Standard Form Contracts- A Comprehensive Analysis*

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"Standard form Contracts" are 'take it or leave it' contracts i.e a contract signed between two parties that has no room for negotiation. The customer is in no position to renegotiate the standard terms of the contract and the company's representative usually does not have the authority to do so. Such contracts are also known as- "Contracts of adhesion"which means that the individual has no choice 'but to accept; he does not negotiate, but merely adheres', "Compulsory Contracts", they being a kind of imposition; and "Private Legislation", they being a kind of code of bye-laws on the basis of which the individual can enjoy the services offered.
For large organizations, it is very difficult to draw up a separate contract with every individual. As Kessler puts it Therefore, they keep printed forms of contract i.e SFC's containing a large number of terms and conditions in "fine-print" which restricts and often excludes the liability of the other party under the contract. Briefly, one can say that the SFC's have arisen as a result of:

a) The convenience in having a printed form;
b) The fact that one party stands in a position where the terms dictated by it can be imposed upon the other, notwithstanding the will of the other, and since the terms of such bargains are known to the former even prior to the entry into the contract, the former prints it out and keeps it ready, waiting for the persons to come forward and enter into such contracts; and
c) The willingness of the customer to allow the provider and his or her perceptions as to the likelihood of the contract being enforced to the latter.

III. **Reasons For Acceptance Of Standard Form Contracts:**
There are a number of specific reasons why such terms and conditions laid down in the contract are accepted, which are as follows:
a) SFC's are rarely read: Such contracts are always printed in fine print and written in complicated legal language which most of the times seems irrelevant to the common mass. And

such contracts are always on "take it or leave it" basis. Coupled with the large amount of time needed to read the terms, the expected payoff from reading the contracts is low and very few people read it.
b) Access to the full terms may be difficult or impossible before an acceptance: Often the document being signed is not the full contract; the purchaser is told that the rest of the terms are in another location. This reduces the likelihood of the terms being read and in some situations, such as software license agreements, can only be read after they have been notionally accepted by purchasing the good and opening the box.
c) Boilerplate terms are not salient: The most important terms to purchasers of a commodity are the price and quality which is generally understood before the SFC is signed so the other terms which may be exploitative in nature are not read at all.
d) There may be diverse social pressure to sign: SFC's are signed at a point when the main details of the transactions have either been negotiated or explained. Social pressure to conclude the bargain at that point may come from a number of sources. For eg. If the purchaser is in front of a queue there is additional pressure to sign quickly or the salesperson may imply that the additional terms are "just something that lawyers want us to do", and in a hurry the purchaser concludes the transaction by signing the SFC.
e) SFC's may exploit unequal power relations: If the commodity which is being sold using a SFC is an essential one for the purchaser or appeals to the purchaser such as a rental property or a needed medical item, then again the "take it or leave it" condition has an impact and the purchaser in many cases has no choice but to buy that commodity.

IV. **The Legal Issues Arising And The Protective Devices:**
As explained above with reasoning an individual can easily be exploited through the SFC's by mere insertion of certain clauses which will completely exclude the seller from the liability. Now, some interesting legal issues arise in these circumstances:

· Generally speaking, what is the legitimacy/validity of such a clause in a SFC?
· What are the limits on its enforceability?

A problem may arise in proving the terms of the agreement where it is sought to be shown that they are contained in a contract in a printed form i.e in some ticket, receipt, or other standard form document. Chitty states that:
"The other party may have signed the document, in which case he is bound by its terms. More often, however, it is simply handed to him at the time of making the contract and the question will then arise whether the printed conditions which it contains have become terms of the contract. The party receiving the document will probably not take trouble to read it, and may even be ignorant that it contains any conditions in at all. Yet standard form contracts very frequently embody clauses which purport to impose obligations on him or to exclude or restrict the liability of the person supplying the document. Thus it becomes important to determine whether these clauses should be given contractual effect."

The individual therefore deserves to be protected against the possibility of exploitation inherent in such contracts like **reasonable notice, contractual document which should be contemporaneous with the contract, no fraud or misrepresentation.**

5. **Theory Of Fundamental Breach:**
This is another method to protect the weaker section from exploitation. It is a method of controlling unreasonable consequences of wide and sweeping exemption clauses. Even where adequate notice of the terms and conditions in a document has been given, the party imposing these conditions may not be able to rely on them if he has committed a breach of contract which can be described as "fundamental". This has been laid down by Lord Denning LJ in J. Spurling Ltd. V Bradshaw. The Supreme Court of India also emphasized on the same rule in B.V. Nagaraju v Oriental Insurance Co. Ltd.

"Every contract contains a 'core' or fundamental obligation must be performed. If one party fails to perform this fundamental obligation, he will be guilty of a breach of contract whether or not any exempting clause has been inserted which purports to protect him." In Davies v Collins it was held that the mere fact of the particular limitation clause in the contract was sufficient to exclude any right to the sub-contract the performance of the substance of the contract. Limitation clauses of this kind do not apply where the goods are lost not within the four corners of the contract but while something was being done which was outside the terms of the contract altogether, or when loss takes place in the course of some operation which was never contemplated by the contract at all.

However, in a few cases the court did not find the bailees liable for any fundamental departure from the main purport of the contract. For eg. In Giband v Great Eastern Railway a cycle deposited at a station of the defendant railway company was not infact taken to the cloakroom but was left in the booking hall itself and from there it was stolen. It was held that the company is protected by the clause in the ticket which exempted the company from liability. The Court of Appeal could find no fundamental breach as it was no part of the contract that the cycle should be necessarily stored in the cloakroom. In Suisse Atlantique Societe D' Armement S.A v N.V Rotterdamsche Kolen Centrale Lord Wilberforce observed that the expression 'fundamental breach' is used in the cases to denote two quite different things, namely:
· A performance totally different from that which the contract contemplates,
· A breach of contract more serious than the one which would entitle the party merely to damages and which would entitle him to refuse performance or further performance of the contract.
Resort to fundamental Breach is now no longer necessary:
It is now no longer necessary to resort to the theory of Fundamental Breach as the same result can be attained by resorting to the test of reasonableness under Section 11 of the Unfair Contracts Terms Act, 1977 which says that in respect of any loss caused by the breach of contract, any restricting or excluding clause shall be void unless it satisfies the requirement of reasonableness. A term will be regarded as reasonable if it is "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have t been known to or in the contemplation of the parties when the contract was made."

Removal of Simpliciter Clauses in Contracts of Employment
If in a contract of employment offered by the Government corporation, a term provides for the removal of a permanent employee without inquiry then it is regarded as unreasonable. The same was laid down by the Supreme Court in Central Inland Water Transport Corpn v B.N Ganguly

Compromise of existing Contract

The Unfair Contract Terms Act, 1977 (English) aims invalidate exclusion clauses in the strict sense, its clauses in a contract which modify prospective liability. The Act does not affect retrospective compromises of existing claims. Section 10 of the Act does not apply to a contract to settle disputes which have arisen concerning the performance of an earlier contract. And it even does not apply where the parties to the earlier and the subsequent contracts are the same. The same was laid down in Shrilekha Vidayarthi v State of U.P

6. **Strict Construction – Contra Proferentem:**
The exclusion clauses are construed strictly, especially when a clause is so widely expressed as to be highly unreasonable. If there is any ambiguity in the mode of expressing an exemption clause, then the clause is resolved in the favour of the weaker party, i.e the decision will be against the party who inserted it- contra proferentem.

To explain it in a better manner, one can say that where the words used in an exclusion clause are capable of having two constructions, a wider construction and a limited construction, then the limited construction would be preferred, because the rule of law is that "every exception clause is to be interpreted, in case of ambiguity, Contra Proferentem". This means that "if there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it…"
Interpretation of Price Review and Escalation Clauses
In a Supreme Court case, Delhi Cloth and General Mills v Rajasthan State Electricity Board, a clause in a contract for supply of electricity provided:
"The rate of supply as determined in Clause 17 shall be reviewed every fifth year provided that the component of the cost of generation out of the total cost varies by 25% or more"

The consumer contended that this was a price escalation clause and would permit increase from the base price only according to a rise in the cost of production. The Apex Court did not accept this.

Explaining the distinction between an "escalation" clause and a "price" review clause, A.K Sen J said:
"An escalation clause, according to the accepted legal connotation means a clause which takes care of the rise and fall of the prices in the market, whereas the right to review confers the power to revise the rate of supply. The word 'review'necessarily implies the power of the board to have a second look and to so adjust from time to time its charges so as to carry on its operation under the Act without sustaining a loss."

The court also cited the following passage from CORPUS JURIS SECUNDUM:
"A contract giving one of the parties the right to vary the price is not unenforceable for lack of mutuality where the right is not an unlimited one, as where its exercise is subject to express or implied limitation, such as that the variation must be in proportion to some objectivity determined base, or must be reasonable, and this rule has been applied to contracts containing so called 'escalator' clauses"

7. **Liability In Torts:**
Even if the exemption clause excludes all sorts of liabilities under the contract, it may not exclude liability in Tort. Consider the following case:
The plaintiff hired a cycle from the defendants. The defendants agreed to maintain the cycle from the defendants. The defendants agreed to maintain the cycle in working order and a clause in the agreement provided: 'nothing in this agreement shall render the owners liable for any personal injuries…' while the plaintiff was riding the cycle the saddle tilted forward and he was thrown and injured'
The court held that even though the clause exempted the defendants, though negligent from their liability in contract, it did not exempt them from liability in negligence.
It is, however, open to the parties to exclude liability even for negligence specific words or necessary implication. The same was laid down in Ruther v Palmer. However, the outcome of such cases would now be different owing to the (English) Unfair Contract Terms Act, 1977, which expressly provides that any clause in a contract which excludes or restricts liability for death or personal injury resulting from negligence shall be absolutely void. The expression "negligence" is defined in the Act to mean the breach of any common law or contractual duty.

8. **Exemption Clauses And Third Parties:**
The doctrine of privity of contract states that a contract is a contract only between the parties to it and no third party can either enjoy any rights or suffer any liability under it. This should be applied to the SFC's too.
In Haseldine v C.A Daw & Son Ltd, it was laid down that "that the duty to the third party does not arise out of contract, but independently of it."

Just as a third party is not affected by the terms of a contract, so also a third party cannot claim advantage of them. The only way of conferring the benefit of exception clauses upon employees or sub-contractors, etc seems to be the principle of vicarious immunity or implied contract as suggested by the House of Lords in Elder, Dempster & Co v Paterson Zochonis & Co.

In conclusion, the following statement of Lord Reid regarding the exemption clause in the Suisse Atlantique case may be cited:
"Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them and if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could take it or leave it. If he then went to another supplier, the result would be the same. Freedom to contract must strictly imply some choice or room for bargaining."

V. **Unfair Contract Terms Act, 1977 (English)**
The (English) Unfair Contract Terms Act, 1977 which came into force on February 1, 1978, tries to improve the condition of Business Contracts, by completely overruling certain types of exemption clauses and subjecting all of them to the test of reasonableness. Following are the important effects of the act:
· The Act is the pioneer for providing for the very first time, a statutory definition of the term "negligence" which is applicable to both tort and breach of contract. As per the definition, negligence means:
a) Breach of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;
b) Breach of any common law duty to take reasonable care or exercise reasonable skill (but not a stricter duty); or
c) Breach of the duty of care imposed by the Occupiers' Liability Act, 1957

· The second important effect is that any clause in a contract which exempts or restricts liability for death or personal injury resulting from negligence shall be absolutely void by the virtue of this act.
· The third important effect is that Section 11 of the Unfair Contracts Terms Act, 1977 says that in respect of any loss caused by the breach of contract, any restricting or excluding clause shall be void unless it satisfies the requirement of reasonableness. A term will be regarded as reasonable if it is "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have t been known to or in the contemplation of the parties when the contract was made."

· The four provision deals with the protection of the consumer and those who have been subjected to a standard form contract. The Act says that a person, who deals with a consumer on his own terms, will not be allowed to claim protection of any of the clauses restricting or excluding his liability, if he himself commits breach; nor can he claim specific performance. He can take the advantage of such terms only if such terms are reasonable.

· The last and important effect of this Act extends to the scope of the Supply of Goods (Implied terms) Act, 1973. This Act does not permit in reference to the consumer sales the liability for breach of implied conditions and warranties to be excluded, which will now apply to all contracts under which possession of or property in goods passes from one person to another, for example, contracts of renting or leasing of appliances. In non-consumer contracts the exception clauses will be subjected to the test of reasonableness.

VI. **The 103rd Report Of The Law Commission Of India On Unfair Terms In Contracts**
· Inadequacy of the Indian Statute Law
The 103rd report of the Law Commission of India which was specially constituted to look into this complex matter of application of Standard Form Contracts analyzed all the issues and the relevant provisions and finally gave certain critical views to improve the provisions of the Indian Contract Act, 1872.

The main issue in the application of SFC's as inferred from all the above discussed issues is that of exemption clauses, which provides for exclusion of liability.
The 103rd LCI report clearly expressed that the present Indian Statute Law is inadequate to deal with these issues. As early as 1909, Shankaran Nair J, in his dissenting judgement expressed the opinion that Section 23 of the Contract Act hits such exemption clauses; but this view has been rejected by the High Courts in later decisions, already referred to. There are a few cases where the Courts have valiantly tried to come to the rescue of the weaker party. But the legal basis of such decisions is elusive.

· Recommendation of the Commission
The Commission felt that the solution to this problem would be to enact a provision in the Indian Contract Act,

1872, which will combine the advantages of the (English) Unfair Contract Terms Act, 1872 and Section 2.302 of the Uniform Commercial Code of the United States.

The Law Commission therefore recommended the amendment of the Indian Contract Act, 1872, by inserting the following new Chapter and section:-

Chapter IV-'A'
Section 67A: (1) Where the Court, on the terms of the Contract or on the evidence adduced by the parties, comes to the conclusion that the conclusion that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that or holds to be unconscionable.
(2) Without prejudice to the generality of the provisions of this section, a contract or part of it is deemed to be unconscionable if it exempts any party thereto from—(a) the liability for willful breach of contract, or (b) the consequences of negligence.

VII. **Suggestions For The Improvement In Law With Regard To Standard Form Contracts**
Standard Form Contracts can be utilized as a successful commercial tool if the common mass reads the document properly before entering into the contract. So, the root cause of the problem is the lengthy terms and conditions of the contract, which may include the exemption clause, and which the common mass is not in a habit to read. The following suggestions can help to solve these issues:
1. Any document in the form of a SFC, must have a short summary in the front of a document which the people can read and comprehend before entering into the contract. This summary should include the exemption clause if any, so that the people are aware about it.
2. As it is next to impossible, that the above suggestion will be adhered to in each and every SFC drafted, the Indian Contract Act, 1872 should be amended and a provision for mandatory adherence of the same should be included in the provision.