party was discharged from his obligation, but if it does not, he is not.

However, if a stipulation is treated as a condition, the plaintiff is entitled to repudiate such contract even if he does not sustain any damage. But if it only amounts to a warranty, the breach will entitle him to claim damages, but not repudiation of the contract. The distinction between a warranty and a condition lies in the remedy for breach. In case of breach of warranty there can only be a claim for damages. But for breach of condition the party injured can refuse to perform his own part of the obligation and invoke in appropriate cases, remedies of recission and restitution.

A comparative analysis of the Indian and English law relating to conditions and warranties with that of the U.S. shows that there is no superficial distinction.

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between conditions and warranties under the U.S. law. The Uniform Commercial Code uses the term ‘warranty’ not only to cover both conditions and warranties as used under Indian and English law, but also to representations, which induced making of such contracts. The breach of such a warranty is remediable by recission, rejection or damages.28

The ambiguities and uncertainties that galore around the terms, conditions and warranties under the Indian and English law need to be straightened by legislative action to the best advantage of all concerned.

Conditions are either expressed or implied. Express conditions are those terms agreed upon by the parties either orally or in writing. However, in certain circumstances, stipulations are implied and are read into the contract as an essential part of it.29 In this process the court or legislature is supplementing terms to the contract made by the parties.

Circumstances in Which Courts Imply Terms into a Contract

Instances were not rare where courts implied into the contract, terms that the parties have not themselves expressly inserted. The parties may sometimes either through forgetfulness or due to bad drafting, fail to incorporate into the contract some essential terms. Had they adverted to the situation in its proper perspective, they would certainly have inserted them in to contract. In such cases, the courts may in order to give ‘business efficacy’ to the transaction, imply such terms as are necessary

28 The U.C.C. (U.S.A.), ss. 2–313 and 2–507.
29 Howell v. Coupland (1876) 1 Q.B.D. 258 (C.A.). Indian application of this principle can be seen in Sannidhi Gundayya v. Illoori Subhaya, A.I.R. 1927 Mad. 89.
to bring out that result. But courts cannot imply terms into the contract unless the failure in this regard will lead to absurd results.

Terms Implied in Contract of Sale

The role of state in a welfare economy at present is diverse and complex. It is not only an administrator but also has assumed the roles of a protector, provider, entrepreneur, and arbitrator. In tune with this notion, states have started helping the consumers against defective goods. Starting with the *laissez faire* doctrine of *caveat emptor* and enforcing only the express terms, the courts slowly evolved a process of providing protection to the ordinary purchasers of goods. This was achieved by a long and continuous process. Ultimately the change took an advanced form of consumer protection measure compelling the seller to sell only goods that are of certain quality and reasonably fit for all purposes for which they are generally used. The terms implied by way of conditions and warranties in the law of sale of goods play an important role in quality control and consumer protection.

Concept of Merchantable Quality

The most significant implied condition in a contract of sale is that of merchantability. The Sale of Goods Act does not give any definition to the word 'merchantable'. But the word has by long use become a term of art in commercial

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34 In India, the law relating to sale of goods was incorporated as a part of the general principles of contract till the enactment of the Sale of Goods Act, 1930. This Act, in many respects is similar to the Sale of Goods Act, 1893 of England.
35 The Sale of Goods Act, 1930, ss. 11 to 17.
Goods are of merchantable quality if they are of such a quality and condition that a reasonable man, acting reasonably, would after a full examination, accept them in performance of the offer. Merchantability is a relative term. The test is whether the goods are merchantable under the particular description in the contract or not. This view was taken by the Calcutta High Court in Trustees, Port of Calcutta v. Bengal Corporation. Here, the Port Commissioners invited tenders for wire ropes of certain specification for use in cranes. The Bengal Corporation, which dealt in these goods agreed to supply the same, the port being entitled to inspect the goods. In an action for price the defendant contended that the plaintiff supplied ropes, which did not correspond with the agreement and the condition or warranty as to quality and fitness. It was held that the goods in question were not of merchantable quality and were not fit for the purpose for which they were required, since the wire ropes were not fit to be used in cranes for which it was purchased. ‘Merchantable quality’ in this sense means that the goods purchased shall comply with the description in the contract so that a purchaser buying goods of that description would regard it as a good tender.

It is not sufficient that the goods are marketable or saleable. The term that the goods shall be of merchantable quality is fulfilled only when they do not differ from the normal quality of the described goods. In the case of foodstuffs, where they are purchased by description, an implied condition as to their being sound and are of

37 Bristol Tramway Co. v. Fiat Motors Ltd., [1910] 2 K.B. 831.
41 Supra n 39.
merchantable quality may also arise. In *Hasenbhoy Jetha Bombay v. New India Corporation Ltd.* the machine in question was found to be less productive. The court held that the machine was not of merchantable quality in as much as it differed substantially from the description.

Goods cease to be merchantable due to defects rendering them unfit for the purpose for which they are usually sold. Merchantability is fulfilled when the goods do not differ from the normal quality of the described goods including the state or condition required by the contract. The goods should be immediately saleable under the description by which they are known in the market.

The goods remain merchantable even if they are unfit for some particular purpose. It is sufficient that they fulfill the requirements of merchantability within the meaning of the description given to it in the contract. This is the view expressed by the House of Lords in *B.S.Brown and Sons Ltd. v. Craiks Ltd.* In this case the buyers ordered for some cloths of a prescribed quality at an agreed rate per yard. The cloth supplied by the manufacturers was not fit for the buyer's purpose, even though it conformed to the prescribed quality. The sellers had thought that the cloth was for some industrial purposes for which it was fit. Reselling could fetch only a reduced price. The House of Lords rejected the buyers' claim for damages on the ground that the goods were not merchantable. The goods were still commercially saleable for industrial purposes. A mere difference in price did not make the goods

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42 *In Re, Beharilal Baldeoprasad Firm of Merchants, A.I.R. 1955 Mad. 271.*
44 Id. at p. 438.
46 [1970] 1 All E.R. 823 (H.L.)
unmerchantable. But if the goods could be resold at a substantially lower price, it would be unmerchantable.

In India, the Sale of Goods Act, 1930, confers protection to the buyer who purchases goods from a seller who deals in goods of that description by implying a condition of merchantable quality. But the seller or producer might have been a person who habitually deals in goods of that kind. He must not be a stray dealer. Constant dealing in commodities of a certain kind enables the dealer or manufacturer to be in touch with the quality and performance of the product in question. His experience with the goods makes him more enlightened about the diverse aspects of the goods. Because of his superior knowledge about the goods, it is justifiable in law to saddle him with the responsibility to compensate the consumers for defects in those goods.

But if the buyer has examined the goods, the implied condition of merchantability will not come to his rescue as regards defects, which such examination ought to have revealed.

Implied conditions and warranties as to quality or fitness for a particular purpose may be attached to a contract by custom or usage of a trade. It has also...

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47 This position is substantially altered by the Sale and Supply of Goods Act, 1994 of the U.K.
48 Id. at p.828.
49 The Sale of Goods Act, 1930, s.16 (2) reads: “Where the goods are bought by description from a seller who deals in goods of that description (whether he is manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality.”
50 The British Sale of Goods Act, 1979, s. 14 (6), before its amendment in 1994, had provided for a definition to the term “merchantable quality” as follows: “Goods of any kind are of merchantable quality... if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.”
51 The Sale of Goods Act, 1930, s. 16 (2), proviso.
52 Id., s. 16(3).
been stated that express warranties and conditions stated in a sales contract will not negate a warranty or condition implied by the Act unless it is inconsistent with it.53

**Merchantable Quality and the Rule of Caveat Emptor**

One essential feature embedded in the sale of goods law is the maxim *caveat emptor*54. The practical impact of the introduction of implied term of merchantability has been to bring down the importance of this principle. The Sale of Goods Act, 1930, being an enactment to strike a balance between the interests of both the contracting parties, a virtual restatement of the principle of *cavea: emptor* doctrine can be seen in the opening words of section 16. It reads:

"Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows…"55.

The rule of *caveat emptor* holds the view that it is the buyer’s duty to select goods that are in conformity with his requirements56. Even though a seller is not supposed to conceal the defects in his wares, he is not ordinarily bound to disclose the defects, which are known to him.57. The scope of the rule of caveat emptor is seen explained by the Irish Court of Appeal in the following words:

"*Caveat emptor* does not mean in law that the buyer must take chance.

It means, he must take care. It applies to the purchase of specific

53 Id., s. 16(4).
54 This term means 'buyer beware'. It has been stated that the doctrine of *caveat emptor* is dying through the benevolent hands of law. See Steve Hedley, "Quality of Goods, Information and the death of Contract", [2001] J.B.L. 114.
55 Ibid. Similar provisions can be seen in s.14 (1) of the Sale of Goods Act, 1979 (U.K.)
things upon which the buyer can exercise his own judgment. It applies
also whenever the buyer voluntarily chooses what he buys and that the
buyer is not relying on the skill or judgment of the seller.58

However, the exceptions enlisted in this section arrest more significance to the
consumers. Even though in normal situations there is no legal fiction of implied
condition or warranty in any sales transaction, in the circumstances narrated there
under, it is thus presumed to advance the consumer interest. The rule of merchantable
quality and fitness for purpose in the law of sales appear as exceptions to the rule of
caveat emptor. These exceptions at present have become more prominent than the
rule itself.59

Evolution of the Concept of Satisfactory Quality

Since the implied condition of merchantability applies only where the seller
sells in the course of a business, there is no statutory requirement of quality when the
transaction is a private sale. The legislative wisdom in treating private sales distinct
from other sales may not be questioned since this enactment is to ensure and regulate
specific conduct in the market where sellers and buyers transact as a class. But the
absence of a proper definition to the term 'merchantable quality'60 has paved the way
for divergent interpretations depending upon the facts and circumstances of

58 Wallis v. Russel [1902] 2 I.R.585 at p.615 as quoted in Michael Mark (Ed.), Chalmer's Sale of
p.53.
60 For a general discussion on 'merchantable quality', see A.G.Guest et.al. (Eds.), Benjamin's Sale of
p.256.
each case\textsuperscript{61}. The British Consumers’ Association in 1979 had pointed out\textsuperscript{62} that the statutory definition given to the term ‘merchantable quality’ was unsatisfactory at least in two respects. In their opinion the definition concentrates excessively on the fitness of the goods for their purpose and ignores aesthetic considerations and appearance. They also argued that reference to the ‘standard which a buyer might reasonably expect’ could open the door to an argument that a buyer could not complain if his new car had ‘teething troubles’ since it was widely known that all new cars had them. Because of the uncertainties attached to the definition, it was eventually decided by the British Law Commission\textsuperscript{63} that it would be appropriate to adopt a test of ‘acceptable quality’ so as to reflect the concerns of consumers. But the Law Commission has acknowledged that there is no magic formula to cover all cases. The British Parliament chose not to adopt a test of acceptability, opting instead to set a standard of ‘satisfactory quality’. The reason, which underlies the use of this alternative adjective, is that many consumers may regard goods as unsatisfactory without wishing to reject them. In other words, people are prepared to accept goods with which they are not wholly satisfied. Moreover, it is opined that if the standard of ‘acceptable quality’ had been adopted, this might have given rise to confusion. The concept of acceptance is closely related to the separate issue of whether a buyer may


terminate his contractual obligation to perform and to reject the goods delivered by the seller. 64

Meaning of 'Satisfactory Quality'

Under the British Sale of Goods Act, 1979, after its amendment 65 in 1994, goods are considered to be of 'satisfactory quality', if they meet the standards that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price (if relevant) and all the other relevant circumstances. 66 The following aspects will also be treated as relevant in appropriate cases:

a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
b) appearance and finish,
c) freedom from minor defects,
d) safety, and
e) durability. 67

It is true that the amendment bid a farewell 68 to the term 'merchantable quality'. However, in determining the status of the implied term and the circumstances in which the implied term is inapplicable, the judicial propositions made earlier can be looked into. 69 It has been said 70 that the new standard of

65 Amendment to the Act was effected by the Sale and supply of Goods Act, 1994.
67 Id., s. 14 (2B).
69 See David Oughton & John Lowry, supra n. 64, at pp. 160-163.
70 Id., p.162.
satisfactory quality' divorces English law from a century old jurisprudence concerning the meaning of 'merchantable quality'.

The Uniform Commercial Code of U.S.A. though not changed the terminology, gives an elaborate list of ingredients that constitute merchantable quality. It includes, tradability with the same description, fair average quality, packing, labeling and price. 71

Limitation to the Doctrine of Merchantable Quality

Section 16(2) of the Sale of Goods Act, 1930, provides for exceptions to merchantability doctrine where the buyer has examined the goods. In such cases, there will not be any implied condition as to merchantability. 72 This limitation is confined to those defects, which such examination ought to have revealed. 73 If the defects are not perceivable through naked eyes, a mere examination will not relieve the seller from the obligations under the section. The purchaser cannot, however, be expected to make a thorough examination. He need only conduct a reasonable

71 U.C.C., Para 2-314. reads : “Goods to be of merchantable quality must –
   a) pass without objection in the trade under the contract description;
   b) in the case of tangible goods, are of fair average quality with the description;
   c) are fit for ordinary purposes for which such goods are used;
   d) run within the variation permitted by the agreement of even kind, quality and quantity within each unit involved;
   e) are adequately contained, packaged and labelled as the agreement may require;
   f) conforms to the promises or affirmations of fact made on the container or label if any;
   g) must fetch that price, on which it is bought, if sold under that description.”

72 The proviso reads: “...if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed”.

73 The English Act of 1979 and the U.S. Code also contain an exception on similar lines. See the Sale of Goods Act, 1979, s.14(2C)(b) and the U.C.C. s.2-316(3)(b). In the Code, a particular buyers’ skill and the normal method of examining the goods in each circumstances determine what defects are to excluded from the scope of warranty coverage by examination.
examination, which is to be interpreted by the commonsense standards of everyday life.\textsuperscript{74}

In \textit{Godley v. Perry},\textsuperscript{75} a six-year-old boy bought a plastic catapult from a retailer who had exhibited it in the show-window of his toyshop. The catapult broke, while being used and a piece struck the boy's eye blinding him. The plaintiff succeeded in an action for breach of implied conditions of fitness for the purpose and of merchantable quality.

The protection to the buyer will not be available if it was understood by both parties that the buyer would carry out some process to the goods to make them merchantable and he has not done this. This was thus held in \textit{Heil v. Hedges}.\textsuperscript{76} The plaintiff in this case bought some pork chops, which were infected with worms. Due to improper cooking, he became ill on eating as a result of infection. The court held that the seller was not liable since proper cooking would have destroyed the worms.

In India, the developments made in these aspects in western countries are not incorporated in the Sale of Goods Act, 1930. Still, the implied condition as to merchantability is a reliable source of protection to consumers. In an era where majority of the goods sold in the market are complex and packed in containers, the implied condition of merchantability has more significance. Besides, being a protective provision, it has the unique effect in indirectly compelling the producer to improve the quality of his wares and at least to avoid causing harm to the consumers.

\textsuperscript{75} Ibid.
The seller can in this process absolve himself from the civil liability to compensate which in the long run will certainly improve his profits and goodwill in the business. In this sense, it is mutually advantageous.

**Implied Conditions as to Fitness for the Purpose**

Law recognizes that the buyer is the best judge to determine the nature and quality of the goods he purchases. But if the purchaser makes known to the seller, expressly or by implication, the particular purpose for which the goods are required, then the law implies a condition that the goods shall be reasonably fit for the purpose for which it is bought. In such a situation, the law presumes that the buyer is relying on the skill and judgment of the seller. This condition applies only if the seller is a person usually dealing in goods of that description. The trust by the buyer on the skill and judgment of the seller creates an implied condition that the goods he supplied are fit for the purpose mentioned by the buyer.

'Reasonable fitness' means fitness for the general purposes as well as for specific purposes. A defect in the tiniest part may become a source of danger to the finished product. Courts have interpreted this provision liberally to do justice to consumers against 'defective and unfit' goods.

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77 Similar provisions can be found in the Sale of Goods Act, 1979, s.14 (3); the Supply of Goods (Implied Terms) Act, 1973, s. 10(3) and the Supply of Goods and Services Act, 1982, ss. 9(4), 5, 4(4) and (6).

In *Priest v. Last*, the seller told the purchaser of the hot water bottle that it was suitable for holding hot water but not boiling water. The purchaser was able to recover from the seller the expenses incurred for treatment of his wife's injuries as the hot water bottle burst on being used.

Similarly, in *Jackson v. Watson & Sons*, a person purchased some tinned salmon from a grocer and provision merchant. Since the salmon was poisonous, the buyers' wife died and he suffered illness. The court held that the buyer was entitled to recover damages including a sum which would compensate him for being compelled to hire someone to perform the services which had been rendered by his wife. This finding was based on the fact that salmon, being a food material, the purpose is known to the seller and the seller could reasonably assume the consequences if it is contaminated by poison. If the goods can be put to one purpose only, there will be a breach of the requirement of fitness for purpose if they cannot be used for that purpose. In such a case, it is unnecessary to require the buyer to make that purpose known to the seller expressly. It will be assumed that the seller is aware that the buyer requires the goods for that purpose. The buyer in such a situation is not required to prove that he relied on the seller's skill or judgement. In *Manchester Liners Ltd. v. Rea Ltd.*, the court held that the mere disclosure of purpose might amount to sufficient evidence of reliance.

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82 [1922] 2 A.C. 74.
In *Ranbir Singh Shanker Singh Thakur v. Hindustan General Electric Corporation Ltd.*,\(^{83}\) the seller sold a Radio set of a particular make with a guarantee to repair freely if defects are found within a specified period. It was found defective from the very beginning. When sued for refund of the price, the court held that the communication of the purpose by the buyer to the seller might be inferred from the description of the goods given by the buyer and from the circumstances of the case.\(^{84}\) Therefore, when the seller sells a watch,\(^{85}\) its purpose can very well be inferred. It is not essential that it must be specifically spelt out.

The position will be different if the goods can be put to different purposes. Here, it cannot be assumed that the goods are fit for a particular use to which the buyer wishes to put them. Hence it is necessary for the buyer to show that he has communicated to the seller the particular purpose for which he requires them. If the goods fail to serve the purpose required by the buyer, he cannot recover damages if the goods are put to abnormal use, which is not made known to the seller.\(^{86}\)

The British Sale of Goods Act, 1979, now makes it clear\(^{87}\) that once the buyer's purpose is notified to the seller, the condition as to fitness will be implied "except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller...." However, this provision also did not project the law in question with sufficient clarity. Therefore, the

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\(^{83}\) A.I.R. 1971 Bom. 97.

\(^{84}\) Id. at p.100.


\(^{87}\) The Sale of Goods Act 1979, s.14 (3). The U.C.C., s.2-316 reiterates the U.S. law on this point.
lacunae is sought to be removed by the Supply of Goods and Services Act, 1994. Under this Act, 'satisfactory quality' of goods will be presumed only if they can be put to all usual purposes for which goods of that description are generally used.88

**Sale Under Trade Name**

. The protection afforded to the buyer is excluded if he relies on any particular patent or trade name.89 The exclusion provision in the Act says that the buyer is not relying on the skill or judgement of the seller if he asks for a particular brand. Instead, he opts to purchase the product on his own assessment. In such a case, the seller need not be saddled with any further obligation. But difficulty arises when the buyer orders goods under a trade name but at the same time intends to rely upon the skill and judgement of the seller. Trade name or brand name to the buyer in this context is only to identify the product. In *Baldry v. Marshall* 90 the following propositions were made.91

i) Sale of an article under its trade name is not in itself sufficient to attract the proviso.

ii) Where the buyer asks for an article and the seller sells under its trade name, the proviso does not apply.

iii) Where the buyer says "I have been recommended such an article" giving a trade name — "will it suit any particular purpose"? and the seller after

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89 The Sale of Goods Act, 1930, s. 16(1) proviso. The proviso reads: "In case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."
91 *Id.* at p.266 per Banks, L.J.
having heard the purpose, sells it without disapproval, the proviso will not apply;

iv) Where the buyer tells the seller, "I have been recommended such an article as suitable. Please send it". Then the proviso does apply.

The scope of the proviso must be confined to articles, which in fact have a trade or patent name under which they can be ordered. In *Taylor v. Combined Buyers Ltd.*, Salmond, L.J. observed that the reliance on trade name does not permit the vendor under the shelter of this proviso to sell useless goods. The mere fact that what has been purchased is having a trade name alone is not sufficient to exclude the presumption of reliance. For this purpose, the circumstances should show that the buyer did not rely upon the skill and judgment of the seller.

Most of the goods produced and pushed into the modern market bear a trademark or trade name. Consumers quite often identify a product by its brand name. Viewed from this perspective, it may not be right to think that a consumer by demanding a product in its trade or brand name intends to exclude the liability of the seller. Hence the British and American law reformers recommended wiping out of this proviso from the statute book. In India, no attempt is seen made in this direction.

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95 *Taylor v. Combined Buyers Ltd.*, (1924) N.Z.L.R. 627. Also see R.S. Thakur v. *Hindustan General Electric Corporation Ltd.*, A.I.R. 1971 Bom. 97, where the court held that even though goods are sold under a patent or trade name by a seller who deals in it, there is such an implied condition. The proviso in the opinion of the court will not absolve the dealer from his liability under the Act.

Implied Conditions on Sale by Sample

At common law, the legal effect of a sale by sample was that the seller had in express terms warranted to the buyer that the goods sold should answer the description of a small parcel exhibited at the time of the sale. Here, since the quality of the article is determined by the quality of the sample that the buyer has selected, the seller need only deliver the goods, which conform to the sample. If it does not correspond with the sample, the purchaser is entitled to reject it. The protection envisaged by the Sale of Goods Act, 1930,97 is distinct in nature and has special importance to retailers and wholesalers whose usual practice is to buy by sample. This, in effect gives a right to indemnity to the retailer, who has often been sued by customers.

In practice, this provides insurance to the retailer against injury caused by the merchandise he sells. 98 It is only a guarantee that when the buyer determines the quality by identification of the sample, he will unconditionally get the same quality in bulk. The sample here in effect largely replaces the need for any description of the goods by words.99 It is therefore natural to imply a term that the bulk will correspond with the sample in quality.

But a mismatch with the intrinsic qualities of the sample may occur in the bulk supplied. Hence it may not be possible to find out easily whether there is a

97 The Sale of Goods Act, 1930, s. 17 says that in case of a contract for sale by sample there is an implied condition—
   a) that the bulk shall correspond with the sample in quality;
   b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
   c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.
99 James Drummond v. Van Ingen (1887) 12 A.C. 284.
violation of the implied term. *Steels & Busks Ltd. v. Bleecker Bik & Co. Ltd.*,100 explains this point. In this case, S agreed to buy 5 tons of pale crepe rubber from B, stating the 'quality as previously delivered'. In a previous contract, S had bought pale crepe rubber from B. The item supplied in this contract was treated as sample. The bulk was the five tons to be delivered. The 5 tons were delivered, and S used the rubber to make corsets. However, this contained an invisible preservative, PNP, which had not been present in the rubber previously supplied. This preservative stained the fabric of the corsets. The court held that the sellers were not liable for breach of the implied condition because the rubber supplied was not substantially different from the sample. It could be used for any of its normal purpose once the dye had been washed out. According to the court PNP was not an impurity, but a preservative, the presence of which did not affect its quality.

According to the Act, the buyer should be given a reasonable opportunity of comparing the bulk with the sample to verify whether the bulk correspond with the sample in quality.101 It is also stipulated that a condition can be implied that the goods shall be free from any defect, rendering them unmerchantable,102 which would not be apparent on reasonable examination of the sample.103

The implied guarantee enshrined in the Act seems to ensure the quality standard predetermined by the buyer when he has decided upon the sample in

101 The Sale of Goods Act, 1930, s. 17(2)(b). The Sale of Goods Act, 1979 of U.K., s. 15 (2) (b) which formerly contained a similar provision has now been repealed presumably on the ground that right to inspection is a basic right of the consumer which is to be made available in all type of sales. See the Sale of Goods Act, 1979(U.K.) ss. 34 & 35.
102 The British Act uses the term 'unsatisfactory quality' for 'unmerchantable'. See the Sale of Goods Act, 1979, s. 15(2) (c).
question. Duty is cast upon the seller to supply goods conforming to the sample. A corresponding right is given to the buyer to compare the bulk with the sample to make sure that the goods supplied are what he had ordered. In this sense, this provision also stands for assuring better trading standards.

Sale by Description

In a sale by description the goods are described by some attributes like quality, origin or finish and the buyer relies on that description. This principle applies even to specific goods. In such a sale, the buyer might not have seen the goods but purchased them based on the nature and other qualities described. The phrase ‘sale by description’ covers a wide-range of transactions. It will encompass transactions in which the buyer does not see the goods but relies on a written or oral description of the thing ordered. It will apply even where a consumer orders for something yet to be made. In such a contract, there is an implied condition that the goods shall correspond with the description. Since description may have reference to quality, the goods must satisfy the description as to quality to that extent.

Unlike the provisions relating to quality and fitness discussed above, this condition is not confined to sellers acting in the course of a business. It also covers private sales.

It is worthwhile to note that under the (U.K.) Sale of Goods Act, 1979, it is even possible for a sale to be by description where the consumer has seen the goods

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104 The Sale of Goods Act, 1936, s. 15.
105 In Re, Beharilal Baldeo Prasad Firm of Merchants, A.I.R. 1955 Mad. 271.
106 The Sale of Goods Act 1979, s. 13(3). It reads: "A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer".
before purchase. Thus in a typical supermarket dealing, where the consumer selects pre-packed goods from a shelf, it is unlikely that the precise subject matter of the contract can be examined then and there. Even where the goods are specific and are identified at the time of the contract, the sale may be by description, where the goods are sold under a descriptive label. But if it is clear that the buyer places no reliance at all on the seller’s description, there will be no sale by description.107

This provision of law gives protection to the consumer from false statements relating to quality of the goods. In Beale v. Taylor,108 the seller advertised his car as a “Herald Convertible White, 1961 model”. Actually it was composed of two different cars welded together one part from a 1961 model while the other did not. This in effect changed the quality of the subject matter. It was held that the words ‘1961 Herald’ formed part of the description of the car. Therefore, the court held that there was a breach of the statutory implied condition.

Similarly, in Grant v. Australian Knitting Mills Ltd.,109 the appellant contracted dermatitis as a result of wearing a woolen garment. This has occurred due to the presence of excess sulphites, negligently left in the process of manufacture. In an action against both the retailer and the manufacturers, the court said:

"It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing sold by description, though it is specific, so long as it

is sold not merely as the specific thing but as a thing corresponding to a description”.  

In *Re Andrew Yule & Co.*, Ameer Ali J. said that what amounts to description of goods is a mixed question fact and law. In this case, the buyer rejected the cloth he had ordered for packing foodstuffs on the ground that it gave a bad smell. This was because of certain bleaching process adopted by the seller. The court opined that smell undoubtedly was a quality, which could form part of the description of the goods.

The provision, no doubt, is intended to protect the buyer from misleading statements made by the seller about the goods he intends to sell. By insisting on the fulfillment of his representations, the seller is forced to state only the true quality of his products. If the descriptions are made by the buyer, the seller shall supply goods in total conformance of the description.

As noticed above, it is really a fallacy to leave out packed goods on display selected by the buyer from the purview of the protection afforded by the Act. In order to ensure that it is applicable to such goods also, the legislation is amended in England.

In order to remove the ambiguity, it is desirable to amend the Indian Sale of Goods Act also on similar lines. Such a step would certainly make the sales law in India more consumers friendly.

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110 Id. at p.100 per Lord Wright. This view has received statutory assent in U.K. by its incorporation in the Sale of Goods Act, 1979.
111 A.I.R. 1932 Cal. 879.
112 Id. at p.881. Also see *Varley v. Whipp* [1900] 1 Q.B. 513.
113 See supra n. 106.
Exclusion of Implied Terms

The legal provisions implying conditions and warranties discussed above are beacon lights to the consumers in many respects. The principle of freedom of contract suggests that it should be open to the parties to a contract to agree on whatever terms they find necessary and feasible. In partial recognition of this principle, the Sale of Goods Act, 1930 has incorporated a provision that enables the parties to exclude all or any of the conditions and warranties implied by law.¹¹４

Before the evolution of the ideas of consumer protection, many seem to have justified such exclusion clauses especially when the buyer contracted to purchase a chance.¹¹５ But judged by the standards of today, this provision¹¹⁶ is perhaps the most obvious target of criticism. As a corollary to this, no distinction is drawn between the protection afforded in a private sale and in a commercial sale. In the present day world the belief that every contract is the result of consensus ad idem finds no acceptance. The exclusion clauses in standard form ¹¹⁷ contracts became a lethal weapon for the exploitation of the consuming public. The judges continued to support the commercial interests ¹¹⁸ of the capital. However, slowly but steadily, the attitude of the judges turned towards an approach in favour of the consumers.

¹¹⁴ The Sale of Goods Act, 1930 s.62 reads: “Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage, if the usage is such as to bind both parties to the contract”. The British Sale of Goods Act, 1979 still contains similar provisions in s. 55. But the operation of this section has been declared as subject to the provisions of the Unfair Contract Terms Act, 1977, which places controls on exemption clauses.


¹¹⁶ The Sale of Goods Act, 1930, s. 62 permits exclusion of liability by express agreement.


Judicial Control of Exemption Clauses

The British courts have developed certain techniques to control the legal effect of exemption clauses. Judicial hostility to exemption clauses is due to consumer ignorance, non-negotiation and inequality of bargaining power. The courts have been scrutinizing the exemption clauses very closely to decide the following two basic problems.

(a) Was the clause exempting the liability, duly incorporated into the contract and
(b) does it, in its true construction, cover the event that has occurred?

(a) Incorporation

The general contractual principles of incorporation treats signed documents and those unsigned differently. If a contractual document is signed, it operates as incorporation of all the terms that appear on that document or which are referred to in it. However, the signatory will not be bound, if he signed the document without negligence and it turns out to be a document fundamentally different from the one he thought, he was signing.

If the consumer has not signed the contractual document, a clause will be treated as incorporated into it, only if reasonable steps were taken to bring it to his notice. Courts in several fact situations have applied this principle.

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[121] This principle is otherwise known as the ‘theory of non-est factum’.
In *Thompson v. L.M.S. Railway*, a lady bought a railway excursion ticket containing the words "for conditions see back". The back of the ticket referred to conditions in the railway timetable, which were available for purchase. Had she obtained and read the railway timetable she would have seen a clause excluding liability for negligence. The Court of Appeal held that the exemption clause had been incorporated into the contract.

But in *Olley v. Marlborough Court Hotel*, a different position was taken. Here a consumer booked a room in a hotel. When he got inside the bedroom he saw an exemption notice on the wall of the room. It was held that there was no incorporation of the term since the clause had been introduced too late. The court opined that the position might have been different if the notice was prominently displayed at the reception desk or if the customer had stayed in the hotel on previous occasions.

*Thornton v. Shoe Lane Parking Co. Ltd.* can be considered as the best modern example of adopting the basic rules of contract, to standard form consumer transactions. Mr. Thornton went to park his car at a new multistorey car park where he had not been before. When he arrived opposite to the ticket machine a ticket popped out, the light turned from red to green and he went through and parked his car. The ticket referred to conditions displayed on the premises. These conditions excluded liability for personal injuries caused by negligence of the defendants or its employees. There was an accident caused partly by the defendants’ negligence and

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\[123\] [1949] 1 K.B. 532.

Mr. Thornton was injured. The Court of Appeal held that the defendants had not taken reasonable steps to bring this particular exemption clause to the notice of the petitioner. Lord Denning, M.R. said:

"It is so wide and destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way... In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing it to – or something equally startling."\(^{125}\)

In *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*,\(^{126}\) the Court of Appeal had to consider the situation where one clause in a set of conditions was particularly onerous. Here, SVP, an advertising agency, telephoned to IPL, a photographic library, requesting photographs of the 1950s for a presentation to a client. IPL sent by hand 47 transparencies in a bag with a delivery note stating that they must be returned within 14 days. Across the bottom of the note were printed nine conditions in four columns, under a fairly prominent heading "conditions." One of the conditions stated that all transparencies must be returned within 14 days and that a holding fee of £. 5/- plus tax per day will be charged for each transparency, which is retained longer than the said period of 14 days. SVP accepted delivery, but did not use them and by oversight kept them for 28 days. When IPL sent an invoice for £. 783.50, SVP refused to pay. According to them most libraries charge less than £. 0.50 per day as late fee. Following Lord Denning's suggestion of "red-ink – red hand" in *Thornton v. ShoeLane Parking Ltd.*,\(^{127}\) the Court of Appeal held that the

\(^{125}\) Id. at p.170.


\(^{127}\) Supra n.124.
condition, imposing an exorbitant holding fee was not part of the contract. Dillon L.J. stated the principle in the following words:

"It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in Thornton v. Shoe Lane Parking Ltd., that if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that, that particular condition was fairly brought to the attention of the other party."\textsuperscript{128}

Even though the clause was not an exemption clause, it is interesting to see the extent to which the courts will use the principle of 'non incorporation' as a tool to protect consumers in an area that the legislature has left out.

The analysis of the cases discussed above shows that exclusion of liability by incorporating an exemption clause in the sales contract will be closely monitored by courts. For an effective incorporation of an exemption clause, the seller should prove to the satisfaction of the court that the buyer knew about the exemption.

\textit{(b) Rules of Construction}

The exemption clause, even if incorporated into the contract, will not automatically become effective. The courts have evolved a number of techniques to counter their effect. The rule of privity of contract, rules of interpretation, doctrine of fundamental breach and the concept of reasonableness are used for this purpose.
Many of these techniques are statutorily recognized in England\textsuperscript{129}. In India, all these methods are still relevant.

(i) \textit{The Privity Rule}

An accepted principle of the traditional contract law\textsuperscript{130} is that an exemption clause in a contract between two persons could not protect a third party, even if he was an employee or contractor employed by one of the parties to the contract. However, this principle is relaxed in subsequent cases. It is possible to have terms expressly included in the contract extending the coverage to third parties as well\textsuperscript{131}. A separate contract between the employees and other party can also be made where performance of the main contract will provide consideration to it\textsuperscript{132}.

(ii) \textit{Rule of Strict Construction and Contra Proferentem rule}

Exemption clauses are generally construed strictly against the party who instigated for its inclusion into the contract and now pleads for its reliance. Any party

\begin{itemize}
\item \textsuperscript{129} The Unfair Contract Terms Act, 1977 (U.K.).
\item \textsuperscript{130} Scruttons v. Midland Silicon Ltd., [1962] A.C. 446.
\item \textsuperscript{131} See for instance, Jackson v. Horizon Holidays Ltd., [1975] 3 All E.R.92 (C.A.). In this case the issue before the court was whether the quantum of compensation awarded to a touring family consequent to the tour being distorted is excessive. Held that if the loss or agony suffered by the entire family is taken into account (though they are only third parties) which in fact been done, the amount is not excessive. However, extension of the benefit to third parties was turned down by courts in cases where there was an exclusive jurisdiction clause in the contract. For example see New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd., [1975] A.C. 154; Port Jackson Stevedoring Ltd. v. Salmond, [1980] I All E.R.257 (P.C.) and The Mahkutai [1996] 3 W.L.R.1 (P.C.)
\item It is worth while to note the recommendations made by the British Law Commission concerning the tests of enforceability by a third party in its Report No.242 of 1996. It has suggested for a ‘dual intention’ test. In its view, a third party shall have a right to enforce a contractual provision (1) where the right is given to him by an express term of the contract and (2) where the provision purports to confer a benefit on a third party who is expressly identified as a beneficiary of that provision. If by proper construction of the contract it appears that the contracting parties did not intend the third party to have that right, no enforceability will be allowed to the third party. Where a third party seeks to rely on the test of enforceability to enforce an exclusion or limitation clause, he may do so only to the extent that he could have done so, had he been a party to the contract. (See the British Law Commission, \textit{Privity of Contract: Contracts for the Benefit of Third Parties}, Report No.242(1996), para 7.6(8) and para 5.
\item \textsuperscript{132} New Zealand Shipping Co. Ltd. v. Satterthwaite & Co. Ltd., [1975] A.C. 154 (P.C.).
\end{itemize}
seeking refuge under an exemption clause must establish that the wording is clear enough to cover the alleged breach. If the words are ambiguous, they are construed by courts in a manner least favorable to the party relying on them. The following cases are apt to illustrate this point. In Wallison and Wells v. Pratt and Haynes, a commercial contract for sale of seeds contained a term excluding “all warranties”. The seller supplied seed of a different description and the buyer claimed damages. The House of Lords held that the seller in the case has broken a condition and not a warranty and hence the clause referring only to warranties did not protect him.

In Andrews Bros. (Bournemouth) Ltd. v. Singer & Co. Ltd., the seller sold a “new singer car” with a clause excluding “all implied conditions and warranties”. The seller supplied a car, which was not new. The Court of Appeal held that the seller had broken an express condition and therefore, a clause which merely referred to implied conditions and warranties will not came to his rescue.

In Nichol v. Godts, the sellers agreed to supply rapeseed oil “warranted only equal to the sample”. Sellers supplied a mixture of rapeseed oil and hemp oil, which matched the sample. It was held that the exclusion clause did not protect them from their overriding duty to supply rapeseed oil in accordance with the description.

Similarly, an exemption clause may be overridden by an oral promise inconsistent with it. Thus in Mendelssohn v. Normand, a suitcase was stolen from a car. The plaintiff had parked it at the defendants’ car park. An employee of the

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135 (1854) 10 Exch. 191.
defendants promised the plaintiff that he would lock the car, but he failed to do so. The Court of Appeal held that a clause excluding “loss or damage howsoever caused” was ineffective in view of the express oral promise.

The rule of *contra proferentem* is an extension of the rule of strict construction. This rule provides that an ambiguity in a contract must be construed against the party who wishes to rely on the clause. *Houghton v. Trafalgar Insurance Company Ltd.*,\(^{137}\) can be cited as a case that illustrates this principle. At the time when the plaintiff’s car met with the accident, there were six persons inside, including the driver. The car normally provided seating for five persons two in front and two behind. The policy under which the plaintiff claimed damages contained an exclusion clause exempting the insurers from liability “whilst the car is conveying any load in excess of that which it was constructed”. The insurers contended that since at the time of accident the car was carrying a load in excess of that for which it was constructed, the assured was not covered under the policy. The Court of Appeal held the insurers liable on the ground that the exemption clause will come to the rescue of the insurers only when the load carrying capacity is specifically mentioned in the policy. Here the laden weight was not specified and hence the exemption clause was held inoperative.

Even though the *contra proferentem* rule has been applied to all exemption clauses, the rigor varied considerably between clauses which merely limited the liability and which purported to exclude liability altogether\(^{138}\). The courts were of the

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view that while it is rather 'improbable' to assume that the injured will agree for a
total exclusion of the other party's liability, there is no such high degree of
improbability in agreeing to a limitation of the liability.\footnote{Id. at p.970.}

The views expressed by the Supreme Court of India are also similar. In
_B.V.Nagarajau v. Oriental Insurance Co. Ltd._,\footnote{(1996) 2 C.P.J. 28 (S.C.).} the petitioner's vehicle was a goods
carrier. At the time of accident, it was carrying nine passengers. An exclusion clause
in the insurance policy limited the liability of the insurer to strangers. But it allowed
six employees of the petitioner excluding the driver to be as passengers. Accident
causd severe damages to the vehicle. The Insurance Company rejected the claim
depending on the exclusion clause in the policy. The Supreme Court allowing the
appeal held that the number of passengers in the vehicle or their character (employees
or others) has not in any way contributed to the occurrence of the accident. The
misuse of the vehicle though irregular is not so fundamental in nature to put an end to
the contract. Following its own decision in _Skandia Insurance Co. Ltd., v. Kokilaben
Chandravadan_,\footnote{(1987) 2 S.C.C. 654.} their Lordships has held that when the choice is between relieving
the distress and misery of the victims and that of the profitability of the insurer in
regard to an occupational hazard undertaken by him, the courts should opt for the
former. This is generally done by reading down the exclusion clauses in the light of
the main purpose of the contract.\footnote{See also _United India Insurance Co. Ltd., v. M.K.J. Corporation_, (1996) 3 C.P.J. 8 (S.C.) In this
case the Court refused to read into the contract a term inserted after the issue of the policy by the
insurer which ought to have negated the very claim of the assured.}
(ii) **Doctrine of Fundamental Breach**

The harsh effects of an exemption clause may not be allowed to subsist if it will lead to breach of a fundamental term of the contract.\(^{143}\) Lord Denning explained the reason for this rule in *Levison v. Patent Steam Carpet Cleaning Co. Ltd.*\(^{144}\) His Lordship said:

> "The doctrine of fundamental breach...still applies in standard form contracts, where there is inequality of bargaining power. If a party uses his superior power to an exemption or limitation on the weaker party, he will not be allowed to rely on it if he has himself been guilty of a breach going to the root of the contract".\(^{145}\)

The development of the doctrine of fundamental breach involved a process of identifying breaches, which were fundamental to the contract. In particular, it was said that there would be such a breach if the party not in default were deprived of substantially the whole benefit it was intended that he should obtain from the contract. In the context of consumer protection, the doctrine of fundamental breach came to be regarded as a rule of law. The result is that every time there is such a breach of contract, an exclusion clause in the contract would automatically fail. This operates as a useful measure in the context of consumer protection. But this rule is criticized because if this general principle is applied to commercial contracts, sensible business allocation of risk might be upset. This has led to the abolition of the rule of law.

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\(^{145}\) *Id.* at pp. 94-95. See also, *Instone v. A. Schroeder Music Publishing Co. Ltd.*, [1974] 1 All E.R.171 (C.A.). In this case, Lord Diplock said that the standard form contract is the result of concentration of particular kinds of business in relatively few hands.
approach.\textsuperscript{146} Now the doctrine of fundamental breach is nothing more than a rule of construction, which requires the court to consider whether the exclusion clause, as worded, was sufficiently clear to cover the particular breach under consideration. As such it can be regarded as an aspect of the contra proferentem rule explained earlier.\textsuperscript{147}

In insurance contracts, courts have applied the principle of fundamental breach by devising the doctrine of reading down contractual clause. Thus when an insurance company sought to avoid liability by pleading suppression of material facts by the insured, the Supreme Court of India defeated the insurer’s claim by applying the doctrine.\textsuperscript{148} This has considerably reduced the rigour of the exclusion clauses to the best advantage of the insured. In Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan,\textsuperscript{149} the exclusion clause in the policy of insurance limited the liability to passengers and employees not exceeding six. At the time of accident there were nine persons in it. When the Insurance Company pleaded exemption from liability for damages to the vehicle, the court opined that the number of persons did not in any way contributed to the accident. In such circumstances, the said exclusion clause would be read down so as to serve the main purpose of the policy, which is to indemnify the insured for the loss sustained due to the accident.

What should emerge is the doctrine of reading down the exclusion clause in the light of the main purpose for which the contract is entered into. The effort, in the

\textsuperscript{147} See supra nn.133-142 and the accompanying text.
opinion of the court, must be to harmonize the two instead of allowing the exclusion clause to defeat the main purpose of the contract. Therefore, wide exclusion clauses will have to be read down to the extent to which they are inconsistent with the main purpose or object of the contract. Accordingly, it was held that the exemption clause must be read down so as to serve the main purpose of the policy of insurance.\(^{150}\)

**Legislative Endeavors to Control Exclusion Clauses**

Widespread use of standard form contracts led to a proliferation of exclusion clauses. Even the cleverest application of the rules of construction could not avoid such exclusions. While the common law rules of incorporation and construction of exemption clauses in contracts served to curb some excesses of the business, it was strongly felt that those rules alone were not capable of affording protection to the consumers. In England, the matter was referred to the Law Commission for consideration. The Law Commission submitted two reports\(^{151}\) recommending legislation. The first was in relation to the exclusion of liability for breach of the implied terms in contracts for supply of goods. The later was in respect of the use of exemption clauses in standard form contracts in general. The Law Commission has opined that in many instances the consumer was unaware of how he was being treated. Even where he has, he was often powerless to do anything but to accept the terms offered.\(^{152}\) The effect of the exclusion of liability was to deprive the consumer of rights which social polity required that he should have.\(^{153}\) The Law Commission was of the opinion that the consumers are not in equal bargaining

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\(^{151}\) Law Com. No. 24 (1969) and Law Com. No. 69 (1975.).

\(^{152}\) Law Com. No. 24 (1969), para. 68.

\(^{153}\) Law Com. No. 69 (1975), para. 146.
strength compared to the business with which they deal. All these considerations constituted the reasons for its recommendations for legislative action. The first report was implemented in 1973\textsuperscript{154} and the second report in 1977.\textsuperscript{155} The Supply of Goods (Implied Terms) Act, 1973, made major changes in the possibility of excluding liability in the fields of sale and hire purchase. These changes were re-enacted with major additions in the Unfair Contract Terms Act, 1977.

The Unfair Contract Terms Act, 1977, applies to exclusions of both contractual liability and liability under the tort of negligence. It covers unilateral exclusions of liability such as notices displayed by the occupier of premises, which generally do not form part of a contractual relationship. The Act divides contracts into two groups, those where the buyer is dealing as a consumer and those where it is not\textsuperscript{156}. Where the buyer is dealing as a consumer and the supplier seeks to exclude or restrict any of his liability in respect of a breach of the implied terms in the Sale of Goods Act, 1979 or related legislation, the exclusion will be regarded as void.\textsuperscript{157} Even if the buyer is not dealing as a consumer still the liability for breach of the implied terms about title\textsuperscript{158} cannot be excluded.\textsuperscript{159} However, liability for breach of implied terms about description, quality and fitness may be excluded in non-consumer transactions. This is also subject to the statutory requirement of reasonableness.\textsuperscript{160} In effect, the implied terms become mandatory in consumer sales and even in

\textsuperscript{155} The Unfair Contract Terms Act, 1977.
\textsuperscript{156} Id., s. 6.
\textsuperscript{157} The Unfair Contract Terms Act, 1977, ss. 6(1), 6(2); 7(2) and (3A).
\textsuperscript{158} The Sale of Goods Act, 1979, s. 12; Supply of Goods (Implied Terms) Act, 1973, s. 8; The Supply of Goods and Services Act, 1982, s.2.
\textsuperscript{159} The Unfair Contract Terms Act, 1977, s. 6(1) and (2).
\textsuperscript{160} Id., s. 3(1).
commercial sales the seller will only be able to exclude them if he is able to satisfy the court that the term excluding or limiting liability was in all circumstances reasonable.

Manufacturers' guarantees, instead of providing additional advantages to the consumers, are used as a tool to exempt the liability of the manufacturer or seller. In England, the Unfair Contract Terms Act, 1977, now regulates guarantees. It provides that where goods of a type ordinarily put to private use or consumption cause loss or damage, either as a result of the defect in goods or due to negligent manufacture or distribution, the liability for such loss or damage cannot be excluded or restricted by reference to a guarantee.161

Any attempt to exclude or restrict liability for death or bodily injury resulting from negligence is also declared as void. 162 Exclusion or restriction of liability for negligently inflicted harm other than death or personal injury should satisfy the test of reasonableness.163 Thus, the purported exclusion of liability in respect of property damage or economic loss, resulting from the failure of a supplier of goods or services to exercise reasonable care, may be struck down on the ground that it is unreasonable for them to rely upon it.

The above discussion shows that the Unfair Contract Terms Act, 1977 applies both to the consumer and non-consumer transactions. The provisions are stringent where the person is dealing as a consumer. The requirement that the exclusion clauses must satisfy the test of reasonableness can save the buyer in commercial sales.

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161 Id., s.5.
162 Id., s. 2 (1).
163 Id., s. 2(2).
(i) **Dealing as Consumer**

In order to apply the provisions of the Act in consumer sales, it must be shown that the purchaser is 'dealing as a consumer'. If the procurement is made in relation to goods that are ordinarily supplied for private use or consumption and the contract is made in the course of business of the former, the purchaser is deemed to be 'dealing as a consumer'. But if the goods are procured on sale by auction or by competitive tender, the buyer is not regarded as 'dealing as consumer'. Subject to this exception the burden to prove that a person is 'not dealing as consumer' lies on the party who raises such allegation.

If a consumer purchases in the course of his business he cannot be termed as a person who deals as consumer. But the issue becomes complex when the purchase is for partly domestic and partly for business purposes. The Court of Appeal considered this issue in *R & B Customs Brokers v. United Dominions Trust.* In this case the plaintiff was a limited company owned and controlled by Mr. and Mrs. Bell. The company conducted the business of shipping brokers and forwarding agents. It purchased a four-wheel vehicle, which turned out to be defective. The issue was whether the purchase was a consumer transaction or not. In the former

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164 *Id., s. 12(1)* defines the term 'dealing as consumer' as follows:

"A party to a contract deals as consumer in relation to another party if: -

(a) he neither makes the contract in the course of a business nor holds himself out as doing so;

(b) the other party does make the contract in the course of a business; and

(c) in the case of a contract governed by the law of sale of goods or hire-purchase or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption".


166 *Id., s.12(2).*

167 *Id., s.12(3).*

168 *Id., s.12(1) (a).*

case, the defendant's standard printed form would be totally ineffective. The defendants argued that the transaction must be considered a business transaction because companies only exist for the purpose of doing business. The Court of Appeal, however, held that the company was 'dealing as a consumer'. The principal reason for this decision was that the company was not in the business of buying cars. To treat the company as a business customer, the purchase must be an integral part of the business carried on by it. Although this decision is laudable from the viewpoint of consumers, it is criticized as un understandable.

(ii) Reasonableness of the Term

The question whether a term in a contract is 'reasonable' or not is dependant on the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when they made the contract. The burden of proving reasonableness of the term lies on the supplier.

In any case involving the reasonableness test, the court has a wide discretion and must consider all the relevant circumstances. Schedule 2 to the Act contains a non-exhaustive list of guidelines for consideration by courts. They are:

a) "the strength of bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customers' requirements could have been met;
b) whether the customer received an inducement to agree to the term or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition could be practicable;

e) whether the goods were manufactured, processed or adapted to the special order of the customer."

In other cases no specific guidelines are laid down by the Act. However, by analogy the courts are applying similar guidelines with emphasis on the first three criteria – bargaining power, choice and knowledge. Lord Wilberforce is seen to have taken clue from the guidelines while considering a pre Act case of Photo Production Ltd. v. Securior Transport when his Lordship said;

"After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention – undemonstrated, but there is everything to be said and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."175
The Act was passed to give added protection to consumers who are at times in a weak bargaining position. It has been pointed out that early cases confirm that the Act is having its desired effect. The traders became more prepared to settle out of court than to subject their clauses to the searchlight of the "reasonableness" test.

**Implying Terms as a Method of Quality Control: A Critical Evaluation**

What has been discussed above shows that the device of implying terms relating to quality in goods into contracts has been used as a powerful tool of quality control from ancient days. Early attempts were judicial and legislative intervention was only subsequent. Improvement of quality standards in goods and services was attained to a considerable extent through this process. Justice to consumers was ensured through the favorable attitude adopted by the judiciary. Legislation, under the pretext of recognition of the principle of freedom of contract, gave enough discretion to the contracting parties to contract out even the beneficial terms implied by law into the contracts. The net result of that freedom was the formulation of standard form contracts by powerful businessmen. These contracts always contained terms excluding or limiting the liability of the businessmen to the consumers.

Judicial emphasis at this stage shifted from interpreting exclusion clauses in a way to minimize its rigor and to render justice to the consumers. For this purpose, the courts evolved many principles of interpretation. Intervention by the legislature also showed greater enthusiasm in controlling contractual clauses that exempt their

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liability to consumers. In England and the European Economic Communities, many enactments have been made towards this end. India must necessarily learn from the experiences of developed countries and must join the queue. In order to improve the plight of Indian consumers, it is very much necessary to have a comprehensive legislation touching upon all evils that the consumers confront in their purchases. Rigorous controls can be made in ordinary sales as distinct from non-consumer sales. Such a bold and urgent step is necessary to save Indian consumers from the present day global market situations.

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