Page 01 - 17 **DOI:** *https://doij.org/10.10000/IJLSI.111531*

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 5 | Issue 1

2023

Adhesion Contracts: Historical Background, Development and Position in India

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ABSTRACT

The law of contract is different from all the other branches of law because the obligations made under an agreement are the creation of parties themselves and no one else. The technique of an agreement includes the presence of an offer at one side and its acceptance by the other side or by the other party. The ever increasing and the speedy commercial growth and the activities of mass production have contributed to the development of the standard form contracts, typically called adhesive contracts. No doubt that freedom of contracting is venerable and esteemed, but it is also quite tough and dangerous and a doctrine that is difficult to catch or understand in its totality. It is also a realization that mass productions, especially in today's fast-growing world is impossible without the standardization of technology also requires standardization of mass contracts. But it is also true that the basic idea the law of contract lies in the freedom of contract and equality of bargaining power has been majorly hampered by the growth of the standard form contract. For our purpose, freedom of contract has two different meanings, i.e., the freedom to enter into an agreement and the freedom from interference with a contract once made. Many of the basic principles of modern law of contract were settled in the 18th century, when, in the time prevailed the Laissez-faire philosophy, it was though wrong to interfere with private agreements on such grounds. The present or the trend of the modern time is rather to stress over the abuses to which the principle of "freedom of contract" can be born, so that the principles can considerably be restricted, both by the legislation and by decisions of the judiciary. This paper aims to understand development of adhesion contracts from a historical perspective.

Keywords: *Adhesion Contracts, Roman Law, Bargaining Power, Historical Perspective, Laissez-faire Philosophy, E-contracts, Commercial Contracts, Exemption Clauses.*

I. INTRODUCTION

Usually, adhesion contracts are considered to be unconscionable. The laws and methods of creating these have become even more complicated with the introduction and growth of the electronic contracts, specifically the consumer contracts.[2] This has also made to a widespread

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[2] Prasad, D., Mishra, P. Unconscionability of E-contracts: A Comparative Study of India, the United Kingdom,

 [ISSN 2581-9453]

of implementation of smart contracts and about the ways to regulate the new technology to deal with them.[3]

Freedom of contract does not commend itself only for the moral reasons; in fact, it is also an eminently practical principle. It is an inevitable and essential counterpart of a free enterprise system.[4] Many of the basic principles of the modern law of contract have been settled and laid in the 18th century, when, in the time prevailed the Laissez-faire philosophy, it was though not right to interfere with private agreements on these grounds. The present trend of the modern time is rather to stress over the abuses to which the principle of "freedom of contract" can be born, so that the principles can considerably be restricted, both by the legislation and by decisions of the judiciary.[5]

Contract, the language of the cases explains us that it is more of a private affair rather than only being a social institution. The judicial systems, therefore, provides only for their interpretation, but obviously, the courts cannot make contracts for the parties.[6]

There is no contract without assent or acceptance, but once the objective manifestations of assent are present, their creator or the author gets bound by them. A person is supposed to know the contract that he says yes to or agrees to.[7]

Freedom is affected in so far as the individual has a decently fictitious substitute to accept the terms that are accessible to him. The traveler may have a choice amongst diverse airlines or shipping corporations, but it will barely ever be a choice between the different terms.

On the additional hand, the court and sometimes even the legislators have found a number of devices to invalidate exemption clause even in absence of any express rule defeating the clause, specifically where the clause was born in the form of a standard contract. Courts or even the legislatures, can do every little to alter this situation which is inherent in modern conditions of life. It is difficult to see how it would be practicable for courts to enforce only those terms to which a reasonable offered would have agreed if he had enjoyed equal bargaining power with the offeror.[8]

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and the United States. Liverpool Law Rev 43, 339–360 (2022). https://doi.org/10.1007/s10991-022-09306-6

[3] Cornelius, K. B. (2018). Standard form contracts and a smart contract future. Internet Policy Review, 7(2). https://doi.org/10.14763/2018.2.790

[4] Roscoe Pound, "Liberty of Contract" *Yale LJ, Vol 18, Issue 7,* 1909

[5] Hamilton, "Freedom of Contract", *3 Encyle, Sec. Sei, 450*

[6] Urain vs. Scranton Life Insurance Co. (1993). 310

[7] L.Estrange vs. F. Grancob Ltd. (1934) 2 K.B. 394 (in the Art. 21) absence of fraud or misrepresentation parties, who have put their contract in writing and signed it will not be heard to say that they have not read it or did not know, understand or assent to its contents provided the document is legible however small the print.

[8] Note 63 Harv. L.R. 504

Naturally, all the newer developments have affected the basic theory and the practice of the contracts and their formation. The methods of economic concentration and the standardization of life has indispensably changed and have even transformed the very basic concept of freedom of contract and the equality in the bargaining power.

The elevating use as well as the increasing need of standard form contracts is a subject which concerns everybody way more than it is commonly realized. It is something to which the lawyers have not paid great or sincere attention. Neither expression 'Standard form Contract', nor any variant of it has taken the status of the term of act or, indeed, any recognized and distinctive meanings.[9]

At the same time, it is very true as well as definite that the standardization of contracts touches both freedom of bargaining except where groups of approximately equal strength confront each other and experience full freedom while forming a contract. This is rarely the case in the type of transaction that has been revealed prior.

An alternative approach to the problem of standardized terms of contract imposed on all corners by a party of overwhelming economic power is that of de-concentration by legislation. But it is fair to say that, while a certain degree of competition may be restored or preserved by such legislation and jurisdiction, it's effect on the standardization of terms as between industry and the customer is small.[10]

II. HISTORICAL BACKGROUND

1. Twelfth century

In twelfth century, before the evolution of assumpsit, in England, the contracts were of minor importance. The royal officers did not normally concern with private agreements.[11] The progression of thirteenth century made available certain writs for the enforcement of specific transactions. Out of these writs certain writs were contractual or quasi-contractual in nature.[12] At this stage and for a century later on, there was hardly a distinction between tortious and contractual claims.[13]

In the sixteenth century assumpsit became the general action for the breach of contract. Action of assumpsit defined the contract in terms and substance. By that time defendant's duty was

[9] Otto Pausnitz, "*The standardization of commercial contracts in English and Continental Law"* (1937)
[10] W Friedmann, *Law in a changing Society* (University of California Press, Berkeley and Los Angeles 1959).
[11] Glanvill, x. 1,2,3,12,14.
[12] Law of Contract, *Chestire and Fifoots* VIII Ed. 1972.
[13] Waldon vs. Marshall (1970), Y.B.Mich.43, 3rd Ed. (It is an instructive example, where horse was injured by negligent work done and finally died. The form of action was tortious, but the substance of claim was contractual.)

based on the breach of a promise. Since then, the jurists had devoted a pleasant time in aiming at to find out the logics-sanctioning a contract. It was only in the sixteenth century that the common law judges enforced the promise on the basis of consideration and the plaintiff was required, in case of a simple contract, to prove that he had bought the defendant's promise, either by conferring a benefit upon him or by furnishing a counter promise of his own. Conferring of benefit was an alternative to the old 'quid pro quid' of debt. [14]

The second idea referred in the foregoing sentence related to the 'Idea of Mutuality', which gave a natural inference that a plaintiff could sue on the defendant's promise even before he had fulfilled his own. In the words of C.J. popham.[15]

'There is a mutual promise, the one to the other, so that if the plaintiff does not (discharge his promise) the defendant may have his action against him.'

That way, we found the theories of Equivalent and Mutuality. To prove mutuality regard were had to be upon the intention of the contracting parties, and too for intention, it should be communicated to the other party.[16]

2. Roman law

In sixteenth century neither the ancient law nor any other sources evidenced, that the society was entirely destitute of the conception of the contract, though be rudimentary in Roman law. The old system that the family members were in capable of contracting and the family was entitled to disregard their engagement came at a stage to fetch the now light. It was not only a formality to which the law attached an obligation or a bond of necessity, and such a mental engagement signified through external act, the Romans called it a pact or a convention and when the convention became the nucleus of the contract, it soon cast away the external shell of the formalities and ceremonies, to Romans the contracts are observed in pacts and it was held a nexus and the parties were turned as a Nexi.

When contract which Greek philosophers set the Roman jurists, to think about the basis of obligation. There were two sorts of promise- (1) formal promises and (2) mere informal promises not recognized by law.[17]

A great advancement in ethical conceptions is seen in the contract which stands next in

[14] Anon (1338) Y.B. 11 and 12 Ed. 111(R.S.) 586. The phrase (quid pro quid was used to indicate this necessary correspondence between benefit and duty.)
[15] Wichals vs. Johns (1955) Cro Eliz. 703.
[16] Anon (1477) Y.B. Parch 17 Edw. IV, f-1, p-2 (Brain C.J. said that if a trite learning that the thoughts of man is not the triable, for the Devil himself knows not the thought of man.)
[17] Pound, 'An Introduction to the Philosophy of Law' Revised Ed. 1953 Chap. VI; 139.

historical succession, which is the real contract. The consensual contracts, the most interesting and important are the contracts of Agency (Mandatum), Partnership (Societies), sale (Emitio Venditio), and Hiring and Purchasing (Lacatio Conductio) came very late.

The peculiarities of these consensual contracts were that no formalities were required to create them out of pact.[18]

In Roman law, simple contracts were enforced upon consideration, even destitute of form or specially. Successive additions at different times were endeavored by the courts to hold men to their undertakings, in view of the social interest in the security of transaction.

3. Role of religion

Religion had also played a predominant part in the development of law of contract. In Roman law, the agreements were matters for religion or for kin or for a guild decision. In Hindu law, we also find the traces of contractual obligations. The holy sayings of Manu, Brahsapati, and Narda evidenced that contracts or agreements were the matters primarily of religious duty to pay the debt of deceased parents, otherwise the soul of deceased would not get rest.

4. Seventeenth and eighteenth century

To the jurists of seventeenth century and eighteenth century, who worked upon the theory of equivalent and will theory, suffered a serious setback by the attack of Lord Mansfield who supported that even a previous normal obligation was sufficient to support an express promise.[19] It was only in 1778 that the theory of equivalent found to survival.[20] The Jurists of this time made, no distinction between natural obligation and a civil obligation maintainable, since all the obligations were commended to be legal one. At this juncture, the will theory found its new life. The equivalent theory made a promise binding because the one party has received equivalent advantage to what he has promised. Promise be secured in such exceptions, and he is denied any interest except secured by the law. Only the promise was held secured.[21]

5. Nineteenth century

The present time is wholly governed by the economic and wealth considerations and wealth is made up largely of promises. Everyone wants to secure the advantages, which others have promised him to provide and claims the satisfaction of expectations created by the promises

[18] Maine, Ancient Laws (1912) Chap. IX.
[19] Pillans vs. Van Mierop (1765). 3 Burr. 1663
[20] Rann vs. Hughes (1778), JTR 35 (where the consideration was considered a necessity in simple contracts)
[21] Weeks vs. Tybald (1605) Noy-11

and agreements and if this claim is not secured friction and waste obviously result.[22]

The early history of contract showed that even the Negro servitude was a resultant of an agreement. The primitive societies, which were once governed by the status of the personalities, in course of time, were governed by a contract.

The concept of freedom of contract is a result of political philosophy of Eighteenth century evolving the concept of individual liberty. Every man should be free to pursue his own interest in his own way, therefore, it was conceived to be the duty of law of give effect to the will of contracting parties as expressed in their agreement. This view was also propounded by Adam Smith.[23]

To the historical thinkers, the freedom of contract, as well as the will theory, had been a sacred conception, to them this had been remained as an ethical idea in realizing the freedom of self-assertion and self-determination through the promises and agreements. Henry Maine has rightly thought of freedom as a civil and political idea realizing in a progress from status to contract. This idea has again been accelerated by the utilitarian jurists especially by Bentham and Mill as a utilitarian principle of legislation and as a means of freeing the individual from the fetters of needless restrains imposed upon them.[24]

The mid half of nineteenth century, however, creates a gap between the utilitarian theory and the realities of economic life of nineteenth century. Friedmann[25] states that four major factors may be regarded as being mainly responsible for a transformation in function and substance of contract.

6. Twentieth century

The expansion of social welfare functions of state has lead multitude terms in a contract collective bargaining has resulted to restore the equality of bargaining power, where there is a great economic disparity between the contracting parties. The problem of equality has vigorously considered in Bentham Steel Corp.'s Case in United States. [26] In this case even the U.S. of American Government was considered by Supreme Court as in a position of bargaining power inferiority. The basic idea that the contract is the result of free choice of parties is subject to the overriding consideration of public policy.[27] The leading principles of 'freedom of

[22] Roscoe Pound, An Introduction to the philosophy of Law (1953) Chapter 6, p. 133.
[23] Adam Smith, the wealth of nations. (1776)
[24] Bentham, Truth against Ashurst (1823)
[25] Supra note 47
[26] United States vs. Bethelhm Steel Corporation (1942) 315 U.S. 289
[27] Lloyd, Public Policy (1953) p. 30

contract' and 'sanctity of contract' as quoted by George Russel[28] has become a Shibboleth and certain limits on sanctity of contract, from very early time were recognized such as fraud, under influence, coercion and misrepresentation. The freedom of contract has been curtailed by the courts even in 19th century by evolving the doctrine of implied terms in the case of 'frustration of contract'.[29] To the courts the intention of parties had been a guiding principle in case of dispute.

III. ADHESION CONTRACTS AND EXEMPTION CLAUSES

1. Contracts of Adhesion and its meaning:

One of the main progresses seen within the field of contract during the last hundred years has been the looks of the quality sort of contract[30] or contract of adhesion.[31] The class, it'll be seen, overlaps with the third category, but nevertheless requires distinction because within the United States and a few continental countries a minimum of, at such offerors are said to possess incurred a requirement to render public services. The subjection of the individual to standardized terms in such a case becomes a corollary of the duty to serve the general public for without that safeguard it might be impossible to manage successfully a business which is subject to illimitable extension.[32]

On the other hand, the practice can also be maltreated, particularly where it is used in contracts amid commercial suppliers or providers of goods or services on the one hand and private consumers on the other. The provider may put into the printed form a clause limiting to which he would then be subject, either by virtue of a term implied in law, or even quite regardless of contract. The individual can barely bargain with the gigantic organizations and therefore, the person's function is only to accept the offer, no matter whether he likes its terms or not. He cannot modify those terms or even debate over them; they are there for him to take or leave. He, therefore, does not assume the laborious and profitless task of discovering what the terms are.

Lord Denning, M.R. pointed out[33]

'No customer in a thousand fully read the conditions. If he had clogged to do so, he would have missed the train or the boat.' One conceivable answer of this problem is for the law directly to control the content of such standard terms, e.g., by averring that they must be reasonable. But

[28] Printing and Numerical Registering Co. vs. Sampson
[29] Tatler vs. Caldwell (1863) 3.B and S.A. 26
[30] Sales (1953), 16 Mod. L.R. 318; Coot, exception clause (1964)
[31] Supra note 4
[32] Lenhoff, 'The scope of the compulsory contracts proprt' (1943) 43. Col. L.R. 586, 597
[33] Thornton vs. Shoe Lane Parking Ltd. (1971) 1 A 11, E.R. 686 CA.

English courts did not advance in any such general principle. Their failure to do so was largely due to the pre volume of laissez faire pecuniary theory in the nineteenth century.'

IV. THE SCOPE OF EXEMPTON CLAUSE

(a) Construction

Assuming that an exemption clause has been duly incorporated in a contract the party relying on it must next show that the breach and the less complained of fall within its scope. If the reasonably sufficient notice of a standard form contract has been given to the person who receives the printed document, we must now consider the way in which the terms of the document are to be construed. Yet a strict adherence to the doctrine of 'the sanctity of contracts' has constrained and courts to give effect to their terms.[34] Thus in L' Estrange vs. F. Granscob, Ltd.[35]

Mrs. L signed an agreement in which she purchased an automatic slot-machine for cigarettes. The agreement was to pay by instalments, and it contain an exemption clause excluding liability for all kinds of defect in the machine. The plaintiff signed the agreement without rendering its terms. The machine was totally defective, and the plaintiff purported to terminate the contract for breach of conditions.

It was held that plaintiff could not do so, as the exemption clause had effectively excluded all liability on the part of the seller.

(b) Liability for Negligence

Liability for breach of contract is in many cases strict, i.e., it arises quite irrespective of negligence. For example, a person who hires out a car may be liable if the car is not fit for the purpose for which it was hired out, even though he was not negligent in failing to see that the car was fit for that purpose. In other cases, a contracting party will be liable only for negligence, this would, for example be the position, where damages were claimed from a garage proprietor in whose hands a customer's car was damaged by fire. The distinction between the two types of cases is relevant where a contract contains an exemption clause in general terms, such as one which exempts one party from liability for 'all loss' or which says that performance is at the 'sole risk' of the other. An example of the application of the application of this part of the rule is provided by White vs. John Warwick and Co. Ltd.[36]

The plaintiff contracted for the hire of a trade man's tricycle for use in delivery of newspapers.

[34] Anson's Law of Contract, (1975) 24th Ed. p 157
[35] (1934) 2 K.B. 394.
[36] (1953) 2 All E.R. 1021

The contract provided that 'nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired' and another clause stipulated that the defendants argued 'to maintain the machines in working order and condition'. It was held that the clause which purported to exclude the defendant's liability would protect them from breach of their contractual obligation to maintain the machines but was not wide enough to exclude their liability in fort apart from contract should actual negligence be established.

(c) Doctrine of Fundamental Breach

Traditionally, the courts not concerned with the fairness of contracts. But it is inevitable that they should attempt by a party to a contract to exclude liability for some particularly serious breach; and to this end they have developed the so-called doctrine of fundamental breach. It is a method of controlling the unreasonable consequences of wide and sweeping exemption clauses. Even where adequate notice of the terms and conditions in a document has been given, the party imposing the conditions may not be able to rely upon on them if he had committed a breach of the contract which can be described as fundamental.' The rule has been thus stated by Lord Denning, L.J.[37]

'These exempting clauses are now-a-days all held to be subject to the superseding proviso that they only avail to exempt a party at the time when the contract is being carried out and not when he shows a deviation from it or is guilty of a breach which goes to the root of it. Just as a party who is guilty of a fundamental breach is disentitled averring on the further performance by the others, so too he is disentitled from relying on an exemption clause.' This approach was 'most clearly and accurately' enunciated by Pearson, L.J.[38]

His Lordship said: 'As to the apprehension of a 'fundamental breach'…there is a rule of construction that in normal course is an exception or exclusion clause or a similar provision in a contract should be interpreted when it is not applicable to a situation that has born due to a fundamental breach of contract. This is not an independent rule of law imposed by the courts on the parties willy-nilly in disregard to their contractual intention. On the contrary it is a rule of construction of the contracting parties. It involves the implication of a term to give to the contract that business efficacy which the parties reasonable must have intended it to have. This rule of construction is now new in principle, but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exception clauses drawn in extravagantly wide forms, which would have produced abcurb results if applied

[37] J. Spurling Ltd. vs. Bradshow (1956) IWLR. 461-465
[38] U.G.S. Finance, Ltd. vs. National Mortgage Bank of Greece, S.A. (1964) 1 Lloyds Rep. 446.

literally.' This opinion was cited with approval by the House of Lords in Suisse Atlantique Societe D' Arment S.A.V.N.V. Rotterdansche Kolen Centrale.[39]

V. THE POSITION IN INDIA

No doubt, in the last hundred years or so, that freedom has seen an alteration and has been cribbed and confined so as to render that freedom a reality to all, specifically to those who have lesser power of bargaining as compared to those of others. The Minimum wages Act, the Money Lenders Act, the Fair Rent Act, whether in India or in the United Kingdom, are but a few of the leading illustrations of the fore going statement.

Although, the problem that the adhesion contracts raise is similar to others that arose in the past, in the history of the law of contract in that, it is called for a balancing of rights and interests. The balance is usually between a superior and inferior party with respect to the strength of balancing power that they have, yet it is novel and unprecedented, since it undermines the presuppositions of that law.

Under section 28 of the contract act, if any party is restricted by a contractual clause obsoletely from enforcing his contractual rights in ordinary tribunals or disabled from seeking his remedy beyond a certain time, he can ignore the clause and seek his remedy under the contract.[40] This section may perhaps, be utilized to most adhesion contract certain refinements which render its utility for the above purpose very limited. There is a distinction, it is said, on the authority of English law, 'between agreements providing for the relinquishment of rights and remedies and agreements providing for the relinquishment of remedies only and that it is only the letter class of agreements that falls within the mischief of section 28 and not the former class of agreements. This distinction seems to be tenuous at least in the present context and it remains to be seen how far the courts will be able to call the section in the aid in cases where it is felt that the limitation clause in standard form contracts does trench upon valuable rights of an aggrieved party.

Section 74 deals with contractual clauses and as drafted, seems inapposite for the purpose, because it anticipates action[41] by parties who had stipulated for a certain amount and approach the court for redress.

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[39] (1966) 2 All E.R. 61, H.I.: (1967) A.C. 361

[40] Section 28 reads: Every agreement, by which any point thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within he may thus enforce his rights, is void to that extent.

[41] The relevant words of the section are:
The party complaining of the breach is entitled – to receive from the party who has broken the contract reasonable compensation not exceeding the amount or penalty stipulated for.

Under section 151 of the contract Act which lays down the extent of duty of care of a Bailee, it has been a matter of some controversy whether the standard of care set in that section is obligatory and whether it can be dropped by contract or not. In the face of such controversy, we cannot perhaps please two much reliance on this section either, as affording a means of reprieve in standard form contract cases so far as they relate to contracts of bailment like carriage of laundry services.

In the overall outcome, the provisions as laid in the Indian contract Act, 1872 exemplifying the general principles of the law of contract, do not seem to afford a sure and reliable guide in dealing with adhesion contracts, as the subsequent or succeeding survey of selected cases will further show.

In the field of carriage by air, for example, the liability of the carrier under his contract of carriage either with a passenger or a consigner of goods has given rise to the problem or brought into focus the issues which we have raised here. In the Madras High Court, the validity of an exemption clause in the printed form in an air-consignment note full to be considered in a good case.[42] Here the respondent Jothaji Maniram, a merchant at Madras, sent a parcel of pen nibs valued at Rupees. 1600/- to calculate through the petitioner (Indian Airlines corporations). The contract of carriage, namely the air consignment notes, had been duly signed by the respondent's agent. One of the conditions, which was seen and understood by the court to be 'legibly' printed on the back of the consignment note, was that the carrier- shall not be liable whatsoever to the consignor or consignee, etc., for loss damage, detention or delay to the goods – whether or not it causes or is occasioned by the act, mistreatment, negligence or any default of the carrier or of pilots, flying operational or other staff members or employees and agents of the carrier or otherwise –

Another stipulation in the contract was that in so far as – any liability may be obtruded on the carrier by law, such liability for loss of or damage to the goods, etc. would be circumscribed and agreed to be restricted to in the aggregate, the actual value therefore or declared value thereof, or Rupees. 300/- whichever was the lowest. The relevant claimed the carrier the value of the goods not delivered as per contract. The question before the High Court were:

1) Whether or not the terms and conditions of the contract that limit the liability of the carrier were brought to the notice of the consignor (respondent) so as to bind him therewith.

2) Whether or not the carrier was liable for the payment of the entire damage that is claimed, notwithstanding the limitation clause. On both of these questions the High court held

[42] Indian Airlines corporation vs. Jothaji Maniram (1959) IT Mad. L.J. 373.

in favor of the carrier. The reasons for the decision were:

- That since the agent of the consignor had signed the consignment note (contract) stating that, he was aware of and accepted the conditions printed on the opposite or back side of the note. So, it was for the consignor to show that the clause that limits the carrier's liability was not brought to his notice. But he failed to show this, and the court was not satisfied for the same.
- Nor did the consignor presented that the practice of any fraud or misrepresentation occurred while securing his agent's signature to the consignment note.
- That although there was negligence on the part of the carrier, the carrier was not liable because he had by contract excluded such liability. In the Rajasthan High Court, the same problem of liability of a carrier in the face of an exemption clause (forming part of conditions printed on the back of the receipt given by the carrier on his understanding to carry the goods in question) arose in the recent case.[43]
- The said receipt had been signed by the booking official on behalf of the carrier alone but not by the consignor, although it contained a place with the words "signature of consignor".

The points made by the court:

It is needless to multiply instances where the court had attached sanctity to the bargain and held and exemption clause therein as valid and binding. In certain other cases however, with similar fact – situations a different yardstick is found to have been applied for approving or rather striking down, such clauses. In a case[44], the action was brought up by a person who gave a sari for dry cleaning to the defendants. The defendants never returned it. The plaintiff sought to recover the value of the sari (about rupees 220/-) from the defendants.

The court, per Narayan Pai, J., observed: -

'The question whether any public policy is involved or not does not, in my opinion, arise. The petitioner is, undoubtedly, a Bailee in respect of the saris given to him and there is a minimum duty of care imposed upon all Bailee's as provided under section 151 of the contract act and

[43] Singhal Transport vs. Jesaram Jamumal (1968) A.I.R. Raj. 89.
[44] Lity white vs. Munuswami (1966) A.I.R. Mad. 13.

therefore they themselves cannot contract out of. Also, anything is not subject to any contract to the contrary between the parties. Under that section in all cases of bailments, the Bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence which is similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. When once that minimum duty upon the Bailee is imposed by the law, then a breach of that duty undoubtedly follows the party that has been affected with the right so that the damages can be commensurate with the consequences.

The decision that section 151 is not capable of being contracted out is a matter not absolutely free from doubt and the view taken above is in fact contrary to what Sarjoo Prasad, C.J., in Rukmanand vs. Airways (India) Ltd.,[45] described as the 'beaten track of precedent' on the point in spite of the very persuasive reasons given by Sankaram Neir, J., in his dissenting judgment in Sheik Mohammad's case[46] that section 151 may be contracted out.[47]

Moreover, a full Bench Decision of the Punjab High Court in Pearl Insurance Co. vs. Atma Ram[48], a clause in the contract limiting the time within which the aggravated party was to bring his action was held to be valid. In the full Bench decision cited above the question was whether a clause in an insurance policy stating that in no case whatever the insurer would be liable for any loss or damage after expiry of twelve months from the occurring of the loss or damage unless the claim was the subject of pending action or arbitration, was or was not valid by virtue of section 28 of the Indian Contract Act. It was a contract of insurance of goods against all risks including riots and looting.

In another comparable situation, however, the court has struck down the time-limit clause as not valid. In a case[49] a writ petition was filed by the purchaser of a prize-winning ticket in the raffle conducted by the state of Tamil Nadu, challenging the validity of a clause in the Raffle Rules under which the state purported to forfeit the prize amounts not claimed within three months from the date of the draw shall lapse and be automatically forfeited to the government.' The contention of the state that the terms of which the petitioner had agreed and so he had no remedy that could be sought by way of a writ petition.

VI. CONCLUSIONS AND SUGGESTIONS

The law of contract is to provide the basis for a democratic system of a private law, and for a

[45] A.I.R. 1960 Assam 71.
[46] Sheikh Mohammad Ravwther vs. British India Steam Navigation Co., I.L.R. (1909) 32 Mad. 95.
[47] Thirteenth report, para 125.
[48] (1960) A.I.R. Punj. 236 (F.B.)
[49] Ramulu vs. the Director of Tamil Nadu Raffle (1972) IT Mad. (J. 239).

competitive economy which works in the interest of the consumers. The law of contract, as far as the parties are concerned, has to be of their own making.

Society, when granting freedom of contract does not guarantee, that all its members will be able to make its use to the same extent. Freedom of contract authorizes the entrepreneurs to legislate in authoritarian manner. The social ideals like economic balance, social uplift, expansion of opportunities for productive employment, keeping of checks upon the prices of commodities, have largely affected the working of the law of contract.

The problem of standard contract is consistently hammering the bargaining lever of two unequal parties. This all is done in the name of 'Freedom of Contract'. To check this uneasy state of affairs, a public control upon the standard terms is required. This would lead to the fair and free setup of democratic society.

The freedom of contract dogma is the real hero in the drama of standard clauses. Standard contracts have become effective instrument in the hands of powerful industrial overloads enabling them to impose a new feudal order of their own making upon the vast host of vassals.

Public law intervenes further, either by the imposition of statutory conditions, or by the compulsory restoration of competition or in the last by transferring the ownership of big industries into public ownership.

Standard clauses are furthermore controlled by collective bargaining. It fills up the gap between the mobility of contract and stability of status. Collective bargaining equals the lever of two un-equals, and the state transfers the law-making functions to the recognized organizations of employers and employees.

Most contracts today are made quickly, often without any thought except their major terms, and many contracts are made without one party having any real alternative but to accept the terms which the other party sets.

The first condition is adequately considered if we restore the principle that a contract includes only those terms which both parties can reasonably be expected to understand. Moreover, the legal machinery itself has provided the tools to maintain this balance, such as construction and interpretation of standard terms. The judicial decisions mentioned in the foregoing discussion, reveal that the courts have played a predominant role in shaping and reshaping the law of contract with regard to the liability of exemption clauses.

The subsequent development in the law of contract such as theory of fundamental breach and Law of frustration have allowed for the statutory or judicial consideration of circumstances

beyond the control of the parties.

Thus, the individual who is subject of the obligation imposed by a standard form, gains the assurance that the rules to which he is the subject have received his consent either directly or through their confirming to higher public law.

Moreover, public policy, through the statutory or judicial prohibition, may declare a contract void, either wholly or in part. If any term of the contract is found prejudicial to the public policy or certain principle of social or economic equality, the courts will not feel hesitant in striking out the terms offending such norms.

The practical importance of the decisions is that they encounter the social evils of standard terms. If we analyze the judicial decisions, it can fairly be concluded, that the occupied premises by the standard terms have to some extent been bridled.

What is needed in a fast-developing economy is effective procedural machinery to minimize the gulf between the bargaining of the two parties.

Standard form contracts have certain disadvantages such as unpopularity, increased litigation, lack of knowledge and lack of novelty. A standard term in a given contract may be so unpopular to which no clear explanation can be given. Secondly, a possible defect in the scheme of standardization may tend to lead to increased litigation because it purely depends upon the skill of draftsman.

In the last we can say that the great merit of this scheme may be that it would ensure, in general, that the terms are fair. By doing so it would help to remove the element of suspension. Moreover, a standard form contract provides a certainty to all the possible consumers. Therefore, it is now possible in law to bind oneself to the conditions about which one knows nothing while making a contract, provided that these are fair; reasonable, certain and uniform for all the recipients.

Whether the solution lies in the adoption of general provisions as in the uniform commercial code in the United States or in the administrative regulations such as Israeli standard contract law, 1964, depend upon the current survey of the evils present in our country. Consequently, the law of contract will have to be restructured not merely in form but contents as well.

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 [ISSN 2581-9453]