CHAPTER-1
INTRODUCTION

1.1 Introduction

Today, in the business world, the person liable for making the contract with the consumer, supplier or service provider or buying a goods or hiring a car, house or etc., on lease should have enough knowledge of law of contract because all business and commercial transactions are based on contracts which are regulated under the law of contract. So, it is highly essential for the traders to manage the contract effectively whereby many unexpected and unpredicted legal issues may be avoided. Both the parties making the contract may decide upon the terms and conditions before within the framework and structure of law. In a technological era, it is seen that business houses make the contract by e-mail with their consumers and sometimes they prepare their own fixed terms and conditions and upload it on the website and which are generally not flexible. While doing so, usually, they incorporate an excluding or limiting clause as a part of the contract. The law of contract provides all relevant keys to the contracting parties which would help them in better understanding the legal and managerial problems in contract formulation, performance and implementation so that they can successfully avoid some of the intrinsic mistakes usually committed by the parties while formulating the terms and conditions for making domestic and/or international commercial contracts.¹

1.2 Concept of Contract

A contract is an agreement between two or more persons intended to create a legal obligation between them and to be legally enforceable.² The essentials of a valid contract are that the parties must have had contractual capacity; must have reached agreement on all the material terms of the contract; must have intended the

agreement to be legally enforceable, as opposed to merely a social or moral obligation; and the agreement must not be objectionable by virtue of illegality, impossibility, or the fact that it is contrary to public policy. A contract is an agreement which the parties intended to be legally binding. The word agreement is used in its ordinary sense but not every agreement, in the ordinary sense of that word, is a contract. For example; the peoples may agree that the conservative party will win the next general election, but this agreement is not contract because it does not involve either party undertaking to do anything.

A contract may be defined as an exchange relationship created by oral or written agreement between two or more person, containing at least one promise, and recognized in law as enforceable. Probably the most important attribute of contract is that it is a voluntary, consensual relationship. There need only be two parties to a contract, but there is no limit on the number of parties that could be involved in the transaction. A contract is created only because the parties, acting with free will and intent to be bound, reach agreement on the essential terms of their relationship. It is the element of agreement that distinguishes contractual obligation from many other kinds of legal duty (such as the obligation to compensate for negligent injury or to pay taxes) that arise by operation of law from some act or event, without the need for assent. Although voluntary agreement between the parties is essential to the creation of contract, "agreement" in the legal sense is subject to an important qualification. The law does not require that the parties reach true agreement, in a subjective sense—that their minds are in accord. It is enough that the words and conduct of a party, evaluated on an objective standard, would lead the other party reasonably to understand that agreement was reached. The essential purpose of the contract relationship is exchange. The trade in property, services, and intangible rights is fundamental to our economy and society, and the primary function of contract is to facilitate and regulate

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these exchanges. The concept of exchange means that the very essence of contract is a reciprocal relationship in which each party gives up something to get something.\textsuperscript{6}

According to the Indian Contract Act 1872, Contract is defined under section 2(h); \textit{“an agreement enforceable by law”}.\textsuperscript{7} Agreement is defined under section 2(c); \textit{“every promise and every set of promises, forming the consideration for each other”}.\textsuperscript{8} “Promise; according to section 2(b), when a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted”.\textsuperscript{9} It may be said that for promise, the proposal is said to be accepted or there should be proposal and acceptance. In section 2(a) proposal is defined as: \textit{“when one person signifies to other his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such acts or abstinence, he is said to make a proposal”}.\textsuperscript{10} Under section 2(b) Acceptance is; \textit{“when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted”}.\textsuperscript{11} Section 2(c) further defined promisor and promisee in the following terms: \textit{“The person making the proposal is called the promisor and the person accepting the proposal is called the promisee”}.\textsuperscript{12} Section 8(d) defined Consideration is; \textit{“when at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing something, such act or abstinence or promise is called consideration for the promise”}.\textsuperscript{13}

In section 10 of the Indian Contract Act defines a valid contract, according with this section, all agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object

\textsuperscript{6} Ibid.
\textsuperscript{8} Section 2(c) of Indian Contract Act, 1872. Ibid.
\textsuperscript{9} Section 2(b) of Indian Contract Act, 1872. Ibid.
\textsuperscript{10} Section 2(a) of Indian Contract Act, 1872. Ibid.
\textsuperscript{11} Section 2(c) of Indian Contract Act, 1872. Ibid.
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
and are not expressly declared to be void.\textsuperscript{14} Thus, so as to make a valid contract, the following elements should to be present:

1. Intention to form legal obligation through supply and acceptance ought to be gift.
2. Free consent of the parties is important.
3. Competence or capability of parties to enter into contract should be ensured.
4. Lawful consideration & lawful object ought to be gift, and
5. Agreement not expressly declared to be void.

The above important elements may be further analyzed as under:

\textbf{1. Offer and Acceptance:} In the first place, there must be an offer and the said offer must have been accepted. Such offer and acceptance should create legal obligations between parties. This should result in a moral duty on the person who promises or offers to do something. Similarly this should also give a right to the promise to claim its fulfillment. Such duties and rights should be legal and not merely moral.

In \textit{Balfour v/s Balfour}\textsuperscript{15}; Mr. Balfour is that the litigator and Mrs. Balfour is that the complainant within the given case. They lived in Ceylon and visited England on a vacation. The complainant remained in England for medical treatment. The litigator has in agreement to send her a particular quantity of money every month till she might come back. The litigator later asked to stay separated. Mrs. Balfour sued for restitution of her legal right and for maintenance adequate to the number her husband had in agreement to send. Mrs. Balfour obtained an order associate five months later was granted an order for maintenance. The court entered judgment in favor of the complainant and control that the defendant’s promise to send money was enforceable. The court control that Mrs. Balfour’s consent was spare thought to render the contract enforceable and therefore the litigator appealed.


2. Consent: The second part is the ‘consent’ of the parties. ‘Consent’ means ‘knowledge and approval’ of the parties concerned. This can also be understood as identity of minds in understanding the term that is to say “consensus ad idem”. Further such consent must be free. Consent would be considered as free consent if it is not vitiated by coercion, undue influence, fraud, misrepresentation or mistake. Wherever the consent of any party is not free, the contract is voidable at the option of that party.

3. Capacity of the parties: The third element is the capacity of the parties to create a valid contract. Capacity or incapacity of a person could be decided only after reckoning various factors. Section 11 of the Indian Contract Act, 1872 elaborates on the issue by providing that a person who; (a) has not attained the age of majority, (b) is of unsound mind and (c) is disqualified from entering into a contract by any law to which he is subject, should be considered as not competent to enter into any contract. Therefore law prohibits (a) Minors (b) persons of unsound mind [excluding the lucid intervals] and (c) person who are otherwise disqualified like an alien enemy, insolvents, convicts etc. from entering into any contract.

4. Consideration: The fourth element is presence of a lawful ‘consideration’. ‘Consideration’ would generally mean ‘compensation’ for doing or omitting to do an act or deed. It is also referred to as ‘quid pro quo’ viz ‘something in return for another thing’. Such a consideration should be a lawful consideration.

For example; A agrees to sell his books to B for `100, B’s promise to pay `100 is the consideration for A’s promise to sell his books and A’s promise to sell the books is the consideration for B’s promise to pay `100.

5. Not expressly declared to be void: The last element to clinch a contract is that the agreement entered into for this purpose must not be which the law declares to be either illegal or void. An illegal agreement is an agreement expressly or impliedly prohibited by law. A void agreement is one without any legal effects. For Example; Threat to commit murder or making/publishing defamatory statements or entering into agreements which are opposed to public policy is illegal in nature. Similarly
any agreement in restraint of trade, marriage, legal proceedings etc. is classic examples of void agreements.16

Under the English Contract Law 1950, contract defined in section 2, according with this section contract specific and reflect the agreement between the parties. Contracts are obviously is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Contracts should be project key part of every business and it is therefore fundamental that all parties to a contract understand the terms included in a contract and the rights and responsibilities of the parties under that contract.17 Every contract should have: Offer, Acceptance, Consideration, Intention to create legal relations, Certainty and Capacity of the parties.

An ‘offer’ in section 2(a), “when one person signifies to another, his or her willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to the act or abstinence, he or she is said to make a proposal”. In section 9 'Acceptance' of an offer occurs when there is an unqualified acceptance of all the offered terms. However, this is unusual and there will normally be a period of negotiation. New terms and conditions introduced through negotiation in effect amount to a series of counter offers to the original offer, cancelling the terms of the original offer. A contract offer has only been accepted when the acceptance is brought to the attention of the offeror.18 This applies in the case of instantaneous communication, such as by telephone, where the party giving acceptance will often know at once if a communication is unsuccessful so will have the opportunity of making a proper communication. The exception to this rule is when the acceptance is posted. The offer is deemed to be accepted when the offeree posts their acceptance. The now commonplace use of email raises the question of whether the "postal acceptance rule" applies to emailed acceptances. Currently there is no statutory law


on this point. The contract could be formed when the email acceptance is read or when the email acceptance is sent.\textsuperscript{19}

In section 2(d) defined consideration is "something done or given by one party to the act or promise of another". Consideration is the requirement of reciprocal obligations on the parties to a contract. Both parties must receive valuable consideration for performance of their side of the contract. Consideration is not required in Scotland where donation is accepted in the law of contract. However, it is extremely unlikely that a commercial organization would provide goods or services for free. An intention is a mental attitude with which an individual act, it can proved but must be inferred from the circumstance. A certainty is both of parties must have a clear understanding of their rights and duties in the transaction for there to be consensus. Capacity of the parties is an otherwise valid contract may be defeated by the lack of contractual capacity of one of the contracting parties. It presumed that each party to contract has legal capacity to enter into it.\textsuperscript{20}

Law of Contract is different from other branches of the law of obligations in one important respect that parties themselves are free to make their own terms on which to enter into a contract, which the legal machinery will enforce as a private piece of legislation. The law of contract does not prescribe the rights and obligations of the parties but imposes a number of restrictions subject to which the parties may create, by their contract, such rights and obligations as they may agree to, so, long as they do not infringe the legal prohibition.\textsuperscript{21}

The Law of Commercial Contracts does not affect only the relative economic strength of various groups operating on the economic market, but also their standards of social conduct and it is in these standards which exemption clauses in standard form contracts seek to change. The law of contracts has in recent times as a problem which is assuming wide and new dimensions. The problem has created from the modern “widespread and large-scale” practice of contracts in standardized


\textsuperscript{20} Ibid.

forms. In today’s world, it is very common to receive printed receipts, bills, etc., which have certain terms and conditions. Even offers provided in advertisements come with a small super-scribed asterisk and the phrase “terms and conditions apply.” All these conditions might be said to form part of the package if the main offer is accepted. A number of questions relating to consent, suitability, etc., arise because of this. All these contracts which are drafted by a single party and apply indiscriminately to those who have entered into transactions can be termed standard form of contracts.

1. 3 Types of contract

According with Indian Contract Act 1872, types of contract can be defined as follows:

1. Void Contract: Section 2 (j) states as follows: “A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable”. Thus a void contract is one which cannot be enforced by a court of law. Example: X agrees to write a book with a publisher. After few days, X dies in an accident. Here the contract becomes void due to the impossibility of performance of the contract. It may be added by way of clarification here that when a contract is void, it is not a contract at all but for the purpose of identifying it, it has to be called a void contract.

2. Voidable Contract: Section 2(i) defines that an agreement which is enforceable by law at the option of one or more parties but not at the option of the other or others is a voidable contract. This in fact means where one of the parties to the agreement is in a position or is legally entitled or authorized to avoid performing his part, then the agreement is treated and becomes voidable. Such a right might arise from the fact that the contract may have been brought about by one of the parties by coercion, undue influence, fraud or misrepresentation and hence the other party has a right to treat it as a voidable contract. At this juncture it would be desirable

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to know the distinction between a void contract and a voidable contract. The
distinctions lay in three aspects namely definition, nature and rights.

These are elaborated hereunder: (a) Definition: A void contract cannot be
enforced at all. A voidable contract is an agreement which is enforceable only at
the option of one of the parties but not at the option of the other. Therefore
‘enforceability’ or otherwise, divides the two types of contracts. (b) Nature: By
nature, a void contract is valid at the time when it is made but becomes
unenforceable and thus void on account of subsequent developments or events like
supervening impossibility, subsequent illegality etc., Repudiation of a voidable
contract also renders the contract void. Similarly a contingent contract might
become void when the occurrence of the event on which it is contingent becomes
impossible. On the other hand voidable contract would remain valid until it is
rescinded by the person who has the option to treat it as voidable. The right to treat
it as voidable does not invalidate the contract until such right is exercised. All
contracts caused by coercion, undue influence, fraud, misrepresentation are
voidable. Generally, a contract caused by mistake is void. (c) Rights: As regards
rights of the parties, in the case of a void contract there is no legal remedy for the
parties as the contract cannot be performed in any way. In the case of voidable
contract the aggrieved party has a right to rescind it within a reasonable time. If it
is so rescinded, it becomes void. If it is not rescinded, it is a valid contract.

3. Illegal Contract: Illegal contract are those that are forbidden by law. All illegal
contracts are hence void also. Because of the illegality of their nature they cannot
be enforced by any court of law. In fact even associated contracts cannot be
enforced. Contracts which are opposed to public policy or immoral are illegal.
Similarly contracts to commit crime like supari contracts are illegal contracts.
Illegal contracts are at par with void contracts. The Act specifies several factors
which would render an agreement void. One such factor is unlawful nature of
contract or the consideration meant for it.

Though illegal agreements and void agreements appear similar they differ in
the following manner: (a) Scope: All illegal agreements are void. However void
agreements might not be illegal at the time of entering but would have become
void because of some other factors. For example, where the terms of the agreement
are uncertain the agreement would not be illegal but might be treated as void. An illegal contract would encompass a void contract where as a void contract may not include in its scope illegal contracts. (b) Nature and character: Illegal agreements are void since the very beginning they are invariably described as void ab initio. As already emphasized under the scope, a contract by nature, which is valid, can subsequently change its character and can become void. (c) Effect on collateral transactions: In the case of illegal contract, even the collateral transactions namely transactions which are to be complied with before or after or concurrently along with main contract also become not enforceable. In contrast in the case of voidable contracts the collateral transactions can be enforced despite the fact that the main contract may have become voidable, to the extent the collateral transactions are capable of being performed independently. (d) Penalty or punishment: All illegal agreements are punishable under different laws say like Indian Penal Code etc. whereas parties to void agreements do not face such penalties or punishments. Further classification of contracts according to the formation is also possible.

Under this sub-classification the following contracts fall:

4. Express Contracts: A contract would be an express contract if the terms are expressed by words or in writing. Section 9 of the Act provides that if a proposal or acceptance of any promise is made in words the promise is said to be express.

5. Implied Contracts: Implied contracts in contrast come into existence by implication. Most often the implication is by law and or by action. Section 9 of the Act contemplates such implied contracts when it lays down that in so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied. For instance ‘A’ delivers goods by mistake at the warehouse of ‘B’ instead of that of ‘C’. Here ‘B’ not being entitled to receive the goods is obliged to return the goods to ‘A’ although there was no such contract to that effect.

6. Tacit Contracts: Tacit contracts are those that are inferred through the conduct of parties. A classic example of tacit contract would be when cash is withdrawn by a customer of a bank from the automatic teller machine (ATM).
7. Executed Contract: The consideration in a given contract could be an act or forbearance. When the act is done or executed or the forbearance is brought on record, then the contract is an executed contract.

8. Executory Contract: In an executory contract the consideration is reciprocal promise or obligation. Such consideration is to be performed in future only and therefore these contracts are described as executory contracts.

9. Unilateral Contract: Unilateral contract is a one sided contract in which only one party has to perform his duty or obligation.

10. Bilateral Contract: A Bilateral contract is one where the obligation or promise is outstanding on the part of both the parties.

The English law classifies contracts as (i) Formal contracts and (ii) Simple contracts. Formal contracts are further classified as (a) Contract of Record and (b) Contract under Seal.

(a) Contract of Record: A contract of record derives its binding force from the authority of court. The authority of court is invariably through judgment of a court or by way of recognizance. The judgment of a court is technically not a contract as it is not based on the agreement between parties. However the judgment is binding on all the persons who are litigants. The judgment creates certain rights on certain persons and obligation on certain other persons. A recognizance, on the other hand is a written acknowledgement of a debt due to the state generally in the context of criminal proceedings.

(b) Contract below Seal: Contract under Seal: A contract under seal is one which derives its binding force from its form alone. It is in writing, duly signed and sealed and delivered to parties. It is also referred to as a deed or a specialty contract.24

1.4 Breach of Contract

If one of two parties to a contract breaks an obligation, which the contract imposes, a new obligation will in every case arise, that is, an obligation to pay damages to the other party in respect of any loss or damage sustained by the breach. Besides this, there are circumstances under which the breach not only gives rise to a right of action for damages but also gives the innocent party the right to decide not to render further performance under the contract and to be discharged from its obligations. However, not every breach of contract operates as a discharge. In order to have this effect the breach must be such as to constitute repudiation by the party in default of its obligations under the contract.25

It is common to speak of the contract as having been 'discharged by the breach'. The phrase, though convenient, is not strictly accurate. A breach does not, of itself effect a discharge; what it may do is to justify the innocent party, if that party so chooses, in regarding itself as absolved or discharged from further performance of the contract. It does not automatically terminate the innocent party's obligation since that party has the option either to treat the contract as still continuing or to regard itself as discharged by reason of the repudiation of the contract by the other party. An acceptance of repudiation must be clear and unequivocal. Once the option is exercised to either keep the contract on foot or terminate it, the decision is not revocable. A fresh option may arise, however, if the repudiation continues or there is another separate repudiatory breach. In principle an innocent party who does not 'accept' the repudiation is entitled to continue to insist on performance because the contract remains in full effect. The appellant, an advertising contractor, agreed with the respondent, a garage proprietor, to display advertisements for his garage for 3 years. On the same day, the respondent refused to perform the agreement and requested the appellant to cancel the contract. The appellant refused to do so, and elected to treat the contract as still continuing. It made no effort to re-let the space, displayed advertisements as agreed, and sued for the full amount due. It was contended on behalf of the respondent that, since he had renounced the agreement before anything had been done under it, the appellant was not entitled to carry out the agreement and sue

25 Young, Max, "Understanding contract law", Routledge, (2009), p139.
for the price: its remedy, if any, lay in damages. A bare majority of the House of Lords rejected this content ion and held that the appellant was entitled to the full contract sum.26

Fundamental breach of a contract is when a person who, as promised to perform a duty or make a delivery, fails to perform or delivers something else altogether. The breach is so fundamental that the contract is deemed to have not been performed in entirety in most cases and this puts an end to the said contract.27 It becomes a critical issue in standard form contracts primarily because majority of such contracts have exclusion of liability clauses which are then used as a defense. But the courts have made it clear that clauses excluding or limiting liability fail to have their protective cover once there is a fundamental breach of the contract. However, the decision of fundamental breach itself, particularly in standard form contract, has been very fact sensitive because such contracts are used for a large number of participants like in the form of insurance policies and, hence, a fundamental breach has to be studied on a case-to-case basis.28 This is a very common defense used by insurance companies to avoid liability and the response of the Indian judiciary is evaluated by two landmark judgments in this regard.

In Skandia Insurance Co. Ltd. v/s Kokilaben Chandravadan29, the licensed driver left the truck with running engine with the key in the ignition to get snacks and meanwhile a cleaner, not licensed or authorized to drive the truck started driving and lost control causing an accident. Due to the gross negligence of the driver the master and the insurance company were held liable. However, the insurance company claimed exemption as at the point of time when the accident occurred the one who had been driving the vehicle wasn't a punctually authorized person to drive the vehicle and such exemption was statutorily provided by bound provisions of the motor vehicles Act. The Supreme Court once reviewing vital precedents upheld that the exclusion clause should be “read down” so as that it's not conflicting with the “main

objective” of the pandects enacted for the protection of victims of accidents in order that the communicator is exempt once he will everything in his power to stay the promise.\textsuperscript{30} It absolutely was highlighted that it’s not the contract of insurance which is being interpreted rather it is the statutory provision defining the conditions of exemption which is being interpreted. It was held that the insurer will not be exonerated because the main aim of the Motor Vehicles Act is to protect the persons and compensate adequately victims of accidents for injuries sustained.

In B.V. Nagaraju v/s M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan\textsuperscript{31}, the Supreme Court was whether the alleged breach of carrying humans in a goods vehicle, more than the number allowable in terms of the insurance, is thus elementary a breach thus on afford ground to the insurance firm to avoid liability altogether. The insurance policy had clearly written that the maximum number of persons to be carried in any vehicle was six excluding the driver and no more should be allowed. They claimed complete exemption because the vehicle carried nine persons and claimed it was a fundamental breach of the contract. The court, however, clearly denied that it was fundamental breach because the accident was a result of the driver’s negligence and the added persons could not be the sole reason for the accident. The court said it was an “irregular” use of the vehicle but would not exempt the insurers from paying the due amount.

1. 5 Standard Form of Contract

Standard contracts are contracts which are drafted by one party and signed by another party without any change or modification. However, the present standard contracts use of advantage of pre-printed standard format; they are originally ”take it or leave it” contracts with no place for negotiations. These contracts are criticized for preventing the bargaining power of the weaker party and open up extensive opportunity for exploitation.\textsuperscript{32}

\textsuperscript{30} Supra note. 26.


The phrase “Standard Form Contract” is used to include of each contract, whether simple or sealed and whether included in one or more documents, one of the parties to habitually makes contract of the same type in a particular form and will allow little, if any, variation from that form. Standard Form Contracts is agreements that employ non-negotiated provisions, standardized format, usually in pre-printed forms. The terms, often portrayed in fine print, are drafted by or on behalf of one party to the transaction, the party with premier bargaining power who regularly engages in such transactions. With a few exceptions, the terms are not negotiable by the consumer. Corporations or other business concerns use these generally to exclude their liability in one form or the other and thus reducing their risk. This helps them to lower their price and increase their profit. The prevalence of standard form of contracts bears evidence of their indispensability in today’s commercial world. Further, through the usage of these standard contracts, the costs of attorney and drafting different contracts for different transactions is drastically reduced.33

Standard form of business to consumer contracts carries out an important efficiency role in the mass distribution of goods and services. These contracts have the potential to decrease transaction costs by removing the need to negotiate the many details of a contract for each sample a product is sold or a service is used. Though, these contracts also have the ability to misuse consumers because of the unequal bargaining power between the parties. For instance, where a standard form contract is entered into between the sales-person of a multinational corporation and an ordinary consumer, the consumer typically is in no position to negotiate the standard terms; indeed, the company’s representative usually does not have the authority to change the terms, even if either side to the transaction were capable of understanding all the terms in the fine print. These contracts are usually drafted by corporate lawyers far away from where the underlying consumer and sales-person transaction takes place.34

However, when the other party does not take note of the terms of these standard form contracts for one reason or another while the system assumes that they have read the contracts. The standard principles of contract law assume that both sides are consenting to the contract and agree to the terms and conditions which are

33 Supra note. 26, p.182.
presented before them. Thus, there exists a difference in the paradigm and reality of standard form contracts. The courts have thus viewed standard form contracts differently from other forms of contract keeping in mind the unique predicaments which come with them. The first consideration to be kept in mind is the nature of the document. If the document is of such a nature that it can be regarded as an integral part of the contract, it must be seen if it has been signed by the party against whom the excluding term is to be pleaded. If it is unsigned, the question to be judged is of reasonable notice of the term.\textsuperscript{35} If the contractual document has been signed, on the other hand, there are various rules which have been evolved by the courts to be kept into consideration while interpreting the various clauses.

Such new variants of standard form contracts create problems in applying contract law. The traditional form of consent, duty to read and consider, is no longer applicable to such new variants. The courts are themselves unsure of the extent of enforceability, and the entire concept of consent is undergoing a severe change. The courts pay utmost importance to the positioning of the terms and whether they were conspicuous enough for the participants or whether the access was difficult.

The risk of accepting unreasonable or unfair terms is greatest where these crafty drafters of such contracts present consumers with attractive terms on the visible or “shopped” terms of more attention to consumers, such as quality and price, but then slip one-sided terms interesting the seller into the less visible, fine print clauses least likely to be read or understood by consumers. In many cases, the consumer may not even see these contracts until the transaction has occurred. In some cases, the seller knows and takes advantage of the knowledge that consumers will not read or make decisions on these unfair terms. The Life Corporation of India, for instance, has to issue thousands of insurance covers every day. Similarly, the railway administration of India has to make umpteen contracts of carriage. It would be difficult for such large scale organizations to draw up a separate contract with every individual.\textsuperscript{36}

Although, the roots of the law of contract lie in many disciplines – economics, ethics, religion, philosophy and Government; emphasis on the individual

\textsuperscript{35} Supra note. 27
\textsuperscript{36} Supra note. 1, p.99
is the common theme. Having been cross-ruffled by social and economic changes, contract has become in large number. The vast majority of today’s “contracts” are standardized forms. Therefore, the use of these contracts, effort, significant economics of time and expense are achieved. Compatibility, Economy and certainty are the three prominent virtues of the standard contracts. In standard form contracts contain exemption clauses in it which completely excludes the liability of one of the party.  

In all these transactions the bargaining power of the parties is unequal. The weaker party has no choice but to follow to it may be because of market position or monopoly. The printed document which sets out standard conditions will never allow the potential customer to have any choice for negotiation and change the terms.  

1.6 Concept of Exemption Clauses

Exemption clause can be defined as a term used in a contract to exempt one of the parties from liability, or used to limit the liability to a specific sum if certain events occur, for example breach of warranty, negligence or theft of goods. It is used to protect the consumer as well as the seller from being liable in a certain events that occurred that caused losses to either party. Besides, it is also known as an advance notice to acknowledge the customer to avoid the liability of the seller of any unpleasant events occurred. In many cases, an exemption clause may turn out to be a term of contract by signature or notice to secure the seller or the company from being responsible for any losses. For example, a person is considered as liable if he signed on a contract that contains exemption clause which excludes all liabilities of the seller even if he did not read it. Besides, a person cannot be held liable even when he signed on the agreement if the term was misrepresented by the seller. An exemption clause must not be signed for it to be effective only if it is known to the public regarding this term or reasonable steps are taken to acknowledge the users on this term before the contract is made.

Moreover, a greater effort to attract the attention of the users is required if the term carries an important message regarding the effects of the exemption clause. An exemption clause will only be accepted when it is clearly stated and represented

38 Padhi, op. cit., 1, p.20.
clearly to the customers in verbal or written format. If the parties have had long and consistent dealings, the clause is said to have effect even if usual steps to incorporate it were not taken. Exemption clause are said to help the seller to avoid liability if any unpleasant incidents happened unwillingly. However, the court worries that some parties will violated the benefits of the exemption clause.

There are several limitations on the use of this exemption clause. To ensure this exemption clause has brings benefits to the public, the court has to consider between the principle that the parties should have complete freedom in making their own terms that protect their rights and the need to protect the public welfare from being signed on any unfair exemption clauses that violated the consumer rights. In order to maintain the fairness and effectiveness of this exemption clause, the court has come out with the (ICA) 1872 and (UCTA) 1977 that protect the parties from any unreasonable and unfair exemption clause. Exemption clauses can be used unfairly which may disadvantage a party. Therefore, there have been changes to the law to create more fairness and to limit the use of clauses. Generally, an exemption clause could be defined as a contract condition which intends to liberate a party wholly or in part from his normal duties under the law. Often, the term exclusion clause is used interchangeable with exemption clause. The main purpose of an exemption clause is to allocate the risks between the parties when entering into an agreement.

Exemption clauses purport to exclude, wholly or partly, liability for the happening of certain events. A total exclusion is known as an exclusion clause; a partial exclusion is known as a limitation clause. Exemption clauses are most commonly found in standard form contracts. This can lead to the allegation that they have been imposed as part of a “take it or leave it” package by the party with the premier bargaining position; so that alternative label of contracts of cohesion. The effect of standard form contracts is often such that the party against whom the exemption clause is being used had no knowledge that it was a term of the contract. In such circumstances it would hardly be surprising if the fairness of exemption clause

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was questioned, particularly where a business person is seeking to depend on an exemption clause against a consumer.42

Exemption clauses are at the present time all held to be subject to the outstanding provision that they only benefit to exempt a party when he is carrying out his contract, not when he is guilty of a breach which goes to the root of it or is departure from it. But, always cited in power is its abuse; and contractual power is no exception. Not all the time but unusually the freedom to contract through exemption clauses and terms is that of one party only. Though such contracts include terms shaped simply to meet the practical needs of the transaction concerned, they also include clauses, few or many, simple or complicated, that confer decided legal as well as other profits upon the party who is in position to insert them. Clearly economic clauses, operational clauses and in particular, exemption clauses may thus be imposed by the party of the weaker contracting position. These exemption clauses usually reduced from the customer’s normal rights. The problems relating to exemption clauses in standard form contracts are one that needs systematic analysis. The armory of law includes only some special and limited tools which could reduction and restoration unfair bargains but not a general instrument which could cut various forms of contractual clauses, and clauses, which are one-sided.

Exemption clauses are often incorporated into standard form contracts. These kinds of contracts serve important functions in today’s business environment. For example, they simplify transactions and lessen the need of time-consuming negotiations between the parties. However, standard form contracts can also disfavor a contract party when harsh or surprising clauses are included in the text. The legislator must therefore find a balance between business necessities and the protection of individuals who may be taken advantage of through the usage of standard form contracts. Here, it is important to distinguish one-sided standard form contracts (often called “contracts of adhesion”) from so-called agreed documents. As the name implies, agreed documents are the result of bilateral collaboration between the parties or representatives of them. In the case of employment contracts, for example, unions representing certain employees may have agreed to the conditions

set forth by the document through negotiations with organizations representing the employer. The risk of abuse is of course lower when the terms are negotiated, especially if the bargain power is balanced between the parties.43

The law of exemption clauses has been developed in recent years, at any rate about printed exemption clauses which so often pass unread. An exemption clause is simply one form of incorporating into a contract a statement of what the parties are promising, or not promising, to do a negative statement delineating positive obligations rather than a shield or defense to a liability already undertaken or accrued.44 However, in cases which might to point out the contrary, now, it is settled that exempting clauses of this kind, irrespective of how widely they are expressed, only advantage the party when he is carrying out his contract in its essential respect.45 They do not profit him when he is guilty of a breach which goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clauses and see what the terms, implied are or express, which impose an obligation on the party.46 If he has been guilty of a breach of those obligations in an attention which goes to the very root of the contract, he cannot rely on the exempting clauses. The principle is sometimes said to be that the party cannot rely on an exempting clause when he delivers something “different in kind” from that concluded contract for, or has breach a “fundamental contractual obligation” or “fundamental term”, but these are, percipient by the general principle that a breach which goes to the root of the contract disentitle the party from depending the exempting clause.47

In the case of Kudos Catering (UK) Limited v/s Manchester Central Convention Complex Ltd 48 Kudos Catering involved a catering contract between the applicant supplier and therefore the respondent conference/exhibition center, consistent to that the applicant was to produce catering services within the

44 Levison v/s Patent Steam Carpet Cleaning Co. (1978) Q.B. 69;
respondent’s premises reciprocally for the payment of a nominative rate of commission. There have been many service standards are different needs to be satisfied by the applicant, and therefore the initial term of the contract was five years. Three years into the contract, the respondent imagined to terminate the contract giving the applicant one month’s notice. The applicant accepted this putative termination as a repudiatory breach of the contract and accepted it as a termination of the contract, creating a claim in damages for lost profits. Clause 18.6 of the contract provided “The Contractor herewith agrees and acknowledges which the company shall don't have any responsibility whatever in the contract, offense containing negligence or otherwise for any damage or loss of business, goodwill, income or anticipated wasted consumption whether reasonably expectable or not or eventful or indirect damage or loss suffered by the contractor or any third party in reference to this contract”. Reliant on this clause, the respondent contended that its liability was excluded and also the only remedy accessible to the applicant was to have rejected the supposed termination of the contract and get performance. Having accepted the termination of the contract, the applicant couldn't get a remedy within the kind of damages for lost profits. The question that fell for the Court of Appeal’s consideration was thus, whether or not any or all of the respondent’s liability for the claimant’s loss of profits is excluded on the right construction of clause 18.6.

The judge held that the respondent’s liability was not excluded by this clause because,

1) The respondent argued that the claimant had an alternative remedy of specific performance which it had voluntarily foregone by treating the contract as repudiated. The judge held that this argument was without merit. The contract here required active cooperation between the claimant and the respondent and specific performance of the contract could not be ordered if the respondent wished to terminate the contract. This left damages as the only real remedy available for non-performance of the contract. Therefore, the first step in the judge reasoning is that damages were the only real remedy against non-performance by the respondent, and the remedy of specific performance was not one which was available to the claimant on these facts.

2) Provided that damages were the only real remedy against the respondent’s non-performance, the respondent’s construction of clause 18.6 rendered the contract
"effectively void of contractual content since there's no sanction for non-performance by the respondent...it's inherently unlikely that the parties supposed the clause to possess this result. The parties thought that they were concluding a reciprocally enforceable agreement." Therefore, the second projection of the reasoning is that within the absence of clear language to the contrary, there's an assumption in English law to interpretation of an exclusion clause in an exceedingly approach that deprives obligations provided in an exceedingly contract of all contractual force.

3) The judge notes that clause 18.6 can't be examined in isolation and therefore the mere use of 'no liability whatsoever' wasn't enough to exclude the respondent's liability. The case of Watford Electronics Limited v/s Sanderson CFL Limited⁴⁹, decided on February 2001, is a vital case because it mentioned the interpretation of "reasonableness" within the Unfair Contract Terms Act, 1977 in reference to limitation of liability clause into the contract. This case enhances which a new thing to the procedure of interpretation of restriction or limitation of liability clause into the contract. The claimant, Watford, signed three contracts with the libellee, Sanderson, when negotiations happened. Sanderson was to cater software products to Watford, three contracts incorporated into between them were a contract of sales for provides of equipment, an separation software license and application license.

All three contracts were created subject to terms and conditions on the reverse that additionally contained a limitation clause. Sanderson's responsibility was restricted by the clause to £104,596 that was the value paid by Watford. The system continuing to perform unsatisfactorily even when continuous amendments and modifications, and was eventually replaced by a new system from a different provider. Watford sued on the idea of pre-contract misrepresentation and violation or breach of a contract regarding to the terms were implied in the contract. Sanderson relied on the reasonableness of the entire agreement clause and therefore the limitation of liability clause for its defense. The entire agreement clause read as follows:

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⁴⁹ English Court of Appeal: Leading judgment: Chadwick L.J.: (2001) 1 All ER (Comm) 696.
The parties consent to these conditions together with the other conditions clearly interpolated in the contract indicative the overall agreement between the parties regarding the sale and buys of the equipment which no statement or representations created by either party have been relied upon by the other in agreeing to enter in contract. The limitation clause as follows: "7.2 the corporate and also the consumer agree to indemnify one another against any liability arising in respect of injury (including death) to anyone or loss or damage to any property which ends up from the act, default or negligence of itself, its workers, agents or subcontractors. 7.3 Neither the corporate nor the consumer shall be at risk of the other for any claims for indirect or consequential losses, whether or not arising from negligence or otherwise. In no event shall the corporate’s liability under the contract exceed the price paid by the client to the company for the equipment connected with any claim." The Appellate Court held that the primary limb of the limitation of liability clause (the exclusion in respect of the indirect or eventful losses) and also the second limb (the limitation of liability to the value paid) were each honest and reasonable under the Unfair Contract Terms Act, 1977. The Appellate Court decided that the subsequent factors showed that the limitation of liability clause was reasonable: each parties had equal talks powers; The key terms of the contract including the entire agreement clause and also the limited liability clause were negotiated and agreed by each parties; and Watford's own terms and conditions contained the same exclusion clause for indirect or eventful loss. This held of the Court of appeal suggests that there's a shift in judicial attitudes in favor of suppliers which customer might find it more durable to overturn limitation of liability clauses than previously. Customers ought to confirm that the limitations of liability within the contracts they sign up to are commercially acceptable in their entirety.

1.7 E-Commerce and Consumers Protection in India

E-commerce, one of the fastest emerging trends in shopping is an unconventional method; this is a very recent development in India and poses a lot of problems to consumers shopping online. CAG felt the need to actually focus on this issue to see if the websites were consumer friendly and also to see if there were adequate laws and redressal mechanisms in India to protect consumers shopping
online. CAG, therefore undertook a study, ‘E-commerce and Consumer Protection in India’ in 2002, to look at e-trading websites and how consumer friendly they were.  

India within the recent years has been experiencing an exponential growth in e-commerce and there are new firms arising at a speedy rate. Concerning the sole things accelerating quicker than the employment of the net are the new risks that are related to the medium's business applications. Though, net dealing has multiplied efficiency in transactions and accumulated accessibility for customers, there exist several pitfalls that haven't nevertheless been satisfactorily dealt with. whereas growth within the e-commerce business is sweeping across the country, there seems to be inadequate oversight (both governmental and non-governmental) and laws dealing with quality control for these new firms and this are what makes the ascent forbidding. Whereas there seems to be some discussion on a legal framework, there are virtually no watchdogs within the variety of client NGOs or otherwise. As a result, it's unlikely that this new variety of business can deal effectively with the difficulty of consumer welfare, which incorporates problems like trust, privacy and sovereignty of customers.  

In light of the above negatives related to e-commerce (specially with buying on the Internet) and taking into consideration the ascent of this business, it's necessary that client groups in India take this problem seriously and are available up with direction which will be accustomed build shopping on the net a secure expertise. These directions will use into the governmental process of cyber laws making to create sure which the problem of sovereignty and consumer welfare during web shopping is exposed.  

It is with this role in mind that CAG in 2001 began observing the expertise of shopping on the net using accessible interactive Indian websites that permit costumers to buy on the net and known potential avenues of trade abuse by such e-commerce suppliers. The 2001 study delivered to lightweight variety problems like privacy of information, provision of contract terms like guarantees/warrantees, refunds, dispute settlement, hidden prices and dishonest information and alternative

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51 Ibid
issues as a result of this sector has been free from any reasonably regulation. In 2006, CAG undertook a follow up study to appear at client responses to online searching and issues they need faced in searching online. An in depth analysis of the laws dominant in several countries exposed that Indian laws are very low and inadequate to faced with difficulty in online searching, problems like spamming, phishing and etc.\textsuperscript{52}

1.8 Indian Contract Act 1872 and Exemption Clause

With the advent of the British Rule, the Hindus who during the Mohammedan rule were subject to the Muslim Law of Contract had a revival of their own laws consequent on the regulations and charters granted by the British Crown to the East India Company. The Hindu concept of the law was more particularly revived in the Saddar and Mofussil courts. The revival of Hindu law and the application of Mohammedan law to Muslims brought in new problems. The need for a unified code applicable to all was felt to be a necessity. This eventually led to the enactment of the Indian Contract Act of 1872 based on the Common Law of Contract obtained in United Kingdom.

Indian contract system does not have any specific differentiation between Standard Form Contract and general contract, as the Standard Form Contract is a kind of contract which is governs by the laws provided for general contracts in Indian contract Act 1872. Due to heavy industrial development these kind of contract has become common and are executed in large numbers in present days. This had led to demand of formulation of fledge rules on standard form of contract to protect the rights of the weaker party in contract. India has remained far behind in terms of an effective legislation for encompassing the wide range of standard form contracts and the concept of unfair terms. It becomes important to study certain Sections of the Indian Contract Act 1872, which may be applicable to standard form contracts.

Section 16(3) provides that “\textit{where someone who is in an exceedingly position to dominate the will of another, enters into a contract with him, and therefore the transaction seems, on the face of it or on the evidence adduced, to be}

\textsuperscript{52} Available online at: http://www.cag.org.in/project/consumer-protection/e-commerce-and-consumer-protection-india, accessed date on (03.09.2015), 22:13 pm.
unconscionable, the burden of proving that such contract wasn't elicited by undue influence shall lie upon the individual in an exceedingly position to prevail against the will of another.”.\(^{53}\) This particular provision is facilitative thus will not be very helpful in rendering speedy and effective remedy in cases of standard form of contracts mainly because in most cases have been considered the powerful party is capable to make a good defense because of the huge financial resources available to them.\(^{54}\)

Another important section that can be used is section 23, which talks about lawful and unlawful considerations. The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy.\(^{55}\) However, this section has been rejected by high courts on several occasions.\(^{56}\) Here, it becomes important to understand that the judges have a responsibility to ensure a commercial-friendly environment and since most of these contracts are in the field of business, like insurance, the public interest is not violated to such an extent by exemption clauses or exclusion of liability to be in a position to use this Section.\(^{57}\)

The Indian Experience Section 23 of the Indian Contract Act deals with when contracts may be declared as void. The Indian Supreme Court in judged in *Central Inland Water Transport Corp. Ltd. v/s Brojo Nath Ganguly*,\(^{58}\) held that an unfair or an unreasonable contract entered into between parties of unequal bargaining power was void as unconscionable under section 23 of the Indian Contract Act. Thus, Indian Courts have shown a remarkable willingness to interfere with printed form contracts where there is evidence of unequal bargaining power. It has been held that the Courts would relieve the weaker party to a contract from unconscionable,  

oppressive, unfair, unjust and unconstitutional obligations in a standard form contract. The Supreme Court has also held that standard form contracts drawn up even by the Government must be fair, and that these contracts are open to judicial review on grounds of unreasonableness or unfairness. The Supreme Court has upheld a plea that a printed form contract was void on grounds of coercion, where the parties had unequal bargaining power. "A printed form in a dry-cleaning contract, exempting the dry-cleaner from any liability in the event of loss or damage to the clothes concerned has been held to be contrary to public policy and therefore void."\(^{59}\)

The High Court of Bombay has view in *R.S. Deboo v/s M.V. Hindlekar\(^{60}\)* In the present case, the plaintiff (customer) entrusted various clothes to the defendant who was carrying on business of cleaners, dryers and launderers, for drying, cleaning and ironing as a Bailee. The defendant was giving receipts for the articles received from the customers. Once the defendant failed to return some of the clothes entrusted to him by the plaintiff for dry clearing and ironing, a suit was filed for recovery of damages for non-return of the clothes. The defendant in his defense relied heavily on the laundry receipt which contained a printed condition on its reverse purporting to restrict the launderer's liability for quantum of loss to twenty Hines the laundering charges or half of the value of unreturned articles, whichever was less, whatever be the cause for non-return of the article entrusted by the customer to the laundry for the purpose of laundering.

The defendant was prepared to pay the amount of compensation as per the condition printed on the receipt given to the plaintiff. The Court held that the above referred printed condition was too wide, one sided and purported to restrict the liability of owner of the laundry arbitrarily and unreasonably. It was also opposed to public policy and fundamental principles of law of contract and the same was thus void under Sec. 23 of the Contract Act, 1872. No stipulation opposed to public policy can be given effect to or enforced by a Court, even where the stipulation is found to and have been assented to, by the parties voluntarily. The application of the "reasonable notice theory", as evolved by the common law principle can be found to some extent in India. This principle states that a clause in a printed form is not binding unless the attention

\(^{59}\) Padhi, *op. cit.*, 1, pp. 18-19.

of the other party is drawn thereto, and such clause is to be brought to his or her notice
in order to bring the party into legal net.61

1.9 The Unfair Contract Terms Act, 1977 and Exemption Clause

However, in many countries judiciary is empowered to apply the principle
of natural justice and give good justice to the weaker parties which there are certain
provisions that may be cancelled by court of law. Apart from courts some legislature
has also made laws related to this kind of contract. There are certain rules made by
the legislature which seems to be unreasonable like in UK, section 3 of Unfair
Contract Terms Act 1977 limits the ability of drafter on consumer or limit the
provision of standard form of contract to the drafter.

The English Unfair Contract Terms Act, 1977 applied rules dealing with
contracts between businessman and consumer contracts. Exemption and limitation
clauses may either be invalid per se or valid only if they are reasonable. Thus, in
English law, many exemption clauses are subject to a need of reasonableness under
the Unfair Contract Terms Act, 1977 or to one of fairness under the Unfair Terms in
Consumer Contracts Regulations 1994. However where these acts are not applicable,
it appears that no decision directly supports the view that a properly incorporated
clause can be invalid on the ground of unreasonableness or unfairness.62 This kind of
problem led to the enactment of the Unfair Contract Terms Act 1977. This Act prevents
the use of scare exemption clauses completely and tenders others ineffective unless
they satisfy the need of reasonableness. Before the Act the common law attempted to
respond to the problem of objectionable exemption clauses. This act outlines rules on
liability and exemption clauses. Section 1(3) of the act states the rules surrounding
liability in business. The act states that the liability will be present as a result of
activities during business or from business premises. Section 2(1) states that personal
injury or death that results from negligence in a contract cannot exclude or restrict
liability. Section 2(2) states that if it is fair, then a contract can exclude or restrict other

61 Ibid. p.19

62 Christoph Brunner. "Force Majeure and Hardship under General Contract Principles: Exemption for Non-
liability as result of negligence. Section 12 outlines that a person becomes the consumer when that person is not part of the business.

The existence of the Unfair Contract Terms Act, 1977 means that the devices developed by the common law to deal with exemption clauses may now be used more meagerly by the courts. Unfair Contract Terms Act, 1977 has the advantage that it often allows the court openly to weigh the factor indicating whether the clause is “reasonable”. Such calculations of reasonableness must have influenced the courts' approach to their use of the common devices, but it can now often be considered openly, with arguments from both sides specifically directed to it, therefore, it should be borne in mind that not all types of contract are subject to Unfair Contract Terms Act 1977 and the courts may be more willing to up the common law devices when faced with a contract excluded from the Act. It should also be noted that the European Commission Directive on Unfair Terms in Consumer Contracts and the Regulations which implement it, apply a “fairness” test to terms which have not been individually negotiated in contracts between consumers and sellers or suppliers, basically the Directive/Regulations focus on the problems of standard form contracts in the consumer context.

1.10 Judicial Award

The contract law has advanced to consider the scope of the document on that the terms and conditions are written and printed. It has a document that can be reasonably considered to be a contractual document and not only a written or printed receipt. In the case of Burnett v/s Westminster Bank Ltd., plaintiff had issued a crossed cheque adjusted to cash for £2300. The cheque had been received from a cheque book that had been issued to the plaintiff in relation to the Borough account, and bearing along the bottom three facts on behalf of cheque number, the bank and its branch, and account number. It was the first cheque book of this new style to be issued

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63 Supra note. 21. pp. 234-35
64 The Directive on unfair terms in consumer contracts introduces a notion of "good faith" in order to prevent significant imbalances in the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand.
to the plaintiff. Not like the preceding cheque book, it had the words on its cover “the cheques and credit slips during this book are going to be applied to the account that they need been ready. Customers should not thus allow their use on the other account”.67

The plaintiff, though want to draw the cheque on his other account erased with pen and ink the name of the opposite account and replaced it.68 However, the cheque found its way magnetically cropped out to the branch for that the cheque book was intended. The litigator made claim against the defendant for acting without his permission. The court decided that when the covers of cheque books had never before been used for the aim of comprising contractual terms, the plaintiff could have reasonably assumed that the cover contained no conditions if no notice had been rendered of such terms being there. Lord Mocatta stated that; if the new style cheque book had been the first issued to the litigator on his opening the account, at that time it would be a diverse situation. In this case, the simple existence of the two sentences on the new style cover is insufficient to affect the presence contractual relationship.

The test of adequacy of notice was first formulated in the case of Parker v/s South Eastern Railway Company.,69 the problem here was of entrusted of articles at the checkroom of a railway station. The ticket had the words “attention back” written on it. It was written which the company will not be liable for any package more than a certain value. The jury had been questioned to judge deciding whether the litigator had read the special term on that the article was entrusted and whether he was under any duty and obligation in the implementation of proper and reasonable prudence. The court held which it cannot be decided whether the litigator had a duty and obligation etc. The problem that required to be considered was whether the company had done whatsoever was reasonably adequate to give the litigator notice of the term and

68 Bhat, Sairam, op. cit. 26, p.184.
In *Thornton v/s Shoe Lane Parking Ltd.*, also, the court confirmed that if the respondents had not completed reasonably enough to bring to the notice of the claimant which the ticket had included certain terms and conditions, those terms and conditions did not form part of the contract. Lord Denning stating in *Spurling v/s Bradshaw* that some clauses would need to be written in red ink with a red hand mentioning to it before the notice might be held to be satisfactory.

Accompanied by this, another principle that has been made is respect to the factor of since a condition is brought to the notice of the party. This is due from the principle of assent of the parties. Therefore, any term that is assumed to form part of the contract has to arise to the notice of the party before the contract has been entered into. This was occupied into consideration through the court in *Chapelton v/s Barry Urban District Council*, and *Olley v/s Marlborough Court Ltd.*, in both the cases, the clause respect to limitation or exclusion of liability was carried to the notice of the party after they had entered into the contract. In the Chapelton case, the problem was of a ticket that was received as a receipt and in the Olley case, a notice rendered behind a bedroom door that had been rendered to the plaintiff through the contract. It has been noticed by the court that if the ticket is to form an integral part of the contract, it has to be passed at or about the time of the contract.

In the case of *R.S. Deboo v/s M.V. Hindlekar*, the problem which arose was of if the restriction of liability of a dry-cleaner by a term at the back of a laundry receipt formed part of the contractual terms. The court decided that the terms and conditions written on the reverse of a receipt don't essentially form a part of the consent the absence of the signature of the other party. In the absence of such a

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70 Further, a three-pronged test was laid down. First, if the person receiving the ticket did not see or know that there was any writing on the ticket, then he is not bound by the conditions. Second, if he knew there was writing, and he knew or believed that the writing contained conditions, then he is bound by the conditions, even though he did not read them and did not know what they were. Third, if he knew that there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he will be bound if the party delivering the ticket has done all that can reasonably be considered necessary to give notice of the terms to persons of the class to which he belongs. (Taken from *Burnett v/s Westminster Bank Ltd.*, (1965) 3 WLR 863.)


72 (1956) 1 WLR 461. https://uk.practicallaw.thomsonreuters.com/D-014-3212

73 (1940) 1 KB 532. http://www.e-lawresources.co.uk/cases/Chapelton-v-Barry.php

74 (1949) 1 KB 532. http://www.e-lawresources.co.uk/Olley-v-Marlborough-Court.php

75 *Thornton v/s Shoe Lane Parking Ltd.*, (1971) 2 WLR 585.

signature, the burden of proof was on the party that had issued the document to prove that the attention of the other party had been sufficiently drawn to the alleged conditions before the contract was concluded.

Therefore, Standard form contracts require a form of interpretation which is separate from that which is applied to general contracts. This is because general contracts are entered into after negotiation between parties having an equitable semblance of bargaining power, primarily to protect the weaker party, and they also ensure that unfair terms that were not consented to or are extremely unconscionable are not enforced. 77 The main issue with pre-determined standard form contracts which are usually prepared by the party with the greater bargaining power for repetitive use is the question of consent. There is a tendency to assess general contracts from a somewhat traditional approach of “objective assent” wherein if both parties have given consent to the contract, then the terms even if unfair would be enforceable to a great extent. This is primarily because great weightage is given to the fact that the parties knowingly entered into a contract and agreed to the terms.

Hence, the court would not go into the unconscionability of every term and see the question of enforceability. 78 The Standard form contracts also attract a stricter form of review because of the past experience of increased burden on the weaker party. The traditional duty to read before entering into an agreement does not seem to apply to these contracts. They are in the form of “take-it-or-leave-it” contracts and it is a very well accepted practice that majority of the participants do not read all the terms prior to consenting. It has to be understood that it is because of the nature of the transaction and the characterization of assent at the formation stage of contract that over time the courts have become more aware of the need to protect the rights of the weaker participants and yet ensure commercial freedom. 79

77 Supra note, 26, p.187.
People generally do not read the terms of standard form contracts and do not have the ability to negotiate the terms. The key concern is whether the consent given applies to all the terms included in the contract. The judges, at times, fall in a dilemma because of the economic viability of such contracts and the need to strike a balance between the market and the individual. According to the consent-based approach each un-bargained term is judged on the basis of whether the term was conspicuously placed, the importance and impact made clear to the parties, and whether assent was given to the term in an outwardly clear manner separate from assent to the main contract. In fact all these approaches are a manifestation of the same basic formula which aims to protect the weaker bargaining power.\textsuperscript{80}

\textbf{1.11 Statement of Research Problem}

1. In all kinds of standard form of contracts, the bargaining power of parties is unequal.

2. The standard form of contracts consists of exemption clauses which exclude or limit the liability and obligation of stronger party.

3. The modern law of contracts does not completely purify the concept of agreement and intention.

4. The modern law of contracts provision is failed in laying down a standard based on which Court can deal and determine the meaning of the unreasonable terms.

5. The UK Common Law is highly confusing, contradictory and potentialities to deal with the issues and problems of exemption clauses in standard form of contracts have not been fully developed. So it is titled as “The Law of Contracts in Commercial Transactions: A Comparative Study in Legality of Exemption Clauses in Contracts under India and UK Legal Regimes”. This study focused on the various aspects of exemption clauses in contract with special reference to the Indian Contract Act, 1872 and the Unfair Contract Terms Act, 1977.

\textsuperscript{80} Supra note. 62, p.475.
1.12 Objectives of the Research

The research has the following objectives:

1. To bring out more information and explanation about the freedom of contract, standard form of contract and exemption clauses.
2. To investigate the exemption clauses as interpreted by courts.
3. To investigate whether any control is being applied on exemption clauses by the legislature and judiciary in India and UK.
4. To investigate construction of exemption clauses in contract and third party’s rights refer to exemption clause.
5. To discuss the various problems in relation to exemption clause in the contract.

1.13 Research Questions

1. What is the standard form of contract?
2. What is the meaning of freedom of contract and exemption clauses in standard form of contract?
3. What is the concept of fundamental breach of contract?
4. How the exemption clauses are to be interpreted by courts?
5. What control is being applied on exemption clauses by the legislature?

1.14 Hypotheses of the Research

Based on the objectives of study, the following hypotheses are formulated:

1. The Indian Contract Act, 1872 does not provide any comprehensive concept about standard and practice of standard form of contract.
2. The Indian Contract Act, 1872 and Unfair Contract Terms Act, 1977 are not positively effective in developing and facilitating the freedom of contract and cannot control the exemption clauses in contract in the real sense.
3. The provisions applied in Indian Contract Act, 1872 in reference to exemption clauses is not comprehensive and sufficient which Courts give relief to the consumers in position of weaker party.
4. The Indian Contract Act, 1872 should be amendment or modify along with changes to the business operation and conduct in modern business era.

1.15 Methodology of the Research

This study is a comparative examination of the “The Law of Contracts in Commercial Transactions: A Comparative Study in Legality of Exemption Clauses in Contracts under the India and UK Legal Regimes”. For this purpose, Doctrinal Method has been adopted. It is substantially doctrinal in nature with a combination of Comparative, Critical and Analytical approaches. The researcher has gathered much information based on library research with emphasis on primary and secondary documents. A law library contains highly specialized materials and this needs special ability to handle. Essentially legal material consists of statutory law, acts, rules and conventions. Researcher uses the Primary Sources for research – convention, model law, treaties and Court’s decisions in both countries and also included the Secondary Sources crucial to thorough research - treatises, periodical literature, current awareness tools and web links.

1.16 Significance of the Study

This research clearly indicates poor condition of the weaker parties and strong position of monopoly markets. It tries to find out to what extent exemption clauses in contract are valid. By identifying the terms of exclusion/exemption clause, this study will provide a basic guidance to the contracting parties to consider the potential risks in the event of a dispute during project implementation. Indirectly the parties would be able to take appropriate steps to evaluate the risk to reduce the losses when there are any disputes in the contract.

Therefore, the rationale for undertaking this study is because there is a shortage of modern scholarly works dealing with issues covered in this thesis. The same is with reliable source and update information on exemption clauses of standard form contract case and practice in this part of the world. Hence, the present study proposes to bridge the gap in the literature and research relating to topic and to give useful insights on contract law in India.
Several important advantages can be derived from the further study in this thesis represents. The conceptual benefit will be an argument that this study will be of interest to people involved in commercial transactions, with companies, whether they are in a position of a company that uses exemption clauses in standard form in their contracts, or in position of a lawyer as a representative of a company and for those wishing to improve the Indian law of contract.

In such study, potential parties to commercial contract in India and their legal representatives may find insights that make them aware of procedural opportunities as well as vague and ambiguity existing in Indian contract regulations. Since there are not sufficient, if any, in-depth studies to deal with these and some other relevant barriers thoroughly, it has been imperative to embark on such study.

1.17 Limitation of the Study

While any piece of this research work had a great number of limitations, and a complete discussion of them would no doubt be much longer than the work itself, there were a few factors of special importance about this study that should be mentioned.

- This study attempts to analyze and compare Law of Contracts in Commercial Transactions. The focus is limited to analyze, criticize and compare the important topics such Meaning and Theories of Contract, Exemption clauses and freedom of Contract, Exemption Clauses Incorporation & Interpretation, Avoidance and Qualification of Exemption Clauses, The Effect of Discharge by Breach on Exemption Clauses, The Unlawful Exemption Clauses, governed by legal regimes of the India and UK.

The scope is further limited as the study only considers the theme in regard to contracts transaction and also limited to exemption clauses of standard form contract in India and UK legal regimes.

For the Case Law includes consideration of court decision in India and UK related with topic but unfortunately all cases are not available because some cases are often confidential and the revealed awards are usually summarized or heavily edited.

1.18 Sources of the Research

Based on the methodology of study, the following sources are formulated:

*Primary Sources are;*


- National legislation has also been of important value when treating the form requirements to Law of contracts, as well as judicial decisions. The decisions have largely been accustomed offer samples of the various interpretations into the present provisions.

*Secondary sources are;*

- Documents from the work done in the entire world in the area of on Law of Contracts in Legality of Exemption Clauses in Contracts have been instrumental, as have general books on Law of Contracts and articles revealed in numerous international journals. Several sources relating to the form requirement could also be viewed as slightly noncurrent compared to the newest developments within the area, therefore newer articles in international journals and information available on the internet represent vital contribution. Still, there are few updated and relevant sources on the subject.
For the Case Law, this study uses a variety of available sources including national gazettes and journals, which publish court decisions. The Case Law includes consider of available court decisions in India and UK related with topic.

1.19 Chapter Layout

For a proper understanding of subject, this thesis consists of six Chapters. This study is limited to Contract Act and area is confined to India and UK. After this Introductory Chapter which sets the framework for the thesis, and informs us what type of discussions, are expected to be followed in the rest of the thesis, this study is organized as follows:

- Second Chapter deals with the Historical background, Meaning and Theories of Contract. The nature and scope of contract has been too much discussed by lawyer interested in particular technical doctrines and through moralists, political and economic theorists’ interested in common social philosophy.

- Third Chapter deals with Exemption Clauses and Freedom of Contract. It is an analysis of the modern tendencies in due to Judicial Decisions and Statutory Enactments. It should be outlined that current attitude into collectivisms is limiting of freedom of contract.

- Fourth Chapter deals with the Exemption Clause; Contractual Force and Construction of Exemption Clauses. It is really a matter of fact that these exemption clauses should be used very thought-out. The question is whether the standard form contract excludes the liability of a person in bargaining position and then to what extent. So it should be incorporated in such a way that there is fairness in contract.

- Fifth Chapter deals with The Effect of Discharge by Breach and Exemption Clauses. It is possibly never very similar which the supporters of fundamental breach would permit their doctrine to expire or die just because of some obiter dictum on the issue from the House of Lords.

- Sixth Chapter will be the conclusion of the thesis that what is and what should be the exact position of exemption clauses in the standard form contract. To draw findings and implications for practitioners and scholars interested in this subject. To know how the laws of both countries protect the poor, opposite party, who has
no alternative but to take it or leave it. To know if the party in a bargaining position can take the advantage of exemptions in standard form contract.

1.20 Review of Literature

Review of literature is very important to study the different aspects of the law of contracts, which gives a clear picture about the development of the law of contracts all over the world. The law of contracts especially exemption clauses literature helps us to know the different aspect of contracts and its law, rules and regulations in both national and international levels. And, it has made great contribution towards development of international trade law. The comparison studies available about contract law especially exemption clauses in United Kingdom and Indian legal regimes having direct and indirect bearings on the objectives of present study are reviewed under some prominent area. These are as follow:

Nigel M. Robinson et al. (1996) had noted that the exemption or exclusion clauses on such terms and conditions as the indicate characteristic of indemnity restriction, limitation, exclusion and in the written contract. So, the authors determined the terms included in the standard form of construction contract. So, they only focus on the standard contract construction forms used in the public work department in order to identify each party’s liability that is set in the contract.81

Iain Murdoch. (2003) has noted that construction projects usually run over budget and/or program and also the contract can confirm that party takes responsibility refined purchasers and contractors area awake to the nature of the risks related to their comes and each commonplace kind and bespoken contracts address allocation of risk in additional and more detail. This making known appearance at however, liability may be restricted in English law construction contracts and at what's, and is not, acceptable within the eyes of the law. The author complete that; even wherever the parties have chosen a selected commonplace kind, there will usually be a negotiation on key terms while not associate degree overall appraisal of risk. By considering the position of risk and straightforward however effective caps and limitations of liability wherever acceptable, the parties can understand what they're cost accounting once

agreeing a worth and also the final negotiations of the contract could also be simplified and also the contract itself might become less expensive. He has known a number of the constraints that area unit oftentimes negotiated. There are a unit in fact several alternative risks that may arise the simplest approach is to undertake to spot associate degree address individual risks in contract and remember that capping liability at an acceptable level will profit all parties.82

Berglund Axel. (2004) has explored exemption clauses between contractual parties in their since of business and statutory furthermore as non-statutory provisions in United Kingdom, United State and Swedish law. She applied a comparative approach for analysis variations and similarities between Swedish and Anglo-American law. The researcher work over Swedish and Anglo-American law despite sure variations, share several vital similarities. A dispute concerning the validity of an explicit exemption clause would thus in all probability end up an equivalent method regardless of if challenged in an exceedingly court. The exemption clauses are going to be implemented by U.K., U.S. and Swedish courts, notably if the cut price positions are equal among the getting parties and also the consent question is created within the course of a business. It’s but necessary that the exemption clause is developed in an exceedingly clear and unambiguous method if the party arguing for the clause desires to make sure that it’ll be recognized by courts. In keeping with the contra proferentem rule83, terms associate degree conditions with an unintelligible language are going to be understood within the least favorable method for the composing party.84

Smith, Stephen A. and Atiyah, P.S. (2006) have seen a significant restructuring of the freedom of contract, and check out to introduce variety of recent themes, particularly, to fret the revival of freedom of contract ideology, and to introduce some basic economic problems in legal philosophy. The aims of the book


83 Contra proferentem in Latin word means “against the offeror”; also known as “interpretation against the draftsman”, is a doctrine of contractual interpretation providing that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording. The doctrine is often applied to situations involving standardized contracts or where the parties are of unequal bargaining power, but is applicable to other cases. The doctrine is not; however, directly applicable to situations where the language at issue is mandated by law, as is often the case with insurance contracts and bills of lading.

84 Berglund Axel. Op. cit. 43
stay unchanged: to produce a basic introduction, not just to the law of contact, however additionally to theories and policies and ideas underlying the topic. Moreover, the authors had regularly resorted to a contemporary historical approach, giving the scholar some sense of however the law has developed over the past one hundred years. The authors had ended that an exemption clause might take several forms; however all such clauses have one issue in common therein they exempt a party from liability that he would have borne had it not been for the clause.\textsuperscript{85}

Sairam Bhat. (2009) had attempted to the situation in use by judges on the various sorts of contracts during a comparative analysis of choices in India, the US, and the UK. He tried to review and analyze the general principles as well as the rules of interpretation involving standard form contracts and to look at how different legislations in the US and the UK have been used to tackle the problems related to these contracts and how this can be incorporated in Indian law as well. The author noted that; the Indian Contract Act, 1872 isn’t adequate enough to satisfy the requirements of the dynamic business setting, with new sorts of contracts rising that are a lot of sophisticated and people provisions that relate to general contracts being insufficient to trot out normal kind contracts. He investigated that; it is essential for the Indian legislature to realize that due to their unique nature, principles of general contract law cannot be applied to standard form contracts. The author concluded that; Indian legislature should taking from the extensive jurisprudence of the United Kingdom and the United States, including the experience of the Indian judiciary, certain legislations should be enacted which crystallize the position of law and also take into account the problems generated by the new forms of contracts.\textsuperscript{86}

Christelle Kok (2010) had discussed about the enforceability and continued existence of exemption clauses according to the framework of the further movement in the direction of consumer protection. He has argued that the provisions of the Act will lead to the outcome that unfair exemption clauses will be outdated because it could be stated void in terms of this law and as a result its use will become impossible. If the conditions of an exemption clause are vague and might be interpreted in more than one way, the court should interpret it to the consumer interest. Exemption clauses


can play a vital role in allotting the risk between parties where neither the guilty. The researcher concluded that, liability because of damaged goods and services not possible longer be excluded through exemption clauses. It should be a fair allot of risk and that both parties must be entirely aware of the risks they are undertaking. Where freedom of contract used to be the rule, the affirmation is going to conduction, to consumer awareness and fairness in contracting.\textsuperscript{87}

Sumanth. N. (2010) has discussed about Indian Contract Act, 1872 which has codified the law regarding contract and contributed to the development of consumer law. It has provided consumer protection in a growing form. Contract law has also aided in the development of Consumer laws. The extension of the scope of Consumer protection Act include the services which, till today is the field which provides huge number of litigation in consumer forum. Thus the author seen that principle of contract were the basis for evolution of Consumer laws and still continue to contribute for the development of Consumer Laws. With the emersion of e-contracts, it is to be seen if contract law can come to the aid of cyber consumers. He concluded that; contract law needs to be revised, lest there should be deficiency in Consumer Protection.\textsuperscript{88}

Sebastian V. S. (2013) in his thesis investigated newline into the measures such as the governmental endeavors to ensure quality in goods and different tools and put to use, relying upon with the requirements entailed by the facts and circumstances under the Unfair Contract Terms Act, 1977, Unfair Terms in Consumer Contracts Regulations, 1994, the Sale of Good Act and The Supply of Good (Implied Terms) Act, 1973 and what is Indian law’s position in protection of consumers. He briefly examined the concept of quality; its relevance to consumers and the role of quality in the present day market and analyzed; method of quality control and quality control standards. The author noted that; quality of goods, which is always a matter of great concern for the customers, is quickly turned into the most important factor in consumer decisions. He concluded that; the exemption clauses virtually negated the implications of implying terms and the usefulness of this device became defunct. It


was at this stage that the judicial trend turned towards consumers. Legislative endeavors that followed were encouraging. However the legislative enthusiasm visible in western countries has not shown its presence in India so far. Therefore, the Indian consumers remain as victims of exemption clauses in sales contract. A change in trend is highly necessary for better protection of the consuming public in India.  

Mahnoor Maalik. (2013), has discussed about a significant difference between English law and Norwegian law due to the legal effects of indemnity clauses attempting to exclude liability for “gross” negligence and intent. He compared two legal effects of an indemnity clause under English law mostly will rely upon a sense of the clause, an indemnity clause under Norwegian law will also be subject to several mandatory rules, such as the general duty of good faith and the standard of reasonableness found in section 36 of the Norwegian Contracts Act. Also, the court could use restrictive interpretation to adjust the balance of the contract that is a significant difference from English law. He seen that; the freedom of contract under English law also allows the parties to limit under the normal conditions regarded to damages, like remoteness and mitigation, from exerting to the indemnity clause. According to the Norwegian law, as contract conditions could easily be disregarded or censored by the courts. The author concluded that; multi-legal effects that could be gained by an indemnity clause under English law are not essentially allowed under Norwegian law. As a consequence, the expectations of the parties with regard to the legal effects of the clause could be defeated if they depend simply on a verbal understanding of the indemnity clause, or otherwise anticipate the legal effects accessible under English law to happen under Norwegian law and also, for the first time without due to the differences between the two legal systems.

The same gap is found in all above literatures i.e. lack of sources and proper applicable law is much more evident on the issue of contract law in exemption clauses. Few existing works dealing with the issue of contract law in exemption clauses in international fall into two categories, namely, those that consider the law in exemption clauses in UK law or Indian law or part of them, and those that consider the law in the


context of a wider comparative study. The first category usually does not extend beyond short papers. More importantly, recent developments in the law have not been discussed sufficiently in the existing literature. Hence, a comprehensive study centering on the contract law in exemption clauses, having both comparative and developmental approaches, seems necessary.