CHAPTER-6

FINDINGS, CONCLUSION AND RECOMMENDATION

6.1 Findings of Research

Exemption clauses are an international phenomena and an international problem. In both the countries under study, it has been realized that a certain control of exemption clauses, is indispensable. The reason for this is the protection of weaker party but the road of protection of weaker party in India is not smooth. It is still in novice stage with many ambiguities that blocked in working of successful of this road in India which are multiple starting from emergent needs to amendment or modify of certain provisions of the Indian Contract Act 1872, to changing the attitude of all potential parties who are involved.

Based on the study from chapter one to five the following findings are arrived at:

Findings 1:

The modern law of contract does not altogether erase the concept of agreement and intention. The ancient is too much emphasis on intention of the interests of justice. Parties have now a right to vary or exclude the normal rules by express agreement. The classical principles are yet there. Modern laws weakness is that the changes are only piece meal here and there. The basic principles of in recent century as revealed by the judgments of that period do remain in main. Intention is yet divined by judges to decide many issues. There is no doubt that to treat standard form of contracts or exemption clauses as normal is to be depreciated. Traditional theories of contracts do not apply to them. The complexity of modern activities makes it also difficult to provide for all eventualities. It is, therefore, difficult to solve the riddles of the law of contract overnight. It is still a problem. The existence of the problem is a sure indication of the growth of that law. Mr. Justice Holmes938 rightly observed:


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“The law is always approaching and never reaching consistency. It is forever adopting new principle from life at one end and it always retains old one from history at the other .... It will become entirely consistent only when it ceases to grow.”

Findings 2:

There are two fundamental and opposing principles competing for supremacy: (1) that it is in the interest of the society that contracts made of persons of full age, understating and capacity ought to be enforced and (2) that this principle ought not to be made a tool in the hands of hard bargainers strength to impose unreasonable terms on the less favorably situated parties. It is in other words, the conflict between of contract and restraint that should be placed on such freedom to ensure its availability to all the members of the society. It has been stated that in actual life real freedom to do anything in art as in politics, depends on acceptance of the rule of our enterprise. As has been remarked elsewhere, the rules of the sonnet do not hamper real poets but rather help weak ones. Real or positive freedom depends upon opportunities supplied by institutions that involve legal regulation.

Findings 3:

The movement to standardize the forms of contract even to the extent of prohibiting variations or the rights to contract out is not to be viewed as a reaction to, but rather as the logical outcome of, a regime of real liberty of contract. It is a utilization of the lessons of experience to strengthen those forms which best serve as channels through which the life of the community can flow most freely. It is said that standardization of contracts is inimical to real freedom. But it is a fallacy. By standardizing contract the law increases that real security which is the necessary basis of initiative and the assumption of tolerable risks.

Findings 4:

The rules adopted by superior courts had not been different. Thus by respecting the intention of the parties and giving effect to that, the judicial tribunals have shown their anxiety to hold the torch of freedom of contract high up in spite of all the present incursions made upon that freedom from several directions. Lord Denning expressed the opinion that an unreasonable onerous term in a standard form
contract would not be enforced by courts, for "there is a vigilance of the common law which, while allowing freedom of contract, watched to see that is not abused."\textsuperscript{939}

**Findings 5:**

In placing judicial restraint on freedom of contract when the contract is drafted beyond the age of minimal requisites of fairness, the courts ought to fostering the preservation and not the emasculation of contract law. Freedom of contract is not an illimitable concept. Courts have been determined to find out whether there was in reality, mutual assent between the parties. Courts have reflected enlightened concern for the delicate balance between the unquestioned need to preserve integrity of agreements and desirability to require basic fairness in order that mutual assent is equated to meaningful assent.

**Findings 6:**

Courts in UK and India have tried to hold the torch of freedom of contract by respecting the intention of the parties and giving effect to it. It is very clear that exemption clauses in standard form contracts are very pre-formulated stipulations in which the offeror's will is predominant and that conditions are dictated to an undetermined number of acceptant and not to one individual party. The party can ‘take it or leave it’ but cannot negotiate its terms and conditions. It has become a device for adjustment of law to the needs of society. These contracts represent a new trend in contract branch and society as a whole has been benefited for them. The purpose of these contracts was to encourage business activity. Kessler has stated: "\textit{Insofar as the decrease of costs of distribution and production thus reached is reflected in reduced prices, society as a total ultimately benefits from the practice of standard contracts.}\textsuperscript{940}


Findings 7:

Common Law of UK is highly contradictory and confusing and potentialities to cope with the problems of exemption clauses in standard form contracts have not been fully developed. However, as a result of persistent and prolific litigation, it's possible to risk certain deductions. UK Legislation has tended either to forbid specific terms, or to require delivery of a specific form giving details of the transaction (as in the Money Lenders Act), or to lay down guidelines within which and by reference to which a tribunal may determine what is fair.

Findings 8:

Legislature in UK has tried to remedy the individual cases but they could not enact a general Act or a general provision that could meet with the abuses of these clauses. The approach that has been followed by UK Legislation is no doubt a pragmatic one yet it is submitted that it is a slow process and will take too much time to check the abuses of standard form contracts and exemption clauses.

Findings 9:

As far as UK Courts are concerned, they have developed some covert techniques to control these unfair clauses e.g. Doctrine of Fundamental Breach, Gibaud Rule, Four Corner Rule, and certain maxims etc. Courts can construe language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and get rid of the bothersome one. It can even throwaway a clause as opponent to the entire purpose of the transaction. It can reject enforcement by one side for want of mutuality, improper notice etc. Clause can also be rejected on grounds of inequality or because the clause is unconscionable. Such clauses are excluded where the document did not appear to be contractual in nature, where the offeree’s attention was not adequately drawn to the conditions, or where the notice of them was given after the contract was concluded. But all these covert techniques adopted by the courts have failed to meet the problems arising out of these contracts in UK. Courts in UK an India still apply traditional principles in interpreting these contracts and their attention has been confined to find out defects in the formation process of the contracts rather than its contents.
Findings 10:

The India and UK Courts have failed to develop general criteria for marking out a clear boundary between admissible and inadmissible clauses and since they all rest upon the theory that the clauses in question are permissible in purpose and contents, they invite the draftsmen to return the attack. Courts are empowered to cancel any clause but are still not empowered to rewrite it so as to do equity between the parties.

Findings 11:

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 seeks to change. A fundamental breach of contract is true not simply the terms of an individual contract, but a fundamental deviation of the values which those names represent and which reflect as much the degree of honesty in commercial dealings of the quality of the goods which one may expect to find on the economic market. We should not forget that allocation of risk affects the character of a contract and, therefore, terms in contracts cannot be regarded as merely “a convenient means of repairing an obvious oversight.”

Findings 12:

In India importance of Doctrine of Fundamental Breach of Contract has been recognized partially. Decisions are generally given on the basis of Section 23 of the Indian Contract Act, 1872 dealing with public policy. There is no doubt that the Doctrine of Fundamental Breach of Contract has been of much use to the Courts in UK and partially in India in preventing exemption clauses from becoming an instrument of oppression, exploitation and justice. Fundamental Breach is not simply the breach of the terms of an individual contract, but a fundamental deviation of the values which those norms represent and which reflect as much the degree of honesty in Commercial dealings as the quality of the goods which one may expect to find on the economic market. Fair conduct is expected from parties and exemption clauses are

941 Ibid
not open “sesame” which provides for “the correct formula” for exclusion of contractual liability and a free pass to deviation without limitation from the legal norms. It is this element of fair conduct which Professor Coote in his learned attack on the doctrine of fundamental breach has consistently tried to exclude from the law of contract, although he appears to acknowledge its significance outside legal relation.

Findings 13:

By eliminating the necessity of restoring to fictional interpretation, the doctrine of fundamental breach has made its greatest contribution. This doctrine has curtailed the liberty of parties to blow hot and cold. Consumers had great protection under it. It has been of great help in controlling abuses of exemption clauses in various branches of law. But now in UK judicial controversy has started regarding the true nature and function of this doctrine. After the judgement in Suisse Atlantique’s\(^{942}\) case, fundamental breach of contract by one party may exonerate the other from the burden of exemption clauses but only as a matter of construction of the contract. If a clause is properly drafted then according to this decision even fundamental breach may be covered. This judgement brought the doctrine to a standstill although Lord Denning’s judgement in Harbutt’s\(^{943}\) case still supports the view that it is a rule of law. It is submitted that instead of going into a judicial battle over the function and effect of this doctrine, it will be better if the solution is left to the Parliament to more suitable legislations with clarity.

6.2 Testing the Hypotheses

The exemption clauses in ‘standard form contracts’ are very pre-formulated provisions and conditions in which the offeror’s will is main or predominant and which conditions are dictated to an indefinite number of acceptant and not to one sole/individual party. The party can “take-it or leave-it” but cannot negotiate its terms and conditions. It has become a mechanism for modification and set out of law to the necessities and needs of society. These contracts signify a new trend in contract and


society as a whole has been profited for them. The aim of these contracts was to patronize business activity.

Based on the objectives of study, from chapter one to five the following hypotheses are tasted:

**Hypothesis One:** “The Indian Contract Act, 1872 does not provide any comprehensive concept about standard and practice of standard form of contract.”

In Indian context cases are entertained under the rules provided by Indian Contract Act, but there are no any Sections, Provisions or Act only made to defined and deal with standard form of contract specifically. As a result, in this kind of contract weaker party can simply be exploited and there is no explicit rule for the prevention from this kind of action by dominating party. Therefore, the researcher accepts the hypothesis formulated.

**Hypothesis Two:** “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.”

There is no doubt that with the change in social structure, standard form contracts have become tools of oppression and misconduct. The general situation everywhere is one of continuing abuses by trade and industry, ineffectiveness of judicial and self-imposed contracts, and an absence of comprehensive mandatory legislation. There is no doubt that standardized contracts, like other laws, serve the interests of some persons better than those of others, and the question of justice thus raised demands the attention not only of legislature but also of courts that have to interpret them. The important lacuna is that no special methods have been used in UK and India to cope with the problems of these contracts. Common Law of UK is highly contradictory and confusing and potentialities to cope with the problems of exemption clauses in standard form contracts have not been fully developed. Legislature in UK and India has tried to remedy the individual cases but they could not enact a general Act or a general provision that could meet with the abuses of these clauses. The approach that has been followed by the Legislation is no doubt a pragmatic one yet it is submitted that it is a slow process and will take too much time to check the abuses.
of standard form contracts and exemption clauses. Therefore, the researcher accepts the hypothesis formulated.

_Hypothesis Three: “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.”_

The whole basis of a contract, that it was voluntarily and freely entered into by the parties with equal bargaining power, entirely falls on the ground when it is actually impossible for one of the parties not to accept the offered terms and conditions. In order to provide freedom of contract a reality and solely of one whose bargaining power is less that of other one to the contract, various criteria like money laundering laws, rent Acts and labor legislation have been enacted, but there is no general provisions in the Contract Act itself under which courts can give relief to the weaker party. The existing sections (16 and 23) in the Contract Act 1872 do not seem to be capable of meeting the mischief. Therefore, the researcher accepts the hypothesis formulated.

_Hypothesis Four: “The Indian Contract Act, 1872 should be amendment or modify along with changes to the business operation and conduct in modern business era.”_

The time is not approaching when the whole structure of Indian contract law with its preconceived ideas and doctrine, has not become so rigid and static that it cannot be expected to bear on all fronts the strains and stresses of modern economic, social and business pressures. It has to be admitted that the changes in social, economic and business spheres have been so fast that contract law should not be allowed to lag behind. On the other hand, it is necessary to recognize the importance of preserving the integrity of agreements and the fundamental rights of the parties to deal, trade, bargain and contract while on the other hand illiterate individual who is the victim of gross inequality of bargaining power usually being the poorest member of the community. Therefore, the researcher accepts the hypothesis formulated.
6.3 Answering the Research Questions:

**Question one: What is the standard form of contract?**

Standard Form Contracts are contracts/agreements that apply standardized and non-negotiated provisions generally in pre-printed forms. These are occasionally stated to as “contracts of take-it or leave-it” or “adhesion contracts”. The terms and conditions every so often described in fine-print, are on behalf or drafted by one party to the transaction and the party with superior bargaining power who consistently engages in such transactions. With few exceptions, the terms are not negotiable by the customer. On the other hands, the standard form contracts are standardized contracts that comprise an enormous number of terms and conditions in fine-print which limit and often exclude liability under the contract. This gives a unique opportunity to the huge company to exploit the weaker party by imposing upon him terms which often look like a sort of private legislation which might go to the extent of exempting that company from all responsibility under the contract.

**Question two: What is the meaning of freedom of contract and exemption clauses in standard form of contract?**

Freedom of contract may be described as a person's freedom to arrange his relations with others by means of contracts. On the other hand, this implies that parties in principle are free to enter into a contract of their choice and on the terms they wish. Contract law provides rules for the way in which parties use their freedom, both relating to the formal aspects of the agreement and to the substance of the contract. The positive side of the principle regards the freedom of self-determination and development of one's personality, whereas freedom of contract in the negative sense refers to the freedom from government intervention in the contractual relationship. An exemption clause is an agreement in a contract that stipulates that a party is limited or excluded from liability. Exemption clauses can be applied unfairly that may loss a party. Consequently, there have been alterations to the law to make more fairness and to restrict the use of clauses.
**Question three: What is the concept of fundamental breach of contract?**

The doctrine of fundamental breach was basically the formation of Denning L.J in the year of 1950 in case of *Karsales (Harrow) Ltd. v/s Wallis.* It was understood to be a law rule which functioned independently of the parties’ intention in conditions where the defendant had so seriously breached the contract as to repudiate the plaintiff considerably the complete of its benefit. According to the doctrine of fundamental breach, the innocent party was exempted from further performance but the defendant could still be held responsible for the outcomes of its “fundamental” breach even if the parties had limited liability by clear and express language. Section 39 of the Indian Contract Act, offers that “if a person overspend in any fundamental breach of the contract and the other party doesn’t agree to the breach, then the party not breaching, is not bound under the obligations of the contract”. So, empower a party to terminate a contract on the ground of considerable failure by the other party which goes to the basis of the contract. Under Sections 55 and 56 of the Indian Contract Act, 1872 in case of delay in performance of the contract “if there is an abnormal rise in prices of goods and labor, it may frustrate the contract and then the innocent party need not perform the contract”.

**Question four: How the exemption clauses are to be interpreted by courts?**

**(A) Strict Interpretation of the Clause**

In order to gain exemption from a legal liability under a contract, it is necessary for a person to use the clearest possible words. Scrutton L.J.; in *Ailson Ltd. v/s Wallsend Slipway and Engineering Co. Ltd.*, decided that “a person is under legal obligation and wishes to throw out of it, he can simply perform so by applying clear words.” The clause need precisely cover the liability that is sought to exclude. Therefore, a clause limiting liability for breach of warranty not cover a beach of condition, and this will be so even where the term broken, although a

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946 Ibid

947 The clear and detailed discussion of this doctrine by the court of Session in Ailsa Craig Fishing Co. v/s Malvern Fishing Co. & Securior (Scotland) Ltd. (1981) S.L.T. 130.
condition, is treated as a breach of warranty by virtue of acceptance. Nor will a clause excluding liability for “latent defects” to be construed as excluding the implied condition as to fitness for purpose under section 14(3) of the Sale of Goods Act, 1979. The same strictness of interpretation is applied to indemnity clauses as to clauses that more obviously apply exclusions and limitations. Further under section 13(2) of The Sale of Goods Act, 1979 where “there is a sale by sample as well as by description, it is an implied condition of the contract of sale that the goods correspond both with the sample and with the description”. In Nichol v/s Godts the seller sold “foreign refined rape oil, warranted only equal to sample.” They delivered oil which did not answer the description of foreign refined rape oil, and was not equal to sample in quality. It was held that the exclusion clause only related to quality; so that while it might have excluded the condition now implied by section 15(2) (c), it could not be construed so as additionally to excuse the sellers from their duty to supply goods answering the contract description.

(B) The Contra Proferentem rule

The need for interpreting a contract can arise in two situations. Firstly, if the Judge or Arbitrator is of opinion that "a gap is needed to be filled" in order to interpret the Contract and secondly, if party believes that "an ambiguity is needed to be resolved" in order to find the correct intention of the contract. The Doctrine of Contra Proferentem is generally applied by the Judges in the latter case where a contract appears ambiguous to them. With the passage of time, the Judges have started appreciating the significance of this doctrine that has originated its core from

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948 Wallis, Son & Wells v/s Pratt & Haynes (1911) A.C. 394. Ibid., p.173.
949 Andrew Bros. Ltd. v/s Singer & Co. Ltd. (1934) 1 K.B. 17. Available online at: https://www.jstor.org, accessed date on (19.06.2016) 12:36 pm
951 Smith v/s South Wales Switchgear Ltd. (1978) 1 W.L.R. 165. Available online at: https://www.uniset.ca, accessed date on (27.04.2016) 16:30 pm
952 (1921) 3 K.B. 435. Available online at: https://www.wenku.baidu.com/, accessed date on (19.06.2016) 22:06 pm
953 That the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.
Insurance law, uses in a condition when a provision in the contract can be interpreted in more than one approach.955 In this case, the court will desire the interpretation that is more desirable to the party that has not drafted the contract. In the other words, the Judge will be more orientated to the interpretation which goes against the party who has place in the vague or the doubtful clause in the contract. A rule in contract law which states that any clause considered being ambiguous should be interpreted against the interests of the party that requested that the clause be included. Contra proferentem rule guide the legal interpretation of contracts, and is typically applied when a contract is challenged in court. Though there is any ambiguity as to the meaning and notion of the words used in a clause limiting or excluding liability, the uncertainty is resolved by building them against the party who has inserted them and who is now depending on them, and in favor of the other party.

(C) Repugnancy

Doctrine of Repugnancy deals with the conflict of laws between the Centre and the State. Repugnancy arose when, there may be inconsistencies in the actual terms of the Statute as when one legislature says “do” and the other says “don’t”. There is a direct and clear inconsistency between the State Act and the Central Act such an inconsistency is unconditionally of such a essence as to bring the two Acts into direct conflict and a condition is reached where it is impossible to obey the one without disobeying the other or may be not an apparent conflict or collision between the two provisions yet there may be repugnancy between both covering the same field or may happen when there is no direct conflict in the two provisions nor the Act directly takes away a right conferred by the other.

(D) Liability for Negligence

Negligence is the commission to do something that a reasonable person guided upon those considerations which generally regulate the behavior of human affairs, would do, or doing something that a reasonable and prudent person would not an act of negligence is committed whenever a person is injured due to the carelessness or irresponsibility of another one. Winfield said that, “negligence is an illegal act that

the breach of a legal omission to be careful which consequences in damage, unwanted by the defendant to the plaintiff”. In the words of Wright L.J, “In strict legal analysis, negligence means more than unaware or neglectful conduct, whether in duty or omission. It signifies the multifaceted concept of duty, breach and damage thereby hurt by the person to whom the duty owed.”

In Hall v/s Brooklands Auto-Racing Club956 Scrutton L.J. said that; “...in my view, where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort.” However, there is a significant difference between disregarding the contract altogether and constructing the contract closely to ascertained whether the preference has effectively excluded his tortious liability by means of contracted exemption clauses. While it is possible for a clause to be drafted in such a way that it excludes tortious liability usually for negligence, though the clause be subject to the constraints of the Unfair Contract Terms 1977, Section 2(1) & 2(2) the usual attitude of the court is that it is exceedingly unlikely for negligence unless the clearest possible terms are used957 as a matter of construction958 the courts have establish that unless negligence is the only liability to which the words could apply, general words of exclusion will have no application to negligence. Therefore, where the clause is formulated in general terms and conditions, a clause excluding liability “for loss or damage or for all damage” it will be first required to established whether the damage complained of could arise both consequently of negligence and of breach of a strict contractual commission, or whether it can only arise consequently of negligence.

**Question five: What control is being applied on exemption clauses by the legislature?**

There have been many attempts to control by statute the operation of exemption clauses, or their insertion into contract, and several different legislative

956 (1933) 1 K.B. 205. Available online at: https://www.gavclaw.com, accessed date on (25.06.2016) 15:57 pm.
958Hollier v/s Rambler Motors (A.M.C.) Ltd. (1972) 2 Q.B. 71. Available online at: https://www.sweetandmaxwell.co.uk, accessed date on (29.06.2016) 13:10 pm
techniques have been used. However, these techniques all have one characteristic in common; they view exemption clauses as something separate from the other promises and undertakings in the contract. On one view, an exemption clause is simply one form of interpolating into a contract as 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. Statutory attempts at control do not appear to acknowledge this and, to a greater or lesser degree, regard clauses of exemption as terms apart from the promises and liabilities of the contract. While this used to reflect the judicial attitude also, there are clear signs now that some judges are taking a different view of such clauses. However, so far as statute is concerned, the unchanging view of the legislature seems to be that exemption clauses have an exclusively prophylactic function, and this has produced some remarkable problems of statutory interpretation.

**Total Invalidity of Statutory Control of Exemption Clauses**

Certain types of exemption clauses are declared absolutely void by statute. They are void either because the type of damage for which they purport to exclude liability or the contractual duty, the breach of which it is hoped to exclude, is such that by statutory control, the public consumer of commercial interest is thereby better served. There are many examples of legislation rendering clauses void on account of the type of damage for which they seek to exclude liability. Thus, any provision attempting to negative or limit the liability of the operator of a public service road vehicle for causing the death of or personal injury to a passenger is void (Road Traffic Act, 1960, Section 151). There is a similar provision in section 43(7) of The Transport Act, 1962 “to cover the carriage of passengers by rail; thus making void

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959 Unfair Contract Terms Act, 1977, sections. 1-14 sched. 2; Uniform Commercial Code, article 2-303 (U.S.A); Standard Contracts Law, 1964 section10 (Israel); Trade Practices Act, 1974 section 68 (Australia). The periodical literature discusses various legislative techniques from many jurisdictions.


961 Section 151 provides that a clause in a contract for the conveyance of a passenger in a public service vehicle which purports to negative or restrict the liability of the carrier in respect of death or bodily injury to the passenger while being carried in, entering or alighting from the vehicle, shall be void.

962 Section 43(7) provides that the Boards shall not carry passengers by rail on terms or conditions which (a) purport, whether directly or indirectly, to exclude or limit their liability in respect of the death of, or bodily injury to, any passenger other than a passenger travelling on a free pass, or (b) purport, whether directly or indirectly, to prescribe the time within which or the manner in which any such liability may be enforced.
a clause” such as that held to be operative in *Thompson v/s London, Midland and Scottish Railway Co. Ltd.* 963 “Any antecedent agreement or understanding between the user of a motor vehicle and his passenger which purports to restrict the driver’s liability to that passenger in respect of risks for which compulsory insurance cover is required (Road Traffic Act, 1972 Section 143) 964, is void under Section 148(3) of the Road Traffic Act,1972”. 965

Section 145 to 164 of Indian Motor Vehicle Act, 1988 “provides for compulsory third party insurance, which is required to be taken by every vehicle owner”. It has been stated in Section 146(1) that “no one shall use or allow using a motor vehicle in public place if there is in force a policy of insurance obeying with the condition of those sections”. Section 147 “provides for the necessity of policy and restrict of liability”. Section 92 inoperative a provision included: “Any contract for the transfer of a passenger in contract carriage or stage carriage, in respect of which a license has been issued under this section, shall, so far as it senses to negative or limit the liability of any one in respect of any claim made against that party in respect of bodily injury to or the death of the passenger whereas being entering, carried in or landing from the vehicle, or senses to impose any conditions with respect to the enforcement of any such liability, be void”. 966

The Unfair Contract Terms Act, 1977 also renders void some exemption clause on the ground that the particular duty, the breach of which it is hoped the clause will excuse or obviate, is not one which, on the grounds of policy, may be omitted

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963 (1930) 1 K.B. 41. Available online at: https://www.e-lawresources.co.uk, accessed date on (28.05.2016) 12:53 pm

964 Section 143 requires every person who uses, causes or permits another to use a motor vehicle on a road to have a policy of insurance (or a security) in respect of third party risks in relation to use of the vehicle.

965 Section 148(3) provides that where a person uses a motor vehicle in circumstances such that under section, 143 of this Act there is required to be in force in relation to his use of it such a policy of insurance or security as is mentioned in subsection (1) of that section, then, if any other person is carried in or upon the vehicle while the user is so using it, any antecedent agreement or understanding between them (whether intended to be legally binding or not) shall be of no effect so far as it purports or might be held: (a)to negative or restrict any such liability of the user in respect of persons carried in or upon the vehicle as is required by section 145 of this Act to be covered by a policy of insurance; or (b)to impose any conditions with respect to the enforcement of any such liability of the user; and the fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negative any such liability of the user. For the purposes of this subsection references to a person being carried in or upon a vehicle include references to a person entering or getting on to, or alighting from, the vehicle, and the reference to an antecedent agreement is to one made at any time before the liability arose.

from the contractual relations between the parties. In their original forms, sections 13, 14 and 15 of Sale of Goods Act, 1979 contained terms to be implied, in the absence of contrary evidence, in all contracts for The Sale of Goods, dealing with such matters as correspondence of goods to contract description, fitness of the goods for their purpose, the merchantability of the goods, and their correspondence with sample. The original intention of the draftsmen was to fill any gaps left by commercial men in their agreements by means of implied terms.

The general tendency of the law of contract over the past twenty-five years to shift away from the protection of the commercial interest has resulted in the statutory insertion of compulsorily imposed terms as to quality by redrafting of sections 12 to 15 of the Sale of Goods Act, 1893 into the form in which they now appear in the act of 1979. Any attempt to exclude the implied undertakings as to title in contracts of sale or hire-purchase will be of no effect. In consumer contracts of sale or hire-purchase, the owner’s or seller implied commitments as to adaptation of goods with qualification or sample or as to their quality or fitness for a specific purpose, cannot be limited or excluded. Similar provisions apply, under The Unfair Contract Terms Act 1977, Section 7(2), to contracts which involve the transfer of ownership or possession of goods from one person to another or the use of or expenditure on goods from one person to another or the use of or expenditure on goods in the performance of any services, such as contracts of hire, exchange and for work and materials. As to the exact content of this last group of implied terms, the common law is unclear and there is, as yet, no statutory definition of them. The Act, 1977 provides that, “whatever these implied terms may be relating to correspondence with the description or sample, quality or fitness for purpose, they may not be excluded or restricted in consumer contracts”.

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968 An illustration of the operation of this kind of invalidity can be found in Rasbora Ltd v/s J.C. L. Marine (1977) 1 Lloyd’s Rep. 645, applying Sale of Goods Act 1893, section 55(4), the fore owner of the Unfair contract terms act 1977, sections 6(2) and 7(2).
969 Law Commission Report No.95, Implied Terms in Contracts for the Supply of Goods. Legislation is, at the time of writing, proceeding through Parliament. It is intended to implement the Law Commission’s recommendations.
The technique of multiplying attempts to contract out of duties imposed by contract or legislation is a common feature on statute books.\textsuperscript{970} It does, however, inhibit the reasonable bargains of reasonable parties, and creates extremely difficult points of interpretation. Suppose that consumer then buys the car for the asking price without further examination and later relies upon those defects in a claim that the vehicle is not of merchantable quality. Normally, no condition to this effect would arise with regard to defects that are specifically indicated.\textsuperscript{972} There are other objections that could be made to section 13(1)\textsuperscript{973} of Unfair Contract Terms Act, 1977. These proceed mainly on semantic grounds but taken literally, they suggest that the provision may, in fact, be discarded as wholly meaningless. Therefore, the provision refers to “restricting or excluding liability” by notices or terms that restrict or exclude the relevant omission or duty, while if the original omission or duty were exempted no liability would arise. Again, it refers to “terms or notices which exclude or restrict the relevant obligation or duty,” whereas the main object of the provision is to ensure that (in certain circumstances at least) the obligation or duty should not be excluded or restricted at all.

In part, from treating exemption clauses as if they had an existence completely independent of the promises and undertakings contained in the contract. So, for instance, in relation to the implied undertakings as to quality and fitness in the Sale of Goods Act 1979, the statutory controls on exemption clauses appear to ignore the basic function of such clauses, which is to allocate contractual risks or, put another way, to determine who is going to pay if the goods are defective. The first priority under the legislation is the domestic consumer and his interests are safeguarded in so far as any exclusion attempt by the retailer in relation to the statutorily implied terms will be void. However, the ultimate responsibility will, in many cases, be that of the manufacturer depends upon the view the statute takes of exemption clause in non-

\textsuperscript{970} More than two people or elements bringing their individual strengths together in a committed activity.

\textsuperscript{971} Defective Premises Act 1972, section 6(3).


\textsuperscript{973} Varieties of exemption clause: To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents: (a) making the liability or its enforcement subject to restrictive or onerous conditions; (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy; (c) excluding or restricting rules of evidence or procedure.
consumer sales which depends, in turn, as we shall see, upon an element of judicial
discretion. This applies without distinction between commercial sales of consumer
durables in the chain between the manufacturer, whose fault the defect may well be
and the retailer.

*The Reasonable Exemption Clause*

The term reasonable is a common and relative one and uses to that which is
proper for a specific situation. By far the most important of these is now The Unfair
Contract Terms Act (UCTA), 1977. As against a person dealing other than a consumer,
statutorily implied terms as to quality, fitness for purpose and
correspondence with description or sample in contracts for the sale of goods or hire-
purchase, or the similar terms implied by the common law into analogous contracts
for the supply of goods, can be excluded, but only insofar as the exemption satisfies
the statutory concept of reasonableness.

Under section 11(1) of UCTA, 1977 a term will be reasonable if it is a fair and
reasonable one to be included having regard to conditions which were, or ought
reasonably to have been, identified to or in the thought of the parties when the contract
was created. Section 11(2) put outs that, in specifying whether the clause is a
reasonable for the aims of sections 6 and 7, which are as follows: (1) The bargaining
power of the parties compared with each other and the accessibility of substitute
supplies, (2) Whether the consumer received a motivation to agree to the term, (3)
Whether the consumer knew or ought reasonably to have known of the existence and
extent of the term, (4) Where the term exempts or limits any relevant liability if some
condition is not matched with, whether it was reasonable at the time of the contract to
expect that obedience with that condition would be feasible, (5) Whether the goods
were produced, processed or adapted to the special order of the consumer.

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974 It will be recalled that in “consumer contracts”, “contracting out” of the implied terms is forbidden, Unfair
Contract Terms Act 1977, sections 6(2) & 7(2).

975 Unfair Contract Terms Act 1977, section 6(3).

976 *Ibid*, section 7(3).
Under section 11(3) a notice (not existence a notice having contractual effect),
the necessity of reasonableness is that it should be fair to let relying on it, having
respect to all the conditions obtaining when the liability arose or would have arisen.
This provision uses a test of reasonableness to disclaimers for harmful liability.
Section 11(4) “where the exclusion clause pursues to restrict liability rather than
exclude it entirely”, the court must have respect to two issues: the resources accessible
to meet the liability, and the amount to which insurance cover was accessible to the
party pointing to limit liability and Section 11(5) “provides that it is up to the
individual who claims that a term or notice is reasonable to show that it is”.

(A) Misrepresentation

Section 3 of the Misrepresentation Act 1967, 977 was substituted by the Unfair
Contract Terms Act, 1977, section 8(1), enacts that “any provision in any agreement
which purports to exclude or restrict any liability of a contracting party for a
misrepresentation, or any remedy available to the other party by reason of the
misrepresentation, shall be of no effect except in so far as it satisfies the requirement
of reasonableness”.

The section seems to use to clauses excluding liability for mis-description,
though, slight, but the usual commercial specifications for a margin in, for instance,
specification of goods, would not be invalidated, either because there would be no
misrepresentation at all if the deviation from specifications fell within the stipulated
margin, or, more doubtfully, on the ground that such a provision did not exclude or
restrict a liability or remedy, but merely prevented the liability or remedy from arising
in the first place.

(B) Indemnity Clauses

Indemnity is remedy for loss or damages. Indemnity in the legal concept may
also refer to an exemption from liability for damages. The law governing indemnity
is set out in Sections 124 and 125 of the Indian Contract Act, 1872. Section 124 of the
ICA, 1872 defines a contract of indemnity as “a contract by which one party promises
to protect the other from loss or damage affected to him by the conduct of any other

person or by the promisor himself.” Section 125 of the ICA, 1872 gives the right of indemnity holder when sued and states that: “The promisee performing within the domain of his power, is enabled to recover from the promisor (1) all damages that he may be bound to pay in any demand in respect of any matter to that the promise to indemnify applies; (2) all charges which he may be bound to pay in any such demand, if in bringing of defending it, he didn’t breach the orders of the promisor, and acted as it would have been careful for him to act in the lack of any contract of indemnity, or if the promisor allowed him to bring or defend the suit; and (3) all sums which he may have paid under the terms of any agreement of any such demand, if the agreement was not contract to the orders of the promisor, and was one which it would have been breach for the promise to make in the lack of any contract of indemnity, or if the promisor allowed him to compromise the suit.”

An indemnity clause is a contractual transfer of risk between two contractual parties normally to preclude loss or damage for a loss which may occur owing to a specified event. It plays an important role in managing the risks associated with commercial transactions by saving against the contractual default, another party’s negligence or effects of an act. The normal trend is to pursue an indemnity which will save a party to the greatest possible extent against obligations arising from the actions of another.978

(C) Guarantees

Under section 126 of the Indian Contract Act, 1872 guarantee defines that: “A contract in which a party promises to another party that he will perform the contract or compensate the loss, in case of the default of a person, it is the contract of guarantee.”

In the Unfair Contract Terms Act, 1977 section 5 imposes statutory controls over exemption clauses contained in guarantees. This section relates to the situation where a manufacturer or distributor of goods tries to use a particular method of excluding or restricting his or her liability for loss or damage arising from goods proving defective, while in consumer use, due to his or her negligence. The specific

978 Available online at: http://www.lexology.com/, accessed date on (29.08.2016) 17:20 pm.
way of exclusion or restriction prevented by section 5 is that of the "guarantee" that purports to assure or promise the consumer that defects will be created good by repair, or partial or complete replacement, monetary compensation or otherwise under the section 5(2)(b) whereas at the same time eliminating liability for other loss or damage, i.e. the exclusion or restriction of liability is "hidden" in a clause which gives the appearance of being beneficial to the user of the goods. Again, the draft Consumer Rights Bill provides for the removal of section 5 from UCTA. 979

*Legal Imposed of Exemption Clauses*

In a few instances, exemption or exclusion from liability will be legally imposed to the contracts. 980 Where this is done, the statute will also normally prohibit any further limitation of liability over and above the statutory provisions. So, the liability of a ship-owner for goods exported from the United Kingdom is governed by the Carriage of Goods by Sea Act, 1971981 which applies to all outward shipments under bills of lading, and the parties cannot contract out the Unfair Contract Terms Act, 1977 (section 29(1)982). The responsibilities of the ship-owner in respect of the safety of goods entrusted to his care are described in detail in the Hague Rules (Article (3) is that the ship-owner is only liable if acting negligently, but the responsibilities of the ship-owner under the Act are lighter than they are at Common Law, and this is then compensated for by a provision that no contracting out is permitted. In those cases where the 1971 Act applies, the Rules further provide maximum limits for the ship-owner's liability for damage to, or loss of, the goods shipped.

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980 A remarkable example in a contract of insurance is discussed in Harker v/s. Caledonian Insurance Co. (1980) R.T.R. 241. Available online at: https://www.swarb.co.uk, accessed date on (11.06.2016) 16:30 pm
981 The Carriage by Air Act, 1961, sched. 1, articles 22, 23(1) and 32; Carriage of Goods by Road Act 1965, sched., articles 23, 41; Carriage by Railway Act, 1972, sched, articles 13, 16 and 23 (1).
982 (1) Nothing in this Act removes or restricts the effect of, or prevents reliance upon, any contractual provision which: (a) is authorized or required by the express terms or necessary implication of an enactment; or (b) being made with a view to compliance with an international agreement to which the United Kingdom is a party, does not operate more restrictively than is contemplated by the agreement. (2) A contract term is to be taken: (a) for the purposes of Part I of this Act, as satisfying the requirement of reasonableness; and (b) for those of Part 11, to have been fair and reasonable to incorporate. If it is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority acting in the exercise of any statutory jurisdiction or function and is not a term in a contract to which the competent authority is itself a party. (3) In this section, (a) "competent authority" means any court, arbitrator or arbiter, government department or public authority; (b) "enactment" means any legislation (including subordinate legislation) of the United Kingdom or Northern Ireland and any instrument having effect by virtue of such legislation; and (c) "statutory" means conferred by an enactment.
These maximum limits if liability may be increased (but not decreased) by agreement of the parties or by a declaration of the nature and value of the shipped goods by the shipper before shipment, together with insertion of this declaration in the bill of Lading.983 The Director General of Fair Trading may include in his recommendations to the Advisory Committee proposals relating to any matters mentioned in schedule 6 to the Act. These include the prohibition of exclusion clauses but also envisage the imposition of a requirement that specified terms be included. These prohibitions or requirement may be incorporated in the Secretary of state’s order. It is conceivable, that the Director General would as a corollary to the imposition of certain statutory obligations (e.g. participation in a compulsory “no fault” insurance scheme) also recommend the compulsory inclusion of certain limitations on liability on one or other side of a consumer transaction.

6.4 Conclusion and Suggestions

Due to the large measure commercialization of the activities, the companies which serves the millions of customers daily started creating a contract with them with the help of a standard form contract, that allows them to engross a large market share, as dealing with a separate customer separately which needs a separate contract with them, which in turn is a costly one and a time consuming process. But then such kind of contract are well-known as “take-it or leave-it”, there are potentials that the weaker party that is to say the consumer is in a position of exploitation. The consumer does not have suitable legal remedy since it accepted the terms and conditions and signed it. Standard forms contracts are ordinarily are fore drafted and pre-printed contracts that are lone contracts in name. The standard terms and conditions unilaterally arranged by one party are offered to the other on take-it or leave-it basis. In some cases the unilateral terms and conditions are forced by stronger party on the weaker party to the contract. The individual participation consists of a mere adherence to the contract drafted unilaterally by the powerful business enterprises.

983 Penilde & River Ltd. v/s Ellerman Lines Ltd (1927) 33 Com. Cas. 70.
The traditional concept of free consent is lacking here or is nowhere is the standard form contracts. The conditions imposed by one party on the other are never put into discussion. One has to fill his name in the fore-printed and pre-drafted contract and sign on the dotted line.

The standard form contract can be beneficial to both the parties to the contract if the terms constitute a fair balance between them. For this it is necessary for that the stronger party to the contract should not incorporate the harsh and one sided limiting terms in the contract. There should be a mechanism to check this menace, so that the stronger party should not be in a position to draft the standard terms in ways highly favorable to himself, both by means of clauses which excludes or limits his liability for failure to perform or for defective performance, and by provisions which confer rights on him under the contract. Therefore, standard form of contracts is standardized contracts that contain a large number of terms and conditions that gives a unique opportunity to the huge company to exploit the weaker party by imposing upon him terms which often look like a sort of private legislation and which may go to the extent of excluding the company from all liability under the contract. In the lack of any judicial control or effective legislative over the usage of standard form contracts, traders are likely to be attracted to benefit themselves of their strong bargaining power to impose on clients’ terms that go beyond what is reasonably required to protect their own legal interest.

Traders who do not have the self-restraint and would pursue to draft the contractual terms and conditions in the way that goes beyond self-protection.\(^{984}\) Extensive use of unfair terms and the bad experience of customers who suffered damage as a result of the usage of unfair terms would make the risk of reducing customer confidence and depressing customer spending. vice versa, if customers are aware that the contracts they are enter into were fairly drafted, customers would feel secure and more confident in creating the purchase and this would tend to raise the sales of the market. Besides, consumer contracts drafted in a fair manner and in good faith are the prerequisite of a fair marketplace which would provide a sound basis for

a prosperous development of economy, and, thus, both consumers and businesses will be benefited ultimately.

It can be said that exemption clauses are an international phenomena and an international problem. It has been realized that a certain control of exemption clauses, is indispensable. The reason for this is the protection of weaker party. As has been pointed out already, the “freedom of contract” which the supplier invokes, has become a fiction, the customer is usually neither able nor competent to bargain, and that remedy has to be provided either by legislature or judiciary.

As a result of prolific and persistent litigation it is possible to hazard certain conclusions which can help to control the unfair exemption clauses in standard form contracts. Exemption Clauses change the general and normal allocation of risk between the parties and apart from exceptional cases there is no legitimate reason for the insertion of exemption clauses in standard form contracts. It may be legitimate to stipulate exemption where choice of rates is provided, where risk is difficult to calculate, unforeseen contingencies affecting performance, such as strikes, fire and transportation difficulty etc. But such clauses as ‘as is clause’ terms in non-compliance with mandatory legislation, warranty clauses, clauses providing for fundamental breach of contract or which are against the main purpose of the contract are not admissible and will not be enforced by courts.

All the judgments indicates to the fact that in order which condition laid down in standard form contracts may be binding it is essential that it should be reasonable and particular notice of them is required to the customer. As regards incorporation of exemption clauses in standard form contracts and their binding effect on the customer certain conclusions can be drawn from the cases already decided:

(1) Exempting condition must be reasonable and must come within four corners of the contract.

(2) The exempting conditions, in specific terms, must be drawn specially to the other party’s attention at, or before, the time of contracting.

(3) Some important clauses may be printed in red ink with red hand pointing to it before notice could be held sufficient.
(4) Where the conditions purports to exclude a statutory liability, “there must be clear indication which would lead an ordinary sensible person to realize that a term (exempting from liability for personal injuries) as a result of negligence on the part of the occupiers of the premises” is incorporated.

Any particularly drawn clause which is destructive of rights should be incorporated by signature. So far as the construction and interpretation of exemption clauses is concerned, attitude of the courts has been one of hostility. A court can construe language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses, and throw out the troublesome one; it can even reject a clause as counter to the whole purpose of the transaction. It can reject enforcement by one-side for want of mutuality, improper notice etc. Clause can also be rejected on grounds of inequality or because the clause is unconscionable. Besides, party can avail of the exemption clauses only when he is carrying out his contract in its essential respect. He is not allowed to use them as a cover for his misconduct or indifference. They do not avail him when he is guilty of fundamental breach of contract. But, it can be said that common law of standard form contracts is contradictory and confusing because of diverse judgement given by the courts.

The techniques e.g. Doctrine of fundamental breach of contract, Gibaud rule, four corner rule, followed by the courts to control exemption clauses are not sufficient. The objection to such techniques is obvious. They fail to develop general criteria for marking out a clear boundary between admissible and inadmissible clauses. And since they all rest on the theory that the clause in question are permissible in purpose and content, they invite the draftsman to return to the attack. Covert techniques followed by the courts in UK to control unfair exemption clauses cannot be relied on. Instead there should be direct control of the clauses. The basic weakness of this provision is that it has failed in laying down a standard on the basis of which court can deal and determine the meaning of the terms unconscionable.

Under UK law, it can be said that term which is, undue, inappropriate, unjustifiable, unwarrantable, and unseemly or, as it is generally called improper. A contract term may typically be regarded as improper towards consumer if, deviating from valid dispositive law, it gives entrepreneurs an advantage or deprives consumers of a right and in that way produces a weighting of the parties rights and obligations so
lopsided that a reasonable balance between the parties no longer exists. In this study also attempts to speak about what is reasonable. As a test, Professor Richard E. Speidel recommends that after the buyer has appointed a prima facie case of injustice, the seller should have the onus of proving that the term is commercially reasonable. Speidel test of commercial reasonableness\(^\text{985}\) has one major flaw. It has been pointed out that all business pursue profits and those tactics which maximize profit are by definition commercially reasonable. The contract model relies upon bargaining to insure the fairness of the exchange; a bargained for clause is commercially reasonable. Speidel must look to other safeguards, but he fails to provide any. Slawson\(^\text{986}\) retains the need to inquire into what would have been the result had there been bargaining or at least complete and understandable disclosure of terms. Slawson fails to develop standards for determining which terms should be enforced. His views are that Buyer’s expectation should govern the terms. Beside all these, there may be other reasons for oppressive contract terms. As Kessler has suggested one cause of oppressive contract may be market concentration or the presence of monopoly power. Unconscionable clauses may also be found among contracts drafted in apparently deconcentrated markets. It may be that low income consumers are too uneducated and ill-informed to act rationally.

The way out of all this difficulty is not a particularly hard one to find. The chief step of course would be to recognize that deviation and quasi-deviation generic and are to be kept distinct from discharge by breach. The second necessary step would be to allow the substantive doctrine of fundamental breach to remain where the Suisse Atlantique case\(^\text{987}\) left to it, decently interred. The third step would be to complete the process begun by the House of Lords in that case and more directly to the acceptance of a universal rule that the effect of exemption clause depends in their proper interpretation, and on that alone.

No doubt, same would object that do all this would be to reduce the courts to a state of impotence. Such a result, it is submitted, need not follow at all. There is already in existence an impressive array of interpretative devices for containing


\(^{986}\) Sydney Corporation v/s West. (1965) HCA 68; 114 CLR 481. Available online at: https://jade.io.

\(^{987}\) (1967) 1 AC 361. Available online at: http://swarb.co.uk.
exemption clauses, and they are open to still further development. It is worth remembering what same of them are:

(1) Every exemption dues is to be interpreted, in case of ambiguity, contra proferentem.

(2) Only in the clearest circumstances will general words of exemption be interpreted to cover important terms or liability for serious breaches. The more important the term or the breach, the clearer those circumstances must be.

(3) Exemption clauses are to be interpreted consistently with the main objects of the contract, and under this head, the literal meaning can be modified substantially.

(4) In case of genuine inconsistency with the positive parts of the contract, exemption clauses can be modified or ignored altogether on grounds of repugnancy.\textsuperscript{988}

(5) Exemption clauses have no application to acts falling beyond the contemplated ambit of the contract.

(6) General words of exemption have no application to negligence unless negligence is the only liability to they would apply.

(7) In bailment contracts, exemption clauses have no application once the bailor exceeds any limitation on his authority.

(8) The courts extend to exemption clauses the rule that a release should ordinarily be limited to those things, which were especially in the contemplation of the parties at the time release, was given.

(9) The presumption of an intention to do justice, used in the interpretation of statutes, should be adapted to exemption clauses.\textsuperscript{989}

(10) There is already a presumption that commercial parties intend their agreements to have contractual effect.\textsuperscript{990} On the existing authorities, this could well be extended to a presumption that particular promises within contacts are also intended to have enforceable contractual content.


\textsuperscript{989} Suisse Atlantique Societe D’armement Maritime Sa v/s Nv Rotterdamsche Kolen Centrale. (1967) 1 AC 361. Available online at: http://swarb.co.uk.

\textsuperscript{990} Firestone Tyre & Rubber Company Ltd. v/s Vokins & Co. Ltd. (1951) 1 Lloyd’s Rep. 32. Available online at: https://www.l-law.com.
(11) There is the rule, long propounded, but overlooked during the fundamental breach era, that the onus is upon the proferens so to word his exemptions as to make them clear to class of persons to whom they are addressed. This must give at least some scope for consumer protection.

Properly applied and developed rules of interpretations such as these would achieve virtually all that fundamental breach could have done and more besides. Importantly, they would make for considerably more flexibility, allowing, for example, differences to be drawn between consumer transactions on the one hand and commercial ones on the other, or between transactions commonly or not commonly the subject of insurance cover in this way the law would be enabled to come to the aid of the “little” man without incurring risk of being the destroyer of commercial bargains. All of this could be achieved without distortion of the law of contract as a whole. The reproach against fundamental breach is not just that it was a concept arbitrary in its application and distorting in its influence inimically, enough, it is also served to divert attention from other hand and, it is submitted effective ways of achieving the objects it was intended to serve.

The pursuit of elegance for its own sake would be an object unworthy of any system of law. On the other hand, that doctrinal coherence has its advantages no law teacher and, one suspect, few legal practitioners would deny. The common law of discharge by breach, it is submitted, is one field where a return to first principles would be not unjustified. In the amended section prepared by law commission it has to be expanded and a list should be added with it enumerating various “obvious cases” or “offensive Terms” or “unconscionable clauses”. In the preparation of such a list help can be taken from the Israel Code of standard form contracts.991 Definition of these terms used in drafting standard form contracts can be as follows:

(1) Terms which exclude or limit the liability of the supplier towards the receiver, where such liability would arise either by virtue of a contract or statute, but for the existence of the restrictive conditions.

(2) Terms which entitle the supplier to cancel or change the conditions of a contract or to delay its performance in his sole discretion, or to bring about otherwise the

termination of the contract or of rights arising from it or the right to decide unilaterally whether the goods are defective and whether the defect comes within their responsibility. The termination mentioned above should not depend on the fact the receiver broke the contract or depend on the fact that the receiver broke the contract or depends on circumstances independent of the supplier.

(3) Terms which permit the receiver to exercise a right arising out of a contract only after having obtained the consent of the supplier or of someone else on the latter are behalf.

(4) Terms which contain the clause ‘in existing condition’ or ‘as is’ for the sale of factory new goods.

(5) “Force Majeure” terms which give a party the right to postpone indefinitely full performance of his obligations on grounds of circumstances outside his control.

(6) A term which gives the performing party the right to raise the contract price because of circumstances within or outside his control.

(7) Terms which force the receiver to deal with the supplier in matters not directly concerned with the object of the contract or restrict the liberty of the receiver to deal in such a matter with a third party.

(8) Term which forms a waiver declared beforehand on the part of the receiver in regard to rights which would arise out of the contract, but for the existence of such a waiver.

(9) A term which empowers the supplier or somebody else on his behalf to act in the name of the receiver in order to realize a right of the supplier towards the receiver.

(10) A term which establishes that the books or other documents made by the supplier or on his behalf should be binding upon the receiver or impose otherwise upon the receiver the burden of proof in regard to matters where such burden of proof would not exist, but for the said term.

(11) A term which makes the right of the receiver to obtain relief in legal proceedings dependent upon the fulfillment of a condition precedent or limits the said rights by fixing the said rights by fixing a time-bar or otherwise. Submission to arbitration is, however, valid.
(12) A submission to arbitration if the supplier has a greater influence than the receiver upon the appointment of the arbitration or in regard to the fixing of the place where the arbitration is to take place, or a condition which entitles the supplier in his sale discretion to select a court for the decision of a dispute.

If any one of the above mentioned conditions has been invalidated by the court, this does not necessarily entail the invalidity of the other conditions or terms contained in the contract. It will also apply to cases in which state is a supplier. These clauses are given merely for the guidance and are certainly not comprehensive examples or in any way limitation on the powers of the courts. So far the Indian scene is concerned, should be aware that modernization and industrialization of the country has given birth to the standard form contracts in various spheres of trade and commerce. In our daily life they have been indispensable. But it is highly surprising and unfortunate that courts are not serious new challenge. Their decisions show complete indifference of the efforts made and techniques developed by the UK courts which are, in essence, of the nature of private legislation. There have been few cases and that too have been decided with reference to Section 23 of the Indian Contract Act, 1872.

The Law of contract in India with its preconceived ideas and doctrines must change in response to the socioeconomic changes in the country and ideological revolution which is engulfing the entire nation; otherwise it will collapse under the strain and stresses of the modern social and economic pressure. In a democratic set up governed by the rule of law, it is of the highest importance that law should be certain and should provide proper protection to its citizens. The task of judiciary to quote Justice Bhagwati,992 must remember that the law must adopt itself to the changing needs of society and whenever it is possible we must not hesitate to adopt new principle for otherwise law will become “antiquated straight Jacket and then dead letter”, and “the judicial hand would stiffen in mortmain if it had no part in the work of creation.”

Of course, we must be prepared to pass through the travails of the emergence of the modern law of contract. It is submitted that a new section or subsection should be added after section 23 of the Indian Contract Act, 1872 or legislature should draft

and enactment a private legislation same as Unfair Contract terms Act, 1977 (UK) in related to standard form of contract specially exemption clause. It should have general application to all commercial transactions and courts should be empowered to declare any bargain unconscionable under it. For the time being it will be a sufficient check on the abuses of standard form contracts and exemption clauses.