1-1-1977

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Recommended Citation

Gabriela Shalev, Control Over Exemption Clauses: A Comparative Synthesis, 1 B.C. Int'l & Comp. L. Rev. 11 (1977), http://lawdigitalcommons.bc.edu/iclr/vol1/iss1/3
Control Over Exemption Clauses:
A Comparative Synthesis

GABRIELA SHALEV

In a comparative examination of techniques employed by nations to regulate the use of exemption clauses, which limit contract liability, Professor Shalev finds general agreement that some degree of control must be exerted, but great diversity in the manner in which this is achieved. Upon an examination of several systems of control, the author discovers that justice is best served when courts are granted wide discretion to avoid giving effect to such clauses when their operation would produce an unreasonable or inequitable result.

I. INTRODUCTION.

Commercial contracts often contain exemption clauses. By these clauses, one contracting party seeks to prevent the other contracting party from imposing liability upon it for any negligent performance of its contractual duties. However, the enforceability of such clauses hinges initially upon the presumption that parties may freely contract away remedies otherwise available to them at law.

Assuming, therefore, that a particular legal system allows the inclusion of exemption clauses in contracts owing to the freedom of contract principle, such clauses may nevertheless conflict with judicial notions of fair play and appropriate public policy. For example, a court may deem it inequitable to allow an exemption clause to bar a party to a contract from

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1 GA A. CORBIN, CONTRACTS § 1472 (1962 ed.).
suing for damages stemming from negligent performance of a contractual duty when the clause was imposed on the injured party as a manifestation of the other party's radically greater bargaining power. Thus, in such settings, freedom of contract may sharply conflict with perceived notions of public policy and fairness.

Viewed in this light, when issues regarding the enforceability of exemption clauses are raised, two interrelated questions confront every legal system. The first issue is whether the system will presume that such clauses are prima facie valid. To the extent that such clauses are not ipso facto enforceable, the second issue—the proper degree to which use of exemption clauses should be limited—is brought into play.

This article surveys the treatment accorded exemption clauses in a variety of existing legal systems. As will be demonstrated, each system assumes that at least some limitations should be applied to the enforceability of exemption clauses. Moreover, three related issues will be discussed: (1) the type of control over exemption clauses deemed acceptable in each legal system; (2) the type of authority considered appropriate to control the enforceability of exemption clauses; and (3) the proper test for determining when control over exemption clauses is needed. It will be submitted that while imposing limitations on the use and enforceability of exemption clauses may abridge somewhat the freedom of contract concept, such control, paradoxically, may be necessary to preserve the remainder of freedom of contract.

II. ENGLISH LAW.

A. Pre-1973 Statutory Limitations

Prior to 1973, statutory control of exemption clauses in Great Britain took two forms. First, some statutes completely prohibited the inclusion of exemption clauses in certain types

of contracts.\textsuperscript{4} Second, other English statutes required particular contracts to contain obligatory terms whose provisions could not be avoided by the inclusion of an exemption clause.\textsuperscript{5}

B. \textit{Post-1973 Statutory Limitations}

The effect accorded exemption clauses in Great Britain, which varied depending on the subject matter of the contract, led to confusion respecting the proper status of such clauses. In response to this confusion, the Law Commission recommended certain changes in the law which clarified the position of exemption clauses.\textsuperscript{6} The Commission's recommendations were partially adopted by the House of Commons in enacting the Supply of Goods (Implied Terms) Act of 1973.

The Supply of Goods Act draws two major distinctions for the purpose of determining the validity of exemption clauses.\textsuperscript{7} First, the Act distinguishes between those terms which will be implied in contracts respecting title, and those terms which will be implied in contracts respecting all other transactions.\textsuperscript{8} Second, the Act distinguishes between those terms which will be implied in contracts for consumer sales and those which will be implied in commercial contracts.\textsuperscript{9} Moreover, the Act ex-

\textsuperscript{4} The inclusion of exemption clauses were expressly forbidden in contracts governed by the Carriage of Goods by Sea Act, 1971, Schedule, Article III, (8); Road Traffic Act, 1960, § 151; Carriage by Air Act, 1961, Schedule I, Article 23; Companies Act, 1948, § 205; Building Societies Act, 1939, § 14; Solicitors Act, 1957, § 60(4); Law Reform (Personal Injuries) Act, 1948, § 1(3); Transport Act, 1962, § 43(7); Contracts of Employment Act, 1963, § 1(3); Employers' Liability (Defective Equipment) Act, 1969, § 19(2).

\textsuperscript{5} See, for example, the terms implied in contracts by the Hire-Purchase Act, 1965, §§ 17(1), 18(3), 19(2), 29(3).


\textsuperscript{8} Id.

\textsuperscript{9} The Act defines a consumer sale thusly: a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods —

(a) are of type ordinarily bought for private use or consumption; and

(b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.
pressly voids any contractual clause purporting to exempt the seller from any of the title provisions of the Act. In the context of consumer sales, the Act voids any attempt to exempt a contract from the provisions of the Act respecting sales by description or implied undertakings as to the quality or fitness of goods. In contrast, an exemption clause in commercial contracts is deemed unenforceable only insofar as it is shown to be not "fair and reasonable to allow reliance on the term." 10 The Act further provides guidelines for determining whether reliance on an exemption clause should be deemed fair and reasonable.11

This examination of the treatment given exemption clauses in England reveals that two differing types of control are exercised over such clauses. On one hand, the English scheme employs purely statutory means to avoid the operation of exemption clauses included in consumer sales contracts. On the other hand, the English scheme employs purely judicial means to determine the validity of exemption clauses included in commercial contracts.

The legislative intervention in this area aptly promotes a long-felt need. This need stems from the fact that the adverse effects brought about by exemption clauses are felt primarily by consumers lacking sufficient bargaining power to restrain large corporations from imposing exemption clauses upon them as a condition for making a sale. In this light, the pre-1973 scheme ill served the interests of consumers, since the law respecting exemption clauses varied widely depending upon the


11 These guidelines are set forth at § 55(5) of the Sale of Goods Act, 1893. Among the matters mentioned are the relative bargaining positions of the contracting parties and the knowledge of the buyer of the existence and extent of the exemption clause.
precise nature of the transaction. In contrast, the 1973 Supply of Goods Act draws a sharp distinction between consumer sales contracts and other regular commercial contracts. This distinction is based on the presumption that while individual consumers rarely possess the bargaining power to change the terms of consumer sales contracts, commercial contracts more often are between parties of equal bargaining power. Consequently, the Act reflects this presumed inequality in the consumer sales sphere by expressly voiding exemption clauses with respect to the liabilities imposed on consumer contracts by sections 13-15 of the Sale of Goods Act. This absolute avoidance provision has the beneficial effect of providing certainty and simplicity with respect to the enforceability of exemption clauses in the consumer sales area. In contrast to the presumptions in the consumer sales area, the presumed equality of bargaining power in the commercial contracts sphere is reflected by the Act's requirement that the operation of an exemption clause in this area can only be prevented by a showing that reliance on the clause is unreasonable in the particular situation before the court.

A significant change brought about in England by the Sale of Goods Act is the broadening of judicial control over exemption clauses beyond the consumer sales area into the commercial contract context. Moreover, the test applied—whether reliance on the exemption clause is fair and reasonable under the circumstances—is flexible and convenient, with the result that much is left to the discretion of the court.

In view of the changes brought about by the Supply of Goods Act, English law is now in the midst of giving statutory expression to practical conclusions respecting the impact of exemption clauses in the absence of a uniform system of control.

12 Opinion was divided among the members of the Commission as to whether to extend control over exemption clauses in commercial contracts. For the arguments both favoring and rejecting this extension, see the Law Commission Report supra n.6, paras 108-09.

13 See text at notes 19-24 infra, for an expanded discussion of the application of a reasonableness test.
over such clauses. The publication and adoption of the recommendations of the Law Commission regarding exemption from liability for negligence and exemption clauses in contracts for services should eventually lead to an extension of statutory control over all types of exemption clauses. Although exemption clauses in contracts for the supply of goods under the Sale of Goods Act and the Hire Purchase Act are merely a beginning, it is submitted that the introduction of control, is a first step towards a comprehensive and systematic regulation of exemption clauses.

C. The Application of Direct Judicial Control

The Act of 1973 exemplifies a rational approach to clarifying a once highly confused area of English law. The approach adopted in the Supply of Goods Act should release the English courts from the necessity of resorting to legal fictions in attempting to avoid the operation of an obviously onerous exemption clause. Prior to 1973, English law had no grounds for the open and direct exercise of judicial control over exemption clauses. This situation stemmed from two factors. First, the English courts lacked general statutory authority to avoid exemption clauses except in limited instances. Second, although the English judiciary arguably had sufficient power to invalidate exemption clauses on public policy grounds for lack of reasonableness, the English courts failed to do so. This reluctance to intervene to avoid the operation of exemption clauses on public policy grounds was consistent with the English courts’ conservative tradition of adhering to fixed, recognized categories of public policy. Thus, the courts refused to create a new category of “unreasonableness” as a ground enabling

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14 Cf. John Lee & Son (Grantham) v. Railway Executive, 2 All E.R. 581, 584 (1949) (per Dunning, J.): “There is the vigilance of the Common Law which, while allowing freedom of contract, watches to see that it is not abused.”


judicial intervention in the exemption clause area.\textsuperscript{17} Moreover, there is no indication that they will do so in the future.\textsuperscript{18} Thus, any future change in judicial attitude in this regard will most likely be the result of express statutory authorization.

D. The Evolution of the Statutory Test of Reasonableness

Prior to 1973, while the English courts did not possess general power to directly control exemption clauses, they did have limited statutory authorization to interfere in the operation of "unreasonable" contractual provisions. Section 7 of the Railway and Canal Traffic Act of 1854,\textsuperscript{19} for example, first introduced the terminology of reasonableness into the exemption clause area by empowering the courts to void any provision in a contract for the carriage of goods by rail that was not "just and reasonable."\textsuperscript{20} Decisions in cases involving this section developed one of the important tests for determining reasonableness: whether there existed a fair alternative to the existing contractual terms and parties.\textsuperscript{21} A provision employ-

\textsuperscript{17} See, e.g., Faramus v. Film Artists' Association, 1 All E.R. 636, 650-652 (1963) which noted, however, that when faced with contracts in restraint of trade, courts will make use of public policy to avoid unreasonable terms. See also Turpin, "Tied Garages and the Public Interest," CAMBR. L.J. 104 (1967), which discusses control over freedom of contract of large corporations by application of a reasonableness standard.

\textsuperscript{18} Cf. Treitel, "Exclusion Clauses—Possible Reforms," J. BUS. L. 200, 204 (1967).

\textsuperscript{19} Repealed by the Transport Act, 1962.

\textsuperscript{20} These requirements of justice and reasonableness are cumulative, like that of the incorporation of the exemption in a written document, which is beyond the scope of this article. See KAHN-FREUND, THE LAW OF CARRIAGE BY INLAND TRANSPORT, p. 212 (3rd ed. 1956, London).

\textsuperscript{21} Under this test, of which the conceptual roots lie in the contractual notion of consideration, and which received the approval of the Lords in Peek v. North Staff Bly., 10 H.L.C. 473, 510, 11 E.R. 1109 (1863), an exemption clause may be recognized if it forms part of a contract in which the price is reduced in consideration for taking the risk. The choice between a cheaper contract containing the exemption and a dearer one without the exemption is treated as reasonable when the reduction in price is substantial and is reasonably proportionate to the additional risk taken. In Peek, it was held that the high cost of insurance was a deterrent and therefore the alternative was not bona fide and the exemption clause unreasonable. The existence of a fair alternative will support the presumption that the contractual arrangements are reasonable and the exemption valid provided there is some indication that the contract was entered into freely. Cf. Clarke v. West Ham
ing a reasonableness standard for contractual terms was also contained in the Solicitors Act of 1957.\textsuperscript{22} Two sections of this latter Act gave the courts broad discretion in determining the fairness and reasonableness of agreements respecting remuneration of solicitors.

In addition to the provisions in the Supply of Goods Act respecting exemption clauses in the commercial contracts context, a reasonableness test is applied for controlling exemption clauses by section 3 of the Misrepresentation Act of 1967. Section 3 of this Act provides that a contractual provision excluding or restricting (any) liability for misrepresentation, or, similarly, any remedy arising out of misrepresentation, "shall be of no effect except to the extent (if any) that . . . the Court may allow reliance on it as being fair and reasonable in the circumstances of the case."\textsuperscript{23}

According to the terms of section 3, the test of reasonableness is applicable only to the appropriateness of allowing reliance on the exemption clause in question. This section thus differs from other statutory provisions which link the requirement of reasonableness to the substance of the clause itself. However, the section 3 statutory approach is similar to the provisions of the Supply of Goods Act of 1973 relating to implied terms. The significant difference in these two approaches lies in the contractual stage at which the reasonableness test applies. On the one hand, the test of reasonableness established by section 3 of the Misrepresentation Act determines

\textit{Corporation}, 2 K.B. 258 (1909), where the limitation of liability of a carrier for physical injury was avoided because of absence of alternative, though not in reliance on the said § 7. See also Manchester, Sheffield Ry. v. Brown, 8 App. Cas. 703, 710-711, 718 (1883) in which it was held that an exemption clause in a contract of carriage was reasonable within the framework of § 7 since there was an alternative in sending the goods (fish) at a lower charge, the carrier assuming liability of a public carrier, or at a higher charge, the sender taking on the risk.

\textsuperscript{22} Solicitors Act, §§ 57(4) and 61(2). Cf. § 60(4) therein, which avoids entirely the validity of a clause exempting a solicitor from negligence.

\textsuperscript{23} § 8 of the Misrepresentation Act thus has broader application than § 7 of the Railway and Canal Traffic Act of 1859, discussed at n.19 \textit{supra}, which applies only to carriage contracts, and § 2-302 of the U.C.C., discussed at n.25-34 \textit{infra}, which applies only to contracts for the sale of goods.
the validity of the exemption clause at the time the plea of unreasonableness is raised. On the other hand, the approach adopted by the consumer sales portion of the Supply of Goods Act determines the validity of an exemption clause at the time the contract was made. The beneficial aspect of the approach adopted by section 3 of the Misrepresentation Act is that it gives courts wide discretion to consider the circumstances subsequent to the time the contract was made in determining whether the exemption clause is valid, since the test for reasonableness is applied retrospectively. This latter approach, it is submitted, achieves greater justice than the alternative Supply of Goods approach, which is directed solely at the exemption clauses' reasonableness when made. This conclusion stems from the fact that in many cases no moral defect is to be found in the exemption provision as such, but rather is the result of the subsequent reliance placed upon it. Nevertheless, the approach taken by section 3 has the adverse effect of increasing the element of business uncertainty, since it is often difficult to predict subsequent events when initially drawing up a contract.

The scope of section 3 requires examination in two different respects. First, it embraces all contracts, and is thus broadly applicable to all cases of contractual misrepresentation. Second, by dealing exclusively with exemption clauses in the misrepresentation context, it thus does not reach the more usual clauses exempting a party from liability as a consequence of its breach of contract.

In contrast to the Supply of Goods Act, section 3 does not contain guidelines for exercising judicial discretion to determine whether an exemption clause is fair and reasonable. Notwithstanding this lack of guidelines the amount of permissible judicial discretion is presumably wide and thus may be exercised not only to annul or uphold the clause in question in its entirety but also to so restrict and confine the clause's application as to render reliance upon the exemption clause fair and reasonable. Each case is therefore dealt with on its own
facts and no general rules of guidance can be deduced. It would nevertheless be reasonable to assume that in exercising discretion, the courts will give due weight to the degree of fault borne by the person making the misrepresentation and the relative bargaining power of the parties to the exemption clause.  

III. AMERICAN LAW.

A. Introduction

In the United States, many state courts have shown little reluctance in avoiding the operation of exemption clauses. Furthermore, sections 574 and 575 of the Restatement of Contracts provides that exemption clauses may be deemed illegal in certain circumstances and, further, delimits the area in which the principle of freedom of contract operates. In practice, however, this increasing trend towards exercising judicial control over exemption clauses so as to avoid their operation has led to differing results in cases involving similar facts. This result, in turn, created a need for express statutory authorization and guidelines enabling the courts to interfere when faced with unjust contractual provisions. This statutory authorization is provided by section 2-302 of the Uniform Commercial Code. Section 2-302 invalidates "unconscionable" contractual provisions, including exemption clauses. The Code defines unconscionability by reference to both the circumstances of the case and the needs of commerce.


26 The term "unconscionability" awakens among English lawyers concepts of the law of equity. Indeed, it may be argued that § 2-302 adds nothing to American law since equity accords the judges the power to control unconscionable conduct. See I, A. Corbin, Contracts § 128 (1962 ed.) and Baker, "The Freedom to Contract without Liability," (1971) 24 Curr. Leg. Prob. 53, 77. Although in Campbell Soup Co. v. Vent, 72 F. 2d 80 (1949) it was accepted, in the framework of an action in equity, that a term in a standard contract was unconscionable, closer
B. Section 2-302 of the U.C.C.

Section 2-302 typifies the important but controversial insistence on the existence of reasonableness, fairness and conscionability when the use of exemption clauses is employed. Section 2-302 provides that

if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Discussion of section 2-302 calls for a number of preliminary observations. While the U.C.C. has been adopted in fifty states, two of these states — California and North Carolina — have omitted the unconscionability section. Moreover, since this section appears only in the Article of the Code respecting the sale of goods, its provisions operate only in this context. Finally, this section does not deal merely with exemption clauses, but instead addresses all contractual provisions alleged to be unconscionable in effect. Unconscionability is an obscure term, and the U.C.C. leaves the definition and delineation of this term to the broad discretion of the courts. While the section does not mention standard contracts specifically, it is usually assumed that its provisions extend to such "boilerplate" contracts, primarily because unconscionable exemption clauses frequently appear in such contracts. This conclusion is amply supported by the history of section 2-302, which in its original

examination of the judgement shows that the court there did not hold the unconscionable clause to be invalid but merely refused to enforce it out of equitable considerations.


form applied solely to standard contracts. The draftsmen of the section properly assumed that in the appropriate circumstances, an unconscionable clause could be isolated from the rest of the contract, thus leaving the remainder of the contract in force.

The unconscionability section is a catch-all provision designed to embrace all matters and instances not covered by the general net of the Code. Thus, its significance cannot be properly gauged by considering it in isolation. Since it appears in the company of sections concerned with the sale of goods, referring directly to exemption clauses, the unconscionability provision seems to constitute a special and superior law.

Two other sections of the Code lay down rules for controlling exemption clauses. Section 2-316 deals with the exclusion or modification of warranties. Its terms support the principle of freedom of contract, but introduce a formal requirement into this context by requiring that when a contract contains an exemption from liability clause, its existence must be made conspicuously apparent. Section 2-719 allows contractual modification or limitation of remedies available for breach of contract, but employs a standard of unconscionability to ensure the availability of at least minimum adequate remedies.

C. Construction of U.C.C. 2-302

In explaining the scope of the unconscionability section, the drafters of the U.C.C. noted

This section is intended to make it possible for the courts to police explicitly against contracts or clauses which they find to be unconscionable... This section is intended to allow the court to pass directly on the unconscionability of the

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contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.

A question which may fairly be asked whether there exists any substantial difference between "prevention of oppression and unfair surprise" on the one hand and "disturbance of allocation of risks because of superior bargaining power" on the other. The use of superior bargaining power leading to a shifting of the risks may result in unfair oppression. Thus, while these two formula may be semantically disparate, the boundary between them cannot be easily demarcated with convincing clarity. The only thing which can be said with certainty is that the section does not permit the fact of an absence of equal bargaining power to be used as the sole predicate for avoiding the operation of an exemption clause.

Reference to § 2-302 was made by the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors.* In *Henningsen,* the court was confronted with an allegedly unconscionable exemption clause in a standard contract entered into with an automobile manufacturer which released the seller from all liability other than that of replacing deficient spare parts. The plaintiff was injured when his new automobile broke down completely after a mere 400 miles. In his action on the implied warranty of merchantability, plaintiff was awarded damages for his bodily injury notwithstanding the existence of the exemption clause. The court's decision was predicated on its finding that the exemption clause violated public policy and was therefore void. Although the U.C.C. unconscionability provision was not in force in New Jersey at the time of the litiga-

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82 75 A.L.R. 2d. 1 (1960).
tion, the court did cite this provision in reaching its decision. This factor has led subsequent courts to refer to the *Henning-
sen* decision in construing the meaning of U.C.C. § 2-302. One view has interpreted *Henningsten* as being based primarily upon the unequal bargaining power of the parties involved, and from this fact maintains that the existence of unequal bargaining power is a necessary condition to triggering the operation of this section. This view, however, is subject to telling criticism. Contrary to the view that the existence of unequal bargaining power was dispositive of the result in *Henningsten*, it is submitted that the decision is based on grounds more narrow than those embodied in section 2-302. This conclusion follows from the fact that section 2-302 applies even to instances of injustice not so extreme as to be voidable for reasons of public policy. Moreover, the seemingly more correct view of section 2-302 is that inequality of bargaining power is irrelevant to the proper resolution of cases challenged under this section. Lending further support to this conclusion is that although judicial hostility toward exemption clauses may be grounded in considerations of protecting the consumer, the section is also applicable to ordinary commercial contracts.

D. Criticism of U.C.C. 2-302

The main problem with section 2-302 arises in determining how to apply it to concrete factual situations. Professor Leff sharply criticises this section, emphasizing its defective drafting and describes it as a section that says nothing with words. His central argument is that "the draftsmen failed fully to appreciate the significance of the unconscionability concept's necessary procedure-substance dichotomy, and such fail-

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ure is one of the primary reasons for sec. 2-302’s final amorphous unintelligibility and its accompanying commentary’s final irrelevance.”

The principal criticism is thus directed at the section’s obscurity. This obscurity, it is argued, conceals a serious threat to commercial stability. Supporters of the provision, in contrast, regard the section’s ambiguity as an advantage. According to this latter view, the section provides a basis for creative judicial activity: the courts applying it do not have to torture its language to arrive at a just result, and can thus achieve that end by utilizing the section’s flexible criterion, adapting it both to commercial needs and to the situation of the parties immediately concerned.

The author does not presume to resolve the controversy. However, discussion of the section reveals the problematic nature of a legislative scheme granting broad discretion to the judiciary in order to control the content of contractual provisions. On one hand, express statutory powers set forth in unequivocal terms effectively prescribe the domain of freedom of contract and accordingly restrict judicial discretion. On the other hand, judicial powers expressed in broad, vague terms invite the criticism that certainty and stability in business matters are prejudiced by the court’s power to remake contracts and, moreover, encourage needless litigation. The resulting conflict typifies one aspect of the clash between dynamic and static certainty in contractual relations. To establish fairness and conscionability in contractual transactions the courts must strike a balance between maintaining freedom of contract while simultaneously guarding against the possibility that allowing exemption clauses will make a sham of freedom of contract owing to the exercise of superior economic power.


III. CONTINENTAL LAW.

A. German Law

In contrast to the American approach, the English approach, according different treatment to ordinary contracts as contrasted with standardized "boilerplate" contracts, is employed in Germany. Control over exemption clauses in Germany is confined to the latter instances. To this end, the Supreme Court in Germany makes use of the general provisions of section 138 of the B.G.B., which avoids every juridical act contra bonos mores. This section is utilized to avoid exemption clauses in standard contracts which result from the abuse of economic monopoly. Furthermore, section 242 of the B.G.B. imposes a duty of good faith performance of contractual obligations. In relation to standard contracts, good faith is interpreted as meaning the existence of a fair and just balance between the parties' interests. Section 242 seemingly provides the courts with a more effective mode of control than does the contra bonos mores provisions of section 138. The decisions of the Federal Supreme Court have resulted in a flexible formula which is nevertheless more specific than the obscure concepts found in the Uniform Commercial Code in the United States. The result has been to make the validity of standard contracts dependent on the degree such contracts depart from the existing dispositive rules worked out by the Supreme Court regarding justifiable contractual provisions for a variety of circumstances. The practical significance of using dispositive rules of law rather than the freedom of contract principle as the starting point for determining the validity of a standard contractual provision is that the burden of proof shifts from the party contesting the validity of an exemption clause to the party

relying upon it, who, in turn, must justify its departure from the relevant dispositive rule.\textsuperscript{88}

This very brief survey of German law in the present context would be incomplete without mentioning that considerations of public policy have been found to warrant the elevation of certain B.G.B. sections from the rank of \textit{jus dispositivum} to that of \textit{jus cogens}, as well as sustaining the prescription of release from liability for willful conduct in section 276(2).

B. \textit{French Law}

In line with the approach adopted by English and German law, French law controls exemption clauses only in the context of standard contracts. The prevailing view in France is that the abuse of economic power by means of standard contracts calls for vigorous legislative intervention. However, since French law lacks an overall statutory system regulating the use of exemption clauses, the task of controlling their use often falls upon the courts. One principle which can be distilled from French judicial decisions is that exemption from liability clauses will not be permitted to prevent the imposition of liability for gross negligence and bodily injury occasioned by negligence. In other cases, as, for example, instances where liability is sought to be attached for negligent damage to property, an exemption clause is permitted to have limited force, resulting usually in merely shifting the burden of proof of sustaining the clause's reasonableness to the defendant.

The approach adopted by the French to the problem posed by exemption clauses is consistent with the prevailing attitude in French law that the rules governing tort liability are inherently part of public policy and therefore \textit{jus cogens}. Moreover, section 1134(3) of the Code Civil also prescribes a good faith requirement in the performance of a contract, which has been construed as further justifying judicial refusal to enforce onerous exemption clauses.

\textsuperscript{88} See the authorities cited \textit{id}. 
IV. ISRAELI LAW.

A. Statutory Control

In Israel, the dominant factor in determining the validity of an exemption clause hinges on the effect of various statutory provisions. Thus, freedom of contract has been subordinated in many areas to statutory regulation respecting permissible contractual terms. Notwithstanding this fact, Israeli courts require that the legislature must have clearly indicated its intention to supervene the freedom of contract principle prior to denying private parties the power to prescribe their own terms. In the exemption clause context, legislative control of such clauses in Israel arises from two sources: the direct negation of their validity in many circumstances, and the mandatory inclusion of certain statutory provisions in contracts.


For half a century before the enactment of current Israeli statutes in 1973, section 64(1) of the Ottoman Civil Procedure Code controlled the validity of exemption clauses in Israel. This section provided for both freedom of contract and certain limitations upon that freedom. Section 64(1) recognized the validity of all proper contracts for value between the parties so long as the contract was not in conflict with any specific law and, further, not in conflict with public morality and public order.

Today the same idea respecting the principle of freedom of contract and specific limitations thereon is embodied in sections 24 (the principle) and 30 (the limitations thereon) of the

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39 See, for example, § 77 of the Companies Ordinance.

40 See § 13(c) of the Pledges Law, 1967; § 16 of the Sales Law, 1968; § 30 of the Joint Investments Trust Law, 1961; and § 131 of the Tenant Protection Law (Consolidated Version), 1972.

41 This fact was true unless it is assumed that the power to set aside an unreasonable exemption clause is an inherent power, "axiomatic from the very judicial function." See Zim v. Mazier, 17 P.D. 1319, 1454 (1963) (Witkon, J.). The different approaches to this assumption come from a different understanding of freedom of contract: is it to be broadened so as to oblige the courts to recognize unreasonable contractual terms?
Contracts (General Part) Law of 1973. Theoretically no basic difference exists between the provisions of section 64 of the Ottoman Code and those of sections 24 and 30. Owing to the basic similarity between section 64 and the new provisions of the 1973 Act, this discussion focuses initially on the operation of section 64, on the assumption that the rules applied thereunder will continue to be applied in the future.\(^\text{42}\)

In order to avoid the operation of an exemption clause under section 64, the party seeking avoidance had to show either the existence of pertinent prohibitory legislation or, alternatively, that the clause was contrary to public morality or public order. The Standard Contracts Law of 1964 well illustrates the type of prohibitory legislation upon which such an avoidance may be based, and further typifies the Israeli legislature’s vigorous statutory intervention designed to control the use of exemption clauses. Under this law, the power vested in the courts to avoid the operation of exemption clauses — created by the use of broadly-worded authorization — is additional to the power vested with the judiciary under general contract law. Thus, any clause not within the ambit of section 14 of the Standard Contracts Law may still be susceptible to general control.\(^\text{43}\)

If a plaintiff is unable to predicate avoidance of an exemption clause upon an express statutory bar, he may nevertheless seek to avoid the operation of such a clause on the grounds it violates either public morality or public order. Under section 64 of the Ottoman Code, “public morality” was defined in a restricted and precise sense; there was no presumption that an onerous exemption clause was necessarily against public morality.\(^\text{44}\) In contrast to the narrow, precise scope accorded the “public morality” concept, “public order” was an obscure

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\(^\text{42}\) This presumption seems realistic within the framework of the principle of public policy more than in other areas of contract law. § 64 was not construed in Israeli law in relation to its historical source but the courts have endeavored to give it original content. It is now necessary to do the same with all the provisions of the Contracts (General Part) Law.

\(^\text{43}\) § 20 of the Standard Contracts Law.

\(^\text{44}\) See Weirauch v. Director of Israel Lands 23 P.D.(I) 491, 493 (1969); which states that a plea of immorality will not be entertained in the narrow field of private civil law.
notion whose connotations were left to the broad discretion of the courts. The case law regarding the nature of the public order concept lends support to the conclusion that in Israel, unlike England, the public order provision of section 64 may be utilized to void unreasonable exemption clauses. However, the courts currently appear reluctant to base avoidance of an exemption clause on these grounds, despite apparently having power to do so under sections 24 and 30 of the Contracts Law of 1973. Instead, the prevailing interpretation of public order is that found in the case of Zim: that avoidance of an exemption clause hinges, first, upon its being found unreasonable (social or moral undesirability), and second, by reference to the context in which the contract was made (i.e., standard contracts). However, the broad rule which Judge Silberg set forth in Zim was restricted by the two other judges who sat.


The Contracts (General Part) Law of 1973 goes beyond a simple reenactment of the basic notion underlying section 64 of the Ottoman Civil Procedure Code—that of avoiding the

45 E.g. Fox v. Etzioni 11 P.D. 358, 361 (1957); Yahad v. Shimanski, 17 P.D. 23 (1963); Riesenfeld v. Jacobson, 17 P.D. 1012 (1963); Zim, supra n.41.

46 Cf. Eörsi, supra n.3, at 226, describing direct control by means of ordre public as "a rare case."

47 Supra n.41.

48 Cf. Shoham v. Feiner, 14 P.D. 1451 (1960), deciding that a clause exempting from liability for damage to property is valid in point of public policy.

49 See also State of Israel v. Hadad, 24 P.D.(I) 7, 12 (1970); Gideon v. Hevra Kadisha, 27 P.D.(I) 10, 20 (1973). Nonetheless, the suggestion—but more than that—in local case law may be noted that the courts are ready to inquire into reasonableness as a condition of the validity of contractual terms. In Gonshiorovitz v. Mifal Hapayis, 19 P.D.(III) 286, 306 (1965), Cohn, J. observed that he had no need to inquire into the reasonableness of the conditions involved in that case because he held them void by reason of no notice having been given of them. It may be inferred that in principle he would be prepared to consider the reasonableness of exemption and other clauses. See also Zim, supra n.41 at 293 per Witkon, J.: "the main thing is that the condition upon which the respondent relies is in itself reasonable in my view."

50 See cases cited id.
operation of a contractual clause only if it is contrary to public policy. While the 1973 Act does adopt this notion, the law also introduces a new element of great significance in local contract law: the obligation to act in customary manner and in good faith both when negotiating a contract (section 12) and when performing it (section 39). A like obligation had earlier been imposed with regard to particular classes of contracts by various enactments. With the passage of the 1973 Law, this principle of good faith and customary manner now governs all contractual relations and even extends to pre-contractual situations.

In the exemption clause context, Continental law has construed good faith in terms of balancing the interests of the parties. By way of contrast, Israeli law respecting standard contracts exercises control over exemption clauses under the Standard Contracts Law with no specific reference to good faith. However, application of the general good faith provisions of the 1973 Act is not barred as an addition to the powers of control provided over standard contracts by section 14 of the Law. Instead, the Standard Contracts Law merely provides an additional cause of action without derogating the existence of other statutory causes of action. This fact raises the possibility that the good faith principle may occasionally be brought into play. It could arise, for example, when an exemption clause is not subject to the provisions of the Standard Contracts Law, including section 14 therein, because of some restriction contained in the latter statute. Also, utilization of the good faith principle may be implicated when, after the exercise of judicial power under section 14 is exhausted by exercising control over the drafting of the terms of the contract, it becomes necessary to control the performance of the contractual terms.


52 This result may arise because § 14 of the Standard Contracts Law extends only to "restrictive terms" in standard contracts which the court finds to be "prejudicial to the customers."
The introduction of the good faith principle through positive legislation provides the Israeli courts with an effective means of judicially controlling the use of exemption clauses in standard contracts. However, the legislative approach incorporated in the 1973 Law, which applied the good faith requirement to two separate stages of the contractual relation—the making of the contract and its performance—requires investigation into the proper focal point for the exercise of control.

Since exemption clauses fix the scope and content of contractual obligations, section 12, and not section 39, of the 1973 Law should be regarded as this focal point. Although the obligations of good faith and customary manner appear in both sections, section 39 relates to the dynamic stage of contractual performance, whereas section 12 pertains not only to the dynamic stage of contractual negotiations, but also to the static stage of the drawing up of the contract.

Since an exemption clause is part and parcel of a contract with all its other stipulations, it is impossible to isolate an exemption clause and treat it separately from the contract as a whole. Hence, no plea under § 39 of lack of good faith will succeed against a party whose liability is limited from the outset. Once such good faith obligations have been restricted in advance by the inclusion of an exemption clause, the contracting party against whom the exemption clause is operative cannot complain that the other party is not acting in good faith, since such a contention would impose a contractual condition contrary to those contained in the contract itself. A contrary result would demand the performing party to carry out—and in good faith!—obligations he has not assumed. Thus, if exemption clauses restrict and exclude otherwise operative contractual obligations ab initio, reliance upon an exemption clause cannot be treated as bad faith performance. For example, a seller, released under contract from liability for defects in the

goods sold, does not perform the contract in bad faith if he delivers defective goods. His liability has from the outset been defined as extending only to the delivery of goods, and if there is any reasonable foundation for the claim against him, it lies not in the manner of performance but solely for non-performance.

Under the prevailing approach which treats the contract and exemption clauses as separable matters, it might be argued that a party who in the course of performance endeavours to release himself from a positive contractual obligation by relying on an exemption clause does not carry out the contract in good faith. But this argument presents the logical and practical difficulties discussed immediately above. It should also be remembered that good faith is a "residual category" of law, and therefore recourse to it can and should be made only after the exhaustion of the more specific provisions which exist in the contract itself. The fact that an exemption clause appears in a contract does not by itself provide a basis for pleading lack of good faith. Notwithstanding this fact, it is also clear that a party relying on a latent exemption clause cannot be said to be acting in good faith. In this latter situation, the party invoking the latent exemption clause stands in a position similar to a party who gives his counterpart false information about the range and content of an exemption clause or who exploits his superior economic position to dictate onerous terms. The avoidance of such terms, although reliance on them is not in good faith, should be effected under the provisions of law which are designed to apply to the given situation — i.e., the requirement of notice, liability for false representation, and application of standard contracts law.

54 This approach is employed mainly in the area of restraint of trade. See Yahad v. Shimanski, supra, n.45. Zim, supra, n.41 is also only explicable in the light of the possible avoidance of a single term under § 64(1).

55 See also, G. SHALEV, supra n.53 at 22-4.

Section 12 purports to introduce the concept of *culpa in contrahendo,*\(^{57}\) under which damages may be obtained from a party whose faulty conduct in the pre-contract negotiations has led to the invalidity of the contract or, alternatively, prevented its completion. The essential yardstick is good faith in the pre-contract relations, and in this respect the principle differs from that of English law under which negotiations are undertaken at the parties’ risk.

Since the local Israeli courts have not given attention to the proper construction of section 12, any comment on its scope is at best a temporary guide. It is as yet difficult to say whether the section will be construed by itself according to its own terms or in the context of other laws which constitute its historical source.

In any event, it is submitted that section 12 should not be restricted solely to those cases where an effective contract has not been made.\(^{58}\) The novelty of *culpa in contrahendo* is that it enables contractual liability to attach in the absence of a contract. However, the relevant situation in the exemption clause context is where a contract has indeed been formed but an attempt is made to extend the contractual relation, logically and chronologically, from before the time the contract is operative to the time of its formation. If no contract exists, any plea based on an exemption clause will, of necessity, fail. The difficulty in this area arises when there is in fact a contract and a party relies on an exemption clause in seeking to be released from liability. In such situations, the issue is whether this plea is prevented by resort to a duty of good faith.

The customary manner and good faith terms of section 12, like its underlying concept, enables the good faith requirement to be extended back to the stage of the formation of the contract. The section accordingly allows for a party to contend that an attempt to restrict liability is inherently contrary to good faith, and consequently the operation of an exemption

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\(^{57}\) See Explanatory Notes to the Bill of the Contracts (General Part) Law. *But see Shalev, "Good Faith in Negotiations,"* 7 Mishpatim 118 (1976).

\(^{58}\) This is also to be inferred from the use of the disjunctive ‘‘or’’ in § 12(b).
clause may be avoided even after a contract containing an exemption clause has been made. The application of the good faith principle to the contract formation stage as well as to the performance stage renders complete control and regulation of exemption clauses possible. This result is in accordance with the basic position that such clauses are also to be regarded as means for determining the range of contractual liability.

While it initially appears irrelevant whether section 12 or section 39 is applied since both prescribe good faith, this assumption is incorrect since cases may arise in which section 39 does not apply, necessitating the application of section 12. From a practical standpoint, the difference in the applicability of these sections stems from the fact that while a party not acting in good faith in performance of a contract is liable for compensation in the ordinary amount under the Contracts (Remedies for Breach of Contract) Law of 1970, in a similar setting section 12 prescribes a lesser amount of damages when the "breach" occurs during the making of the contract.

V. Evaluation of the Treatment to be Accorded Exemption Clauses.

A. What Authority Should Exercise Control over Exemption Clauses?

A central question in exercising control over contractual provisions concerns determining what is the proper authority for exercising such control. The choice lies between employing statutory or judicial control. While both approaches have distinct advantages and disadvantages, the analysis in this context focuses on specific points characteristic of control over exemption clauses.

Two preliminary observations are in order. The first observation is that identifying the question of the proper kind of control as being synonymous with a choice solely between judicial and statutory authority for exercising such control is apt to be misleading. This fact arises because control outside
the realm of law is also possible. For example, control over contractual provisions by means of economic and social checks and balances may be more effective than either judicial or statutory control. Thus, an active, powerful and knowledgeable consumer protection organization may result in this kind of control. However, relieving the courts and the legislature from the burden of designing control mechanisms by trusting that control will be forthcoming from the play of a free market does not, in reality, appear desirable or rational. Instead, such an approach would be more likely to lead to unbridled competition, oppression and exploitation. At the opposite pole from the approach relying solely on the market mechanism to control the contents of contractual provisions lies the paternalistic view that the state and its organs should be completely entrusted with protecting the legitimate interests of the citizen. This approach also appears to be undesirable and irrational since it undermines the basic presumed validity of the freedom of contract principle. Moreover, sufficient guidelines for exercising control, may well be adequate to obtain the results sought for short of such complete governmental pre-emption.

The second preliminary observation is that an attempt to sharply distinguish between judicial and statutory control gives rise to a number of conceptual difficulties. Part of the difficulty stems from the fact that judicial control often derives its force and authority from statutory enactments, while conversely, statutory control is always ultimately enforced by the courts. However, this interrelationship is not always in force. For example, courts may exercise control of contractual provisions solely by virtue of their inherent powers or by virtue of a public policy rule not derived from any statutory source. Similarly, the legislature may assert its authority and exercise control by means of some non-judicial mechanism such as an administrative body.

In light of these considerations, a question arises whether statutory provisions designed to control exemption clauses which are implemented by the courts should be characterized
as judicial or statutory control. Resolving this issue seems to require reference to the substance of the provisions. Where the provision leaves room for the court’s discretion, the control should be characterized as judicial, since avoiding or upholding the exemption clause is primarily a function of the adjudicative process. Where the statutory provisions prescribe avoidance under well-defined conditions either directly or by way of prescribing certain stipulations, the control should be characterized as statutory, since the courts in such a setting merely enforce the legislature’s fiat.

The recommendations of the English Law Commission\textsuperscript{59} are instructive of the difference of the modes of control. As noted earlier, the Commission distinguished between consumer and business sales. With respect to consumer sales, the Commission recommended that a number of the provisions of the Sale of Goods Act be made \textit{jus cogens} without giving private parties the power to contract these terms away. Thus, the type of control exercised in such situations is properly characterized as statutory. With respect to business sales, by way of contrast, the Commission recommended control by application of a broad reasonableness test assuming, initially, that control was determined necessary. The type of control exercised in the business sale context is therefore properly deemed judicial. Thus the Commission suggested two differing systems of control to meet two differing situations: one which would negate the validity of exemption clauses by precise criteria established by statute — statutory control — and the other vesting a wide discretion in the courts to avoid or uphold exemption clauses, guided by broad general standards — judicial control.

1. \textbf{Statutory Control}.

Under a statutory system, prior control is exercised in two modes — by declaring that certain exemption clauses are void,\textsuperscript{60}

\textsuperscript{59} The Law Commission Report No. 24, discussed at text and n.6-13, supra.

\textsuperscript{60} \textit{See}, for example, in English law, § 151 of the Road Traffic Act, 1960, and in Israeli law, § 77 of the Companies Ordinance.
or by providing for certain minimum obligatory terms which cannot be contracted away.61

The main advantage of this system of control is that it provides stability and legal certainty. It enables people to conduct their affairs intelligently, to arrange their rights and obligations with some clarity, and to obtain sure legal advice regarding the validity of the contracts they make, thus avoiding unnecessary litigation to the benefit of all concerned.

However, this system also has certain disadvantages. First, legislation is political in character and reflects competing vested interests. Thus, statutory enactments may not adequately reflect the needs of politically weak or unfocused segments of society. Second, legislation is marked by rigidity which, while aiding stability, may further pose a barrier to change such that the legal system may be unable to respond to social, economic and moral changes. Moreover, legislation often lags behind social changes by the time it is finally adopted. In a rapidly changing legal context, such as the exemption clause area, this lag may be fatal for the balance which is sought between the different social forces at play.62 Finally, it is often difficult to accurately frame a statute which will encompass the whole panoply of situations in which it will be justifiable for courts to intervene or refrain from intervening in exemption clauses.

2. JUDICIAL CONTROL.

As noted earlier, an alternative to express statutory control of exemption clauses is judicial control. In this type of scheme, the courts utilize general legislative authorization, usually set forth in the broad undefined terms of reasonableness, conscion-

61 See, for example, §§ 4 and 12 of the Supply of Goods (Implied Terms) Act, 1973 in English law, and in Israeli law, § 13(c) of the Pledge Law, 1967 and § 16 of the Sale Law, 1968.

62 Furthermore, the total avoidance of different kinds of exemption clauses may lead to inflationary tendencies in the economy. Presumably, exemption clauses which are open to such avoidance will be those in standard contracts, that is to say, contracts one party to which is normally a consumer. The reaction of the manufacturers or suppliers to avoidance will be two-fold, insurance against claims and shifting the cost of insurance upon the consumer by increasing prices.
ability, fairness and/or good faith, to intervene into the unjust operation of exemption clauses.

Employing such a scheme of judicial control avoids turning contract law into a closed system by providing "safety valves" for judicial intervention in an appropriate setting. Although various denominations are given to the standard applied in schemes utilizing judicial control—for example, reasonableness, conscionability, good faith—the exact name given the standard does not change the essential content of the test. Substantively all these tests endeavour to balance the interests of the parties in the light of the moral principles which positive law seeks to embody.

The advantage of utilizing judicial control by use of pliant standards and referring to the circumstances of each case is that it leaves the courts a broad area for maneuver. It thus allows the law to change and evolve in step with current social mores. However, the major disadvantage of this system is that it militates against certainty and stability in contractual relations. Thus, the main advantage conferred by statutory control is lost by utilizing judicial control. This disadvantage should not, however, be overstressed. The legitimacy of certainty and stability must be examined and elucidated. While the ideals of certainty, stability and clarity each has its place, they are not the sole end of the law. A too-insistent demand for certainty in contractual transactions may well result in a failure to achieve substantial justice in a given case. Thus, the possible adverse effect of creating uncertainty, inherent in the exercise of broad judicial discretion, must be balanced against the equally important interest of doing justice in the framework of contractual law.

A further relevant consideration in this area is whether the absence of such broad judicial control over exemption clauses results in certainty, clarity and stability. In current English law, judges have exhibited helplessness in the face of onerous exemption clauses and have been compelled to resort to fictions to evade rigid rules and outdated doctrines to reach equitable results. In this attempt to reach an equitable decision, great
confusion and uncertainty has often followed. Such a situation would seem to be improved by granting the courts express discretionary power to control exemption clauses. Indeed, as noted earlier, this conclusion has led the legislature in England recently to intervene in this direction with regard to certain contracts for the supply of goods.

Contrary to the indirect control which has until now existed in England, it is submitted that legislation introducing open and direct judicial control over exemption clauses is both proper and necessary in modern economies. This conclusion finds support in the proposition that while it is difficult for courts to elaborate clear guidelines for exercising control over exemption clauses when courts are forced to resort to legal fictions to evade unjust results, explicit guidelines can more reasonably be developed when courts are vested with express authority to intervene into the operation of such clauses. Judicial recourse to broad, flexible concepts like reasonableness, good faith and fairness will tend to produce a coherent body of substantive law such that the element of uncertainty will diminish. The case-by-case development of such standards will reduce uncertainty and help to achieve the most suitable balance between the contesting demands of stability and justice in the field of contractual relations.

In this light, the proper test to be applied to exemption clauses is one which employs a pliant measuring rod adaptable to the varying conditions of commerce and the circumstances of each individual case and, further, which invites judicial creativity within the bounds of general empirical guidelines.

Under this proposed general statutory standard, the courts are able to avoid those exemption clauses which are unreasonable, unconscionable or contrary to good faith. Moreover, the validity of exemption clauses will also hinge on the particular circumstances of each case. By their very nature these circumstances differ from instance to instance and examination of each pertinent factor is a proper function of the court. Notwithstanding the variety of situations a court may be required to investigate, reference to the existing case law enables the
following elements to be distilled as constituting relevant factors in determining the validity of an exemption clause.\textsuperscript{63}


The relevance of the relative bargaining power of the parties stems from the same factors which have led many countries to distinguish between those exemption clauses contained in standard sales contracts and consumer sales contracts.\textsuperscript{64} Where the respective bargaining powers are seemingly in balance, and the contracting parties negotiate at arm's length, a presumption arises that the exemption clause is a valid exercise of the principle of freedom of contract. In such settings, the clause's validity should be initially sustained in order to preserve the remainder of freedom of contract. By contrast, quite different considerations should apply in situations involving standard or consumer contracts. Gross inequality of bargaining power in this context negates the presumption that the exemption clause reflects freely arrived at contractual terms. Constructive criticism must, however, reconcile itself with existing law and treat the nature and kind of contract involved as only one of many elements — albeit a highly relevant one — in any examination of the validity of an exemption clause.

(II) Formulation of the Exemption Clause.

In examining the context in which the exemption clause was formulated, the presumed difference between standard and ordinary contracts is also conspicuous. With ordinary contracts, there is nothing to prevent recognition of a broadly drawn exemption clause, provided that it clearly reflects the parties' intention to secure or grant exemption from a given

\textsuperscript{63} See also Law Commission Report No. 24, \$ 113; \$\$ 4 and 12 of the Supply of Goods (Implied Terms) Act 1973. These sections set out a number of guidelines for the consideration of the courts, among them the circumstances of the case, when ruling on the reasonableness of exemption clauses.

\textsuperscript{64} The last was adopted throughout by English law in the Supply of Goods (Implied Terms) Act, and it may be used beyond the area of sale contracts. See 121 N.L.J. 873-74 (1971).
liability. Hence obscure or ambiguous drafting will form an obstacle to recognizing the clause's validity, either in whole or in part. In standard contracts the impact of the circumstances under which the contract was formulated differs from that in the commercial contract context, for it is submitted that exemption clauses should be wholly disallowed even if perfectly drafted. This conclusion follows from the fact that such clauses are usually imposed upon the consumer against his will and in a setting in which he has no recourse to other means of obtaining the goods sought.65

(iii) Notice.

When a party has notice of the existence and content of an exemption clause, a presumption arises that the contracting party has acquiesced in its terms. This fact, in turn, tends to buttress the clause's validity and thus prevents an assertion that the clause should be set aside. Conversely, the absence of notice raises a presumption against a party relying upon an exemption clause that the undisclosed exemption clause is invalid.66

(iv) Commercial Usage.

The normal course of dealing in a particular branch of business should raise an inference that a liability exemption which conforms with normal usage is valid.

(v) Previous Negotiations.

The existence of similar terms in previous contracts between the parties also creates an inference of implied acceptance of an exemption clause.67

(vi) Insurance.

A number of questions arise in the exemption clause setting which are relevant in deciding whether the clause is valid: Is insurance possible in the circumstances? Which party is ex-

65 See ShaLev, supra n.53, p. 36 et seq.
67 E.g., Spurling v. Bradshaw, 1 W.L.R. 461 (1956).
pected to insure against the risk of an exemption clause? What cost does insurance entail? In general an exemption clause will be considered reasonable where insurance is available to protect the party against whom the exemption clause is asserted. In commercial contracts, the bargaining powers of the parties being presumably equal, insuring against breach of contract is usually available in the normal course of trade. 68

(vii) Fair Alternative.

When a fair alternative exists to a contract having an exemption clause — i.e., the possibility of obtaining a contract without the clause, even if it costs more — some basis is present for assessing the reasonableness of the exemption clause. A party choosing a cheaper contract containing an exemption clause may have consciously chosen to assume the risk of loss. This element should be considered in light of the insurance element, since the cheaper contract may possibly have been chosen because of the possibility of insuring against the risks involved in the exemption clause.

(viii) The Kind of Risk.

Limitation of or exemption from contractual liability will appear more reasonable when the risk is unusual in the context of the particular contract involved. No obvious ground exists for not respecting the wish of a person exempting himself from a liability which is not a “natural” part of the obligation he assumes, particularly when this wish has taken contractual form.

(ix) Kind of Obligation.

It is more reasonable to sustain an exemption clause which relates to secondary or minor obligations than one which goes to the heart of the contract. If the broken obligation is a major

68 For instance in a carriage contract, consideration should be given to the question of who normally bears the burden of insurance against the risks involved. It may be cheaper for the passenger or the owner of the goods carried to pay the marginal insurance than be charged more for the carriage.
one the first reaction of the courts will be to deny validity to exemption from liability since to do so empties the contract of all content and turns it into a mere declaration of will.

(x) **Interest Affected.**

A clause exempting a party from liability for injury to property will secure judicial recognition more easily than one regarding injury to the person.\(^69\) This is a matter of general outlook which prizes a person's bodily integrity above his property interests.

(xi) **Degree of Fault.**

In exercising control the courts will incline to attach great importance to the question whether the exemption goes to loss caused negligently or willfully, or without fault.\(^70\) Clauses of the latter kind are of course more reasonable than the former.

(xii) **Consideration.**

The presence of consideration will enhance the status of an exemption clause. A party agreeing to release another from liability in return for some benefit under the contract will find it difficult to plead lack of reasonableness.\(^71\)

(xiii) **Subject Matter of the Contract.**

This is another element to be taken into account in assessing the reasonableness of an exemption clause. For instance, an exemption clause in a sale of second-hand goods may well be treated as reasonable in contrast to one in a sale of brand-new goods.

(xiv) **Effect of Avoidance.**

Exemption clauses are a legitimate means of spreading risks and allocating loss, and they are legitimate for maintaining

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\(^69\) See note 21, supra.

\(^70\) Cf. Restatement of Contracts, §§ 574-75. See also Dun and Bradstreet v. A.G., 46 P.M. 92, 100, 104 (1965).

\(^71\) For example, such a benefit may be a reduction of price, sometimes to a minimum. Cf. Genys v. Matthews, 1 W.L.R. 758 (1966) and Gore v. Van Der Lann, 2 Q.B. 31 (1967).
certain standards. The consequence of avoidance must therefore be taken into account; namely, who will shoulder the burden and bear the risks?

VI. CONCLUSION.

Examining a variety of systems employed to control the unjust operation of exemption clauses reveals a wide diversity in approaches. However, the salient factor to be noted from this investigation is that each examined system has concluded that justice requires that some degree of control over exemption clauses must be exercised. It is submitted that the proper approach to adopt in most cases is one which allows courts broad discretion to avoid the operation of clauses they deem unreasonable and inequitable. Such an approach properly balances the interests of the parties involved, as well as allowing the broadest possible scope to the freedom of contract principle in the context of exercising some degree of control over exemption clauses.