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Exclusion of Liability through Exemption Clauses: The Permissible Extent

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ABSTRACT

"Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals", said Sir Henry Maine. Dominating the global market with the doctrine of the freedom of the will, the laissez faire economy changed the world view on how their businesses should operate. Parties were given choice to introspect their commercial interests and form their own contracts. With the freedom to incorporate almost any clause into their contracts, with the further added rapid industrialisation, it was just until a matter of time when standard form of contracts left a dearth in the bargaining power of the consumers, most especially common while excluding contractual liability.

Contractual law states that parties are bound by the clauses, they have consented to, and only to the extent provided for, even if such consent was given while someone was absent minded. However, to the relief of the consumers, the Judiciary has sought to lean towards a more welfare oriented approach. By devising canons of contra proferentum and fundamental obligation, the Courts exclude themselves from otherwise applying the general rule of strict interpretation of the contract, when the terms are carefully placed at the extreme disadvantage of a consumer.

The author while analysing into the judicial doctrines, will further dwell into how the countries of England and the United States, along with India, have responded to the emergence of unreasonable exclusionary terms, to highlight the varied consumer welfare approaches applied by these countries.

I. INTRODUCTION

The Right to contract, having established as a prime presence for the current day blueprint of our market based economy, is one of the indispensible rights associated.[2] Violation of this

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[2] David N. Mayer, *Liberty of Contract: Rediscovering a Lost Constitutional Right* (Cato Institute, Washington D.C., 2011)

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right crumbles down the foundation of a functional, choice based market and has been many-a-times approached with complete vehemence, even been viewed to be historical in certain cases, like limited rights of women and slaves (almost none) to a contract, prior to the nineteenth and the twentieth centuries. [3]

More important to consider now, is the area of application of a contract, which has been widened over the years. Earlier primarily focusing on commercial transactions, a contract has now branched out to rule several other transactions as well, such as child custody agreements, surrogacy agreements, prenuptial agreements, etc., which can no longer be termed as purely commercial. [4]

As Sir Henry Sumner Maine said that the evolution towards progressive society was a passage *from status to contract*[5]; what is essentially implied over here is that the freedom of the will is the most important facet in ensuring the enforceability of contract. Determination of rights of the respective parties is dependent on this right to contract. Contracts represent that a bargain has been freely entered into by the parties of the contract and that the contract was entered into, only after the terms were freely negotiated. Thus, there is presumption that all the parties were accorded with an almost equal bargaining power as amongst themselves. The law only steps in when this free will may be compromised, such as in the cases of infancy, lunacy, fraud, etc.[6] The basis of this free willed contract stems from the idea of a "laissez faire" economy, which ruled the roost in the nineteenth century.

Known for their fleeting state of mind, it is imperative to ensure that men are bound to the performance of their reciprocal promises, the purpose which is served by a contract.[7] Thus, contracts help establish promises which the parties can rely on and then thus, help flourish the emerging economy where agreements are freely carried out.[8] Contract law recognised freedom of will as an essential, indispensable element of a contract, which regulates both the formal aspects of a contract and its substance. Providing with the freedom of self determination and to develop one own's personality, this however, suffers from the vice of government intervention. But again, ironically, in order to guarantee full enjoyment of this freedom, some amount of intervention is welcome. With legislative and judicial interpretations, resources can be put to use in order to ensure that before a contract is

[3] David P. Weber, "Restricting the Freedom of Contract: A Fundamental Prohibition", 16 *Yale Human Rights and Development Law Journal* page number (2013)
[4] Ann Laquer Estin, "Love and Obligation: Family Law and the Romance of Economics" 36 *William & Mary Law Review* 989 (1994)
[5] *Sir Henry Maine, supra* note at 1
[6] N. Rajagopala Ayyangar, "The Freedom of Contract", 3 *The Indian Law Institute* 125 (1961)
[7] World Bank Group, "Doing Business 2015: Going beyond Efficiency" 90 (2014)
[8] Edward Younkins, "Freedom to Contract", *Liberty Free Press* 1 (2000)

formally made, all the respective parties have almost the same level of bargaining power and that they substantially contribute to the terms and conditions of the said agreement.[9]

However, today, we all are familiar with the 'standard form of contract', which continues to dominate both the domestic and international markets. Emerged to mould the pre -existing contract into the modern contractual exigencies, a contract of adhesion or as specified before, a standard form of contract, comes to the rescue when a company enters into several contracts, with its customers, on a daily basis and it is not practically possible for each contract to be bargained separately.[10] Known in lay man terms as "*take it or leave it*" contract, only one or few parties are in a position to negotiate and lay down the contract; a consumer has only two options – either to 'take it' and enter into a contract or forget about it at all.[11] Thus, while one party holds the wielding power, the other doesn't have much option to deliberate on the terms. Typically found while purchasing and installing a software or while purchasing most of any other products, a party's right to negotiate the terms gets affected.[12] Hence, it can be seen how the traditional theory of contract is challenged through this medium.

II. EXEMPTION OF LIABILITY

Any provision forming a part of the contract constitutes a contractual term. In most cases, each term leads to a corresponding contractual obligation, the breach of which may be proceeded legally.[13] But it's not necessary that all these terms may be covered by the text of the document, and may be implied as well.[14] One such terms, are in the form of *exception* or *exemption* clauses, which exclude or limit the right of an injured party to approach the court to redress his damage. [15]As mass production increased with intensive industrialization, complexities arose in the overall trade and business. With new market arrangements, only fewer parties began to hold the bargaining power; more consumers began susceptible to such exclusionary contractual terms. [16]As industrialization further progressed, as discussed, there

[9] Chantal Mak, *Fundamental rights in European contract law: A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England* 26 (Wolters Kluwer Law & Business, Alphen aan den Rijn, 2007)
[10] Standard Form of Contracts, *available at* https://lawtimesjournal.in/standard-form-of-contracts/ (last visited on July 30, 2020)
[11] *Ibid*
[12] Florencia Marotta Wurgler, "What's in a Standard form of Contract? An Empirical Analysis of Software License Agreements", 4 *Journal of Empirical Legal Studies* 677, 713 (2007)
[13] Ralph Sutton, N.P. Shannon, *Sutton And Shannon on Contracts* 6 (Butterworth and Co, Australia, 1970)
[14] Contracts: Express and Implied Terms, *available at* https://hjsolicitors.co.uk/article/contracts-express-and-implied-terms/#:~:text=Implied%20terms%20are%20terms%20implied,day%20one%20of%20the%20contract. (last visited on July 30, 2020)
[15] Cheshire and Fifoot, *Law of Contract* 423 (Oxford University Press, Oxford, 1971)
[16] Robert W. Gomulkiewicz, "The License is the Product: Comments on the Promise of Article 2B for Software

came the need for the standard form of contracts, where parties with already less bargaining power, were stripped off their right of negotiation through these pre drafted contracts. [17]Terms have been carefully placed to determine and even limit/ exclude liability. Nonetheless, except for in instances of mistake or misrepresentation, a party is bound by the terms of the contract he has signed, and only to the extent that is provided for in the contract, even if he barely read the contract while signing it.[18] But in cases of tickets or notices, it is not sufficient to state that they had hold of the said document.[19] It is necessary to show that such exclusionary clauses were brought to the knowledge of the parties. If this is failed to be proven, such clauses can't be enforced against the plaintiff. [20]

III. THE RULES OF CONTRA PROFERENTEM AND FUNDAMENTAL OBLIGATION: JUDICIAL REACTION

In the midst of this chaos, the Courts have adopted a welfare oriented approach to ensure the just performance of these promises by the respective parties to a contract, when essential formalities are not fulfilled. What is reasonably conveyed by the document is what the right meaning is.

a. Contra Proferentem

Illustrating a welfare approach of adjudicating cases[21], the Courts began adopting what is known as the *contra proferentem* rule. This rule states that while interpreting a contract, if one term comes across as ambiguous, the same should be interpreted as against the party who asked for that provision to be inserted into the contract.[22] It is safe to assume that even in a *perfect* agreement, interpretative problems may creep in.[23] Judges recognise that in modern trade and business, corporate giants can easily act to the detriment of their consumers through

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and Information Licensing", 13 *Berkeley Technology Law Journal* 891, 895-99 (1998)

[17] Edward A. Dauer, "Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction" 5 *Akron Law Review* 1 (1972)

[18] 0lley v. Marlborough Court [1949] 1 KB 955; [1949] 1 All E.R. 127 (C.A.).

[19] Mukul Dutta v. Indian Airlines Corpn. A.T.R. 1962 Cal. 314; Hood v. Anchor Lines [1915] A.C. 837

[20] Richardson v. Rowntree [11894] A.C. 2117;
See also R Yashod Vardhan, Chitra Narayan, *Pollock and Mulla, Indian Contract Act and Specific Relief Act* 62-66 (Lexis Nexis, Chennai, 2014)

[21] Exclusion clauses and the limitation of the contra proferentem principle, *available at* https://www.ashurst.com/en/news-and-insights/legal-updates/exclusion-clauses-and-the-limitation-of-the-contra-proferentem-principle/ (last visited on July 30, 2020)

[22] Henry Campbell Black (ed.), *Black's Law Dictionary* 296 (Thomas Reuters, Minneapolis- Saint Paul, 1981)
Contra proferentem principle is used in connection "with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language."

[23] Bayless Manning, "Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on section 385" 36 *The Tax Lawyer* 12 (1982)

their pre drafted contracts.[24]

Sir Edward Coke said, "*verba chartarum fortius accipiuntur contra proferentem", or 'the words of deeds are to be taken more strongly against the one who put them forward*'.[25] In most cases, thus, judges are more oriented in an interpretation that is favourable to the consumers, who had little or no role in the drafting and bargaining the concerned term. The rationale behind it is that "th*e party drafting an agreement should bear responsibility for any ambiguities in it, as he is likely to provide more carefully for the protection of his own interests than for those of the other party*."[26] He who has caused a misunderstanding by drafting an unclear term could have avoided so, if he was clearer about it.[27]

Drafting contract can be excruciatingly lengthy and long drawn out and each party is looking forward to ensure that their interests are taken care of. Translating to guilt of the drafter in Latin, the rule acts both as a caveat and as a penalty, warning parties of enforcement of remedies against them, for intentionally introducing vague and ambiguous clauses into the contract.[28] In the case of a standard form of contract, this rule adopts a stricter application.

However, like any other doctrine, contra proferentem rule is not an automatic application. And further imperative to consider is that the Courts usually adopt this doctrine as a last resort[29]; it has been held to be a subsidiary rule of interpretation.[30] Before anything else, the language employed in the text of the contract needs to be reviewed, in order to find out if there actually exists an ambiguous term. If the clause is found to be ambiguous, the Courts will then attempt to investigate into the intention of the party who drafted the contract or the subject ambiguous term. [31]In the celebrated case of *Horne Coupar v. Velletta & Company*[32], the application of this doctrine was discussed in detail through a dispute between two law firms. Prior to leaving Velletta & Company to join the other firm (Horne Coupar), a lawyer renegotiated her compensation terms which now entitled her to a percentage of "*collected professional fees*" on the cases that she had worked on. On

[24] Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* 21 (Oxford University Press, Oxford, 1991)
[25] *Siegelman v. Cunard White Star, 221 F2d 189*
[26] *Dardovitch v. Haltzman*, 190, F.3d 125, 141 (3d Cir. 1999)- the Court makes note of Restatement (Second) of Contracts, s.206
[27] Iran- US, Case No. 34, C.T.R.257 YCA (1987)
[28] Kautz v. Zurich General Accident and Liability Insurance Co. Ltd., 300 P. 34 (Cal. 1931)
See also Michelle E. Boardman, "Penalty Default Rules in Insurance Law." 40 *Florida State University Law Review* 305-48 (2013)
[29] *Ibid*
[30] First Travel Corp. v. Iran, 9 IRAN-U.S. C.T.R 371
[31] Morgan Stanley Group Inc. v. New England Insurance Co., 225 F.3d 270, 275-76 (2d Cir. 2000)
[32] 2010 BCSC 483

joining the second firm, the issue of dispute that arose was regarding the number of clients that she would take on into her consecutive job. Horne Coupar wanted to be reimbursed for the loss of the clients to Velletta & Company. Court motion directed that Horne Coupar must be compensated through professional fees on a proportionate basis for those number of hours, while the matter was still under the first firm's conduct. However, the lawyer deducted a further fifty percent charge under the prior negotiated compensation term, as discussed above, from the payment. Deciding in favour of the first firm, Justice Romilly stated that the said compensatory amount must be paid without this deduction. "*This provision provides only for payment, not for deduction of "fees" to which Ms. Newman feels she is entitled (and has since deducted). Ms. Newman's failure to include a provision or stipulation for deduction of her own fees has resulted in an ambiguity which is to be construed against her by application of the rule of contra proferentem. Therefore, the clear interpretation of this provision (as against the drafter) is that fees are not deductible."* The doctrine ensures that the drafters be alert and be clear and specific while drafting an agreement. It also encourages drafters to foresee contingencies, as failure to do so will be used against them, under this doctrine.[33] When a buyer sued the sellers for short supply of thread, much after the stipulated time in the contract, the Court yet granted relief to the buyer on the ground that damages related to the unsupplied goods were demanded, not the ones that had been already delivered.[34]

What the Court is interested in is the intention of the party; it will see if the intention of one party to exclude/ limit liability has properly been communicated to the other party. They have established that when an agreement makes a general exclusion for misrepresentation, fraudulent misrepresentation and non-disclosure won't be saved by this clause; only negligent and innocent misrepresentation could be excluded.[35]

But Lord Morton said, "*if the clause contains language which expressly exempts the person in whose favor it is made from the consequence from the negligence of his own servants, effect must be given to that provision"*[36] *. On the face of it, it essentially deals with exclusion of liability for the acts of a servant, but it has been borrowed to interpret in situations where the defendant may be directly responsible for his negligent act.*

In India when the question arose as to how the terms stipulated in a Voluntary Retirement Scheme were to be interpreted, the Court opined that it was the bank who was responsible

[33] *Ibid*
[34] Beck & Co. Ltd. v. Szymanowski & Co. Ltd, (1923) 17 LI.L. Rep. 97.
[35] *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank, [2003] UKHL 6*
[36] Privy Council in Canada Steam ships Line Ltd V. The King, [1952] UKPC 1

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for preparing the Contractual Scheme, "*therefore, they bear the risk of clarity, if any*". [37] In the United States, disclaimer and limitation clauses in commercial contracts may be subject to contra proferentum. Besides otherwise in cases, the canon also finds its imprint in the Uniform Commercial Code and the Restatement (Second of Contracts).[38]

b. Fundamental Obligation

The Courts have also, over a period of time, devised what is now known as the doctrine of fundamental obligation. What it tries to see is that the relative position of the parties, after successful formation of the contract, is not fundamentally different than what was stipulated and bargained for in the agreement.[39] The doctrine clearly rules it out that no party is permitted to step away from performing the fundamental obligations stated in the contract, despite what the clauses may say as with regards to his non liability for failure to perform his promise under the contract.[40] No exemption clause, no matter the manner in which it is drafted, can justify breach of a fundamental obligation of a contract.

The breach in itself will cause the substratum of the contract to be destroyed and will render it futile; such breaches constitute fundamental breach and under such circumstances, it is believed that an exclusionary clause will not contain exemption of liability from a fundamental breach. If garments are given for wash, failure to return them will constitute fundamental breach and one can't exempt such liability from any clause.[41] If the goods sold are so defective that they have been rendered futile for the purpose for which they were purchased, a seller will still be liable for the defects which make them unmerchantable, even if there is a stipulation excluding/ limiting his liability.[42]

In the English common law, the obligation to convey a valid title is recognised fundamental, under any contract of sale of goods.[43] Before a sale, the seller should be the rightful owner of the title, who should be in a position to convey it. If due to the same, a buyer suffers any consequential loss or is deprived of his goods, he is entitled to terminate the contract and also claim the amount paid, along with additional costs.[44] When the seller delivered incorrect products, it was held that total misperformance of contract will

[37] *Bank of India vs. K. Mohan Das, [2009] 5 SCC 313*
[38] *Cheshire, supra* note 24
[39] B. Coote, "The Rise and Fall of Fundamental Breach" 40 *Australian Law Journal* 336-47 (1967)
[40] Cf. Montrose, "Some Problems about Fundamental Terms" 60 *Cambridge Law Journal* 12-16 (1964)
[41] Davies v Collins, (1945) 1 All ER 247
[42] Pinnock Brothers v. Lawis and Peat Ltd., (1923) 1 KB 690
[43] Sale of Goods Act 1979 (Act 54 of 1979), s. 12
[44] Rowland v. Divall, [1920] 2 KB 500

constitute a fundamental breach and the whole contract stands repudiated.[45] Lord Abinger said, "*If a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas and if he sends him anything else in their stead it is a non-performance of it*."[46]

Section 14 of the Indian Sale of Goods Act, 1930 states the implied undertakings associated with a sale. A corresponding reading of the same will indicate that, similar to English Common Law, only a true owner can make a valid sale or an age0nt of the true owner of the title relating to the subject product. In *Radha Kishan v. Ganga Bishan*[47], when it was proven in the criminal court that the sold goods held by the buyer were stolen, he proceed to file a suit of action against the seller for return of the consideration price paid. Because of the implied warranty contained in section 109 of the Contract Act of 1872 (which is now repealed and replaced by section 14 of the Sale of Goods Act), it was inferred that a buyer could very much terminate a contract, when a seller has failed to prove his title. There is a fundamental breach in such a circumstance and even if the buyer had made some use of the product, prior to being deprived of them, he can repudiate it. But this judgement, for lack of having cited valid authority, leaves a dearth as to if failure to deliver a true title calls for fundamental breach of contract, or if its liability can be subject to exclusionary clause.

Many-a-times, even when the seller fails to deliver the product as per the description provided for in the sale contract, the Courts have viewed it as a fundamental breach. Since, this is a fundamental breach, the seller can't avail the use of an exclusionary clause to his benefit to stop the buyer from repudiating the contract. Recognising this line of thought with restricted application, the Calcutta High Court held that when a property fails to match the description of the description forms, a buyer is entitled to reject the goods, as they form conditions of the contract.[48] In National Traders v. Hindustan Soap Works[49], Justice Ramachandra Iyer noted that the question of the right to reject the sold goods does not depend on if the goods had been passed on to the buyer. If the goods do not conform to the description, there is no performance of the contract at all. If they fail to be of merchantable quality, the consumer does not get what he bargained for.

[45] Chanter v Hopkins, (1838) 4 M & W 399, 150 Enq. Rep. 1484 (1915) ; Pinnock Bros v. Levis & Peat Ltd. (1923) 1 K.B. 690.
[46] *Ibid* (referring Chanter v. Hopkins)
[47] (1925) 86 I.C 1020
[48] In Mitchell Reid & Co . v. Buldeo Doss Khettry, (1888) 15 Cal. 1.
[49] A.I.R 1959 Mad 112

The Sale of Goods Act, however, states that in situations of acceptance, or when any of the circumstances of deemed acceptance (as per section 42) is present[50], he will lose his right to reject the goods. Remedy in such a case is to be sought through damages, as in situations of breach of warranty.

Regardless, fundamental obligation provides for remedy when the substratum of the contract has been totally defeated. Indian Courts have recognised that misdescription of products sold in itself gives buyers the right to repudiate the contract. But as mentioned before, the problematic situation arises due to the fact that in India, it has not been categorically dealt with if misdescription otherwise, amounts to breach of fundamental obligation. In fact, it is very much possible for a seller to make use of the exemption clause to exclude his liability in the event that a product fails to correspond to the contractual description. Lahore High Court, in a case[51], observed that when the buyers took delivery of the goods, despite being warned of the fact that the sellers won't assume liability if goods don't match the corresponding description, *"the plaintiffs took the delivery of the goods at their own risk."*

IV. LEGISLATIVE REACTION

The general judicial trend, from what is observed above, is to not permit the operation of the unreasonable exemption clauses. However, that still doesn't warrant that all types of cases will be covered under such judicial canons.

a. United Kingdom

To ensure that the ends of justice are met and that all types of such cases are included, England has stepped in to ensure adjudication of the same through several laws.

When the Court is to take on a case of standard form of contract, it applies the test of fairness or reasonableness of clauses. Exploitative provisions will not be enforced. [52] Following this line of thought, the Unfair Contract Terms Act of 1977 (the "UCTA") was enacted. This Act prescribes the limits on the extent of liability (for breach of contract, negligence, fault of the servants etc.) that can be avoided through the use of exclusionary clauses. A term is reasonable if and only if it is fair and reasonable for it to have been included, with due consideration to the circumstances which are thought to have prevailed, while the contract

[50] The Sale of Goods Act, 1930 (Act 3 of 1930), s. 42- describing circumstances of deemed acceptance. On intimation of acceptance, or failure to act in a way contrary to ownership on delivery, or failure to intimate the seller about rejection within a lapse of a reasonable period of time, the buyer is deemed to have accepted the said goods.

[51] . Bombay y Baroda and Central India Raillway. v. Firm Nihal Chand Jagan Nath, (1941) 192 I.C. 175

[52] *A. Schroeder Music Publishing Co. Ltd. v. Macaulay (formerly Instone) (1974) 1 WLR 130*

was being negotiated. [53]

When a party seeks to limit his liability for negligence, the limitation is permissible only if the requirement of reasonableness is satisfied. Reasonableness means that the subject term is in consonance with Section 11 of the UCTA. In *Goodlife Foods Limited v. Hall Fire Protection Limited*[54], the clause, under question, was contained in the Terms and Conditions of the contract. The term limited the liability of the defendant for negligence in the supply of a fire suppression system. The Court found that the clause was not unreasonable; there was nothing unusual or onerous about it and it has been brought to the sufficient knowledge of the plaintiff. Hall Fire had, prior to this, supplied installation service, for a modest number of years. Other than a limited warranty, it had no business or connection with the premises, once the installation was served. It is safe to assume that there is nothing extraordinary about wanting to fully protect oneself, against the possibility of unlimited liability, in such an event. Amongst other factors, the parties relatively had almost equal amount of bargaining power; adequate notice of the term was given. It was also noted that the plaintiff had the option to enter into contract without the subject clause, but at a higher price. The clause was, thereby, not unreasonable. The Court stated that party autonomy is an important pillar of English common and commercial law and "*even where UCTA is applicable, at least in the case of commercial contracts between parties of broadly equal bargaining power, considerations of party autonomy and freedom of contract remain potent*".

Following an attitude of noninterference, the court's intervention can be sought only if it satisfied that one party has taken advantage of another, or that it is so unreasonable that it can't reasonably inferred why it was added in the first place.[55] When parties have almost equal bargaining power, it is assumed that the matter, in its entirety, is known to its parties. A strained construction of words on the exclusion clause, which is capable of one meaning, in commercial agreements, was found to be wrong.[56] They should be the judge to best serve their commercial interests and be prudent to judge the fairness of each of the terms of the agreement.[57] It is applicable to only those cases where the parties are governed by the standard business terms of one of the parties.[58]

Several other Acts have also incorporated specific provisions, in order to curb the misuse and the exploitative use of the exclusionary clauses. Road Traffic Act, 1960 dictates that in a

[53] The Unfair Contract Terms Act, 1977 (Act 50 of 1977), s. 11
[54] [2018] EWCA Civ 1371
[55] Watford Electronics Limited v Sanderson CFL Limited, [2001] 1 All ER Comm. 696
[56] Photo Production Limited v. Securicor Transport Limited, [1980] 2 WLR 283
[57] *Watford*, *supra* note 55
[58] *Unfair Contract Terms*, *supra* note 52, s.3

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contract of carriage in a public service vehicle, any agreement which seeks to nullify or restrict the liability, in the event of death or bodily injury to any passenger on the vehicle, would be void.[59] The Transport Act, 1962 places similar restriction when passengers are carried by rail.[60] Consumer Safety Act of 1978 makes it imperative that the goods supplied are safe for consumption by the consumer. If safety guidelines are violated, punishment is attracted and one can file a civil suit. Any agreement to exclude or restrict civil liability will be void.[61]

b. India

Section 73 of the Indian Contract Act, 1872 provides that when a party breaches a contract, the other party is entitled to receive compensation for any loss or damage suffered, as a consequence of such breach, or which the parties could have reasonably anticipated being a likely result from a breach, when the contract was being made.[62] However, compensation can't be granted for remote or indirect losses and damages.[63]

While India has no specific legislation in force barring the use of clauses to exclude or limit liability for damages, the Contract Act provides that any agreement which has an unlawful object or consideration is void.[64] The consideration or object of a contract is void when if permitted, would defeat the provisions of law, or is opposed to public policy, or the court considers it to be immoral.[65] Similarly, when the consent for a contract is obtained through undue influence, the contract is voidable at the option of the party whose consent was so caused.[66]

Section 16 recognises that when one party is in a position to dominate the will of the other party, and makes use of that position to gain an unfair advantage, it can be said that the consent was obtained through undue influence.[67] Starting with "*In particular and without prejudice to the generality of the foregoing principle*", sub section (2) can also cover, within its ambit, cases where unequal bargaining power persists between the parties, due to which a one sided contract may be procured. *In Central Inland Water Transport Corporation. v. Brojo Nath Ganguly*[68], the Court observed that several instances of unequal bargaining power

[59] The Road Traffic Act, 1960 (Act 16 of 1960), s. 151
[60] The Transport Act, 1962 (Act 46 of 1962), s. 43(7)
[61] Consumer Safety Act, 1978 (Act 38 of 1978), s.6
[62] The Indian Contract Act (Act 9 of 1872), s.73
[63] *Ibid*
[64] *Indian Contract*, *supra* note 62, s. 23
[65] *Ibid*
[66] *Ibid* at s. 16
[67] *Ibid*
[68] 1986 AIR 1571

are caused to due to the existing economic disparity between the rich and the poor. As a result, an ordinary man is dependant on the dominant party for obtaining goods and services, as per the terms of the latter. No matter how unfair or unreasonable the contract may be, he has no other choice but to consent to their standard set of rules and conditions. Finding a provision for termination of employment to be unfair, the Court held that terms which shake the conscience of the court are void and opposed to public policy. However, this principle is restricted to only those cases where there is an unequal bargaining power; where it is almost equal, it shall not be applicable.

Justice Burroughs defined public policy as, "unruly horse and when you get astride it you never know where it will carry you."[69] Later, in 1938, Lord Thankerton said that a judge is ought to expound into a policy, not to go ahead and expand it. Thus, he apprehended the extension of public policy doctrine at the expense of the right of freedom of contract.[70] But an altogether different approach was sought, when Lord Denning said, "With a good man in the saddle the unruly horse can be kept in control; It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice."[71]

Chinnappa Reddy believed that it was more imperative now to evolve new heads of public policy in this modern progressive society, whenever the situation calls for it. With fast changing values and morals, law can't remain unaffected and stay stagnant. Judges are under an obligation to evolve and adapt new ways to meet the changing conditions. Advocating for community interest, he further stated that laissez faire economy was of the bygone days, "'freedom of contract', has now ceased to have the idealistic attraction it had in the 19th century."[72]

When a clause in a dry cleaning agreement which provided for really low liability against bailee's negligence as per section 151 of the Indian Contract Act, was put for consideration, it was found to be unreasonable.[73] In yet another dry cleaner agreement, when a clause was found to restrict the liability to only 50 percent of the value of the lost saree, the same was held unreasonable and non binding. "It appears to me to be very clear that a term which is prima facie opposed both to public policy and to the fundamental principles of the law of contract, cannot be enforced by a court merely because it is printed on the reverse of the bill..." In ordinary circumstances, the conditions printed will govern the performance of a

[69] Richardson v. Mellish, (1824) 130 Eng. Rep. 294, 303
[70] Fender v. St. Johan Milkmay, (1938) AC 1 at 23
[71] Enderby Town Football Club v. Football Association Limited, (1970) 3 WLR 1021 at 1026
[72] N.V.P. Pandian v. MM. Roy, A.I.R. 1979 Mad. 42
[73] Siddalinqappa v. Nataraj, A.I.R. 1970 Mys, 154.

contract, but when such a condition is not in the interest of the public, and a bill containing such a term is served, then the Court will not enforce the same.[74] In Simplex Infrastructure v. Siemens Limited,[75] the Delhi High Court said that when the law is made for an individual benefit, it may be waived off. However, when the law is in relation to collective interest, all the rights arising from it cannot be waived off as it becomes an affair of public policy.

While India may not have a specific legislation in place to combat with unreasonable exclusionary clauses like England, yet the Judiciary has actively, on a case to case basis sought to protect the interests of the weaker party by assessing the contract through the dual lens of undue influence and public policy. As against purely focusing on freedom of contract, attempts are made to ensure that a consumer is not unduly taken advantage of.

c. United States of America

Adopting a proactive approach, the country has also been very high up the game in regulating the exemption clauses. States like New Hampshire have held it in general that a contract cannot waive the protective public policy against negligence of individuals which cause injuries.[76] In addition, the courts follow what is known as the Doctrine of Unconscionability. When it is discovered that the term(s) contained is/are just so unjust, or that the same is so biased, that no reasonable and informed person, with almost equal bargaining power, would agree to otherwise, the Court will generally refuse to enforce the contract on the ground that it is opposed to good conscience.[77] In Williams v. Walker- Thomas Furniture Company[78], a widely acclaimed case, the arrangement for credit was done in such a way that none of the products would be considered sold until the last one was also paid up for. When the plaintiff failed to make the payment on the last item, the store proceeded to gain back possession of all the products, just like provided for in their arrangement. Returning the case to the lower court to determine further facts, the District of Columbia Court of Appeals held that the contract could be held unconscionable. It is codified to sale of goods cases through section 2-302 of the Uniform Civil Code. Later, the Restatement (Second) of Contracts also ensured that justice is provided in cases of unreasonable contracts as per section 208[79], which applies to a

[74] Lily White v. Munuswami, A.I.R. 1966 Mad. 13.
[75] 2015 (5) Mh. L.J. 135
[76] Wessman v. Boston & Maine Railroad, (1930) 152 A. 476, 478- it was held by the Court that every individual in the conduct of his lawful business is bound to act on exercise of ordinary care to avoid injuring those with whom he knew or should have known his business would bring him in contact. If he fails to do so, he is responsible for the consequences. "It is declared policy of this state that the operation of this rule, which is reasonable in theory and salutary in effect, shall not be interrupted by private contract."
[77] *Pelfrey v Pelfrey* 487 SE 2d 281, 284 (Va Ct App 1997)
[78] 350 F.2d 445
[79] Restatement (Second) of Contracts, 1979, s.208

wide variety of contracts. The entire unconscionable contract will be rejected by the Court or the same will be enforced, without the unconscionable term, if it is so permissible.

V. CONCLUSION

While the judicial attitude so far has been rather sufficiently oriented in protecting the consumers from the unfair bargains, yet it has been observed so far that there persists a scarcity in legislative content to ensure consumer protection. It is quite possible for giant corporations to attempt to escape liability on the shield of freedom of contract, which happens to be one of the foundations of a valid contract. The 199th Law Commission Report[80] also suggested that procedural and substantive unfairness be recognised and that we should have a law which is adequate enough to ensure more fairness in contracts by enhancing equality in bargaining power. While the present market demands the use of standard form of contracts, for the sole reason of ease of contracting business with multiple people, the same poses as a situation when contractual freedom may be misused at the expense of a consumer. But yet, at the same time, how do we even talking about compromising our freedom of will? It is rather hard to answer. With the lack of an environment with sufficient laws in force or, an amendment in the present Indian Contract Act which can prevent the use of such unfair exclusionary clauses, interests of a magnitude of low bargaining consumers continue to remain at stake.

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[80] Law Commission of India, "199th Report on Unfair (Procedural & Substantive) Terms in Contract" (August 2006)