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Exemption Clauses in Pakistan's Corporate Industry Standard Printed Contracts: An Analysis in Light of Shari'ah and English Law

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ABSTRACT

The objective of this article is to analyze the exemption clauses as available in Pakistan's corporate industry contracts such as insurance, banking and travel industry and their judicial and regulatory controls under the Pakistani, Shari'ah and English contract law principles. Although, the exemption clauses which exclude or limit liabilities of the contracting parties are commonly available in commercial contracts but in Pakistan, mostly these clauses are available in consumer contracts such as insurance, banking and travel industry contracts. This article states that in today's technology-oriented world, the key progress in the contract area is the common use of the standard printed contracts containing large number of exemptions clauses and terms and conditions in "fine print" limiting, exempting or excluding liability of the suppliers in the widest possible terms. Executing standard printed contracts results in provision of exemption clauses causing commercial exploitations and abuses, however, effective statutory and judicial controls in Pakistan by following Shari'ah and English contract law principles can counter these abuses and exploitations.

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Introduction

One of the key developments in today's technology oriented world relates to the use of standard printed contracts by the corporations which include in a "fine print" a large number of terms and conditions[1] limiting or excluding liability of the suppliers[2] in the widest possible terms.[3] Though the use of these contracts with the obvious benefit is to save time of the contracting parties while having business dealings, but, this also is open to abuse as the individual cannot alter those terms; they are there for him to take or leave.[4] Lord Denning pointed out that: *"No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat*." [5]

As we know that the contract law is one of the key structures underpinning the business economy.[6] Similarly, we see that in our society, moving with a contract is generally considered a fundamental phenomenon and right for everyone willing to enter into it and a requisite for building a stable and market-based economy.[7] Like from the important but occasional business transactions, for example, buying a home, car leasing, entering into banking related transactions to a day-to-day commercial matter like buying a sporting event tickets, insurances package, telecom SIMs, the standard printed contracts are there to manage such contractual transactions.[8]

Similarly, when we talk about Shari'ah, there is strong emphasis under Shari'ah to fulfil the agreed obligations under the contracts which are done based on the free mutual consent and no elements of coercion, fraud, misrepresentation and abuse is involved while reaching to the closure of the contract. The Qur'anic injunctions and sayings of the Holy Prophet's (ﷺ) *Sunnah* repeatedly accentuate that the terms of the agreements should be honoured. In Holy Qur'an at many places this word is used such as: *"God will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate oaths."*[9] and *"O ye who believe! Fulfill (all) your obligations (contracts)."*[10] In the commentary from Abdullah Yusuf Ali on the above second verse, it is written as: *"The general principles established are: (1) take no futile oaths; (2) use not God's name, literally or in intention, to fetter yourself against doing a lawful or good act; (3) keep to your solemn oaths to the utmost of your ability; (4) where you are unable to do so, expiate your failure by feeding of clothing or clothing the poor, or obtaining someone's freedom, or if you have not the means, by fasting. This is from a spiritual aspect. If any party suffers damage from your failure, compensation will be due to him, but that would be a question of law or equity."*[11]

In corporate industry standard printed contracts such as insurance, banking and travel industry contracts, the use of exemption clauses is very common and through these clauses, a party to the contract generally seeks to restrict the other contracting party to impose any liability in case there is any negligence in the performance of the contractual liabilities. The bases of the incorporation of these exemption clauses in commercial contracts, are to divide the risks between the contracting parties, however, as their misuse can result into an imbalance between the rights and duties of the

contracting parties, the application of such provisions also come under the legislative controls. It was once suggested by Elizabeth Macdonald that *"those clauses provide a point in which the 'tension' between freedom of contract and the control of unfairness meet"*,[12] but it was stated that in cases where the contracts are individually negotiated and contain the exemption provisions, the general assumption is that they are not harmful.[13] In *Photo Production Ltd. v. Securicor Transport Ltd.*,[14] Lord Diplock held that these exemption provisions to also be similarly treated like the other terms in the contract with the emphasis on the area where there is no liability for a party, so, there will be no obligations. The prevailing approach these days is that such clauses work as a protection to the liability.

This article will critically discuss the use of exemption clauses in Pakistan's corporate industry standard printed contracts especially in insurance, banking and travel industry contracts and their statutory and judicial control through the various techniques of interpretation used by the courts in dealing with exemption clauses. It will further explore how the laws in Pakistan deal with reference to Shari'ah and English contract law principles in relation to the use and enforceability of exemption clauses.

2. What are the Exemption Clauses?

The exemption clauses are contractual terms by which one party attempts to limit, exclude or cut down the scope of his contractual liability for a possible breach of contract for which he would have been responsible in the case such a term was not available in the contract.

3. The concept of the exemption clauses

It is commonly in practice that a party who has a strong bargaining power against the other party, generally incorporates the exemption clauses in the contract in order to exclude his liabilities in the contract while the party who has either no or weak bargaining position is not aware of the legal consequences or outcome of these exemption clauses incorporated in the contract. So, the major issue with the standard printed contracts is that they include terms which either limit the liability of the drafting party or completely exempts the drafting party in case any contractual breach is done due to his negligence and even if that happens, he tries to come under the cover of the exemption provisions.

In all those printed contracts, standard contractual terms are set out for the use by their customers for a similar transaction. It would become impossible to negotiate and then sign a contract with each of their customers. Even if we think for a moment, it is not possible for a big laundry shop, insurance companies, telecommunication companies, logistics, cargo and travel entities to execute a separate contract with each of their customers and travellers, so, the swiftest mode they adopt is to use the standard printed contracts for contracting with their customers and consumers. The primary objective of the standard printed contract as stated above is to save time of

the carriers, bankers and insurers otherwise, it would not be possible if they have to settle terms of each contract, they enter for each of their transaction. However, the other side of the picture is that the corporations when bring these pre-drafted contracts, the other party being weak in position is just required to put his signatures on the space left blank for the signature or on the dotted line and are unable to change the pre-drafted terms of the contract.

4. Validity of standard forms of exemption clauses

4.1 Validity under English Law

Where a clause in a contract provides that in case of breach, a precise sum by way of damages to be recovered will be effective and enforceable where the sum stated is a genuine pre-estate of the possible loss to a party. Such clause would be ineffective if added *in terrorem* or is a penalty provision with the intention to punish the other party against the loss resulting due to any breach.[15] However, in case where an upper limit of the claimed damages is placed such as in the case of breach, 25 times of the contract value will be recoverable, such clause will be interpreted as *contra proferentem* but will not be strictly constructed as an exemption clause. This notion gets the clarity in the matter of *Ailsa Craig Fishing Co. Ltd v. Malvern Fishing Co. Ltd.* from the House of Lords with the judgment text from Lord Wilberforce as:[16]*"Clause of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms,..."*[17]

In the case of *Wilkinson v. Barclay,*[18] it was provided that in a contract, where a right to damages are excluded by a clause, it is the practice that it is to limit the effect of the clause to stop rejection, restrict it to some minor matters or confirm or limit the purchaser to only the purchase prices in return only. However, it seems that the effect of such provision under the contract will be to restrict a party from any damages related claim.

Similarly, the phrase "with all faults" as used generally in the sale contracts means and implies that risks of all imperfections defects in the goods sold to be assumed by buyer with the exception that this exclusion would not destroy the goods identity being sold. A sample clause related to phrase "with all faults" is generally available in the sale of goods contracts as:*"…With all faults, the buyer acknowledges and agrees that: (i) except for the excluded liabilities, the property is sold, and buyer accepts possession of the property on the date hereof, "as is, where is, with all faults"*.[19]

In the matter of *Shepherd v Kain,*[20] the contract provided a phrase that the vessel is being sold *"with all faults, without allowance for any defect whatsoever"*. It was held that the buyer was entitled to reject the goods as such phrase does not provide any protection to the seller as the delivered vessel was not fastened by a copper as being core to the contract.

Furthermore, in a contract, where there is a clause which purports to exclude liability of a party from a "consequential" damage or loss, it would be effective in cases where

the damage or loss is not due to the result of a direct and natural breach of contract.[21] It was held in *British Sugar plc v. NEI Power Projects Ltd.*[22]where the court provided a more specific guidance on the matter. The relevant clause stated as: *"The seller will be liable for any loss damage cost or expense incurred by the purchaser arising from the supply of any such faulty goods or materials or any goods or materials not being suitable for the purpose for which they are required save that the seller's liability for consequential loss is limited to the value of the contract."*

In the matter of *Leicester Circuits Ltd. v. Coates Brothers plc,*[23] the clause excluded liability of a party as available in the contract between the contracting parties, related to *"consequential or incidental damage of any kind whatsoever…including without limitation any indirect loss or damage such as operating loss, loss of clientele…"* The outcome from the decision of the court was that such party is not entitled to exclude such liability related to profit loss as the case in the circumstances state that such thing must have been reasonably contemplated by the parties as also decided in the matter of *Hadley v. Baxendale*.[24]

5.2 Validity under Shari'ah

Now we see from different Islamic jurists' opinions as how Shari'ah treats the exemption clauses. From the consensus of Islamic jurists on freedom of goods from defects being an implied term based upon *muqtad'a al-aqd*[25] of the sale contract, one would expect that they should likewise agree on invalidating any exemption or disclaimer clause that excludes or even limits such a term implied by law. An exemption clause to this effect is a stipulation that is obviously contrary to *muqtad'a al-aqd* or the essence of the sales contract. Such stance expected from Islamic jurists would be of a particular importance in modern times in view of the universal practice of standard contracts, which almost invariably contain clauses exempting from such liability.

However, Islamic jurists are not in complete agreement in this respect. They do not adhere to *muqtad'a al-aqd* with the same degree of tenacity. Secondly, such exemption clauses, which are necessarily express stipulations (written or verbal), are treated by Islamic jurists according to the rules governing the making of stipulations generally which are peculiar to each schools of legal thought.

According to Imam Abu Hanifah (عليه الله رحمة), an exemption clause excluding liability for defects, known or unknown to the seller or buyer, is a valid stipulation.[26] Obviously, this is a contradictory position if we bear in mind the *Hanafis'* general belief that freedom of contract is exceptional and more particularly, their view that *"shart' a-salamah min al-u'yub"* is and implied term by *muqtad'a al-aqd*. However, this contradiction is only apparent since *Hanafi* jurists validate stipulations established by custom as an exception to their view about freedom of contract and *muqtad'a al-aqd*. Conditions and stipulations established by recognized custom are considered valid

notwithstanding the fact that they might be contradicting to *muqtad'a al-aqd*; and such is the case with *shart' a-salamah min al-u'yub*.[27]

By recognizing custom as such, the *Hanafis*, in fact, have created a very wide exception that would swallow up their general rule against freedom of contract. Exemption clauses are so widely used in modern times that scarcely you find a standard contract devoid of any of them. No doubt, that clauses of this kind have become an established custom of all trades. For this reason, it is doubtful that the *Hanafi* school should remain among the *Zahiri* group classed against freedom of contract. However, at least one prominent *Hanafī* jurist i.e. Zufar, held the opposite view that an exemption clause is invalid where the excepted defect is unknown at the time of contracting.[28]

According to Imam Malik (عليه الله رحمة), an exemption clause excluding liability for defective quality is invalid. There is only one miner exception which is at any rate rendered inapplicable by modern civilization; that is the exception relating to the abeyant slave trafficking practiced in the past. However, better than the position held by the *Zahiris* regarding the effect of invalid stipulations on the contract and on the buyer's remedies, the *Malikis* would invalidate the exemption clause only leaving the remainder of the contract intact.[29]

Imam Shafi' (عليه الله رحمة) is reported to have three views on this matter that:[30](i) *shart' al-baraah*[31] is valid provided that it does not apply to defects occurring after contracting; (ii) it is valid only in relation to the sale of animals and in respect of latent defects only; and (iii) it is invalid because an exemption clause would necessarily refer to unknown defects at the time of contracting. This last view seems to be the preferable one as it is in harmony with Imam Shafi's own view about *muqtad'a al-aqd.* Moreover, it is also preferred by Shirazi, one of the prominent *Shafī'* jurists,[32] as it is in line with their basic principles about waiving and transferring of rights, which do not recognize transfer or waiver of indeterminable or unknown rights.

Imam Ahmed Ibn Hanbal (عليه الله رحمة) is also reported to have expressed three different views on the matter such as:[33](i) *shart' al-baraah* is invalid unless it refers to a particular defect known to both seller and buyer; (ii) it is invalid where the defect exempted is known by the seller; and (iii) that it is valid only in relation to a defect shown to the buyer. Though we have noted earlier that *Hanbalis* would not invalidate stipulations by strictly applying the theory of *muqtad'a al-aqd*, but it is submitted that, the first and third views are more consonant with their conceded exception that a stipulation is not valid if it deprives the buyer of a right established by the contract (e.g. resale, gift etc.).

In conclusion, with the exception of the *Hanafi* position, one can safely say that in Shari'ah, terms of quality are implied by law in favor of the buyer (consumer). In addition, exemption clauses, at least as they are used at present, are generally not permitted in respect of liability for defects in goods. Such a position would

undoubtedly furnish the consuming public with the contractual protection most desirable at the present time.

7. Enforcement of exemption clauses

Having understood the validity of exemption clauses under English law and Shari'ah, now we briefly review the enforcement of such provisions. The contract law at one side recognizes the principle of "freedom of contract" pursuant to which a person willing to enter into a contract can agree on whatever terms he likes and on the other side, due to the dominating position of one the contracting party, the oppressive and onerous contract provisions may be imposed resulting into the injustice to the weaker party who normally lacks the capacity to negotiate such terms. The answer which comes from the supporters for the contractual freedom with the justification that a person may not enter into a contract if he doesn't like such terms of the contract.[34]

In *Salvage Association v. CAP Financial Services*,[35] Forbes J. stated the below words in support of this approach: *"Generally speaking where a party well able to look after itself enters into a commercial contract and with full knowledge of all the relevant circumstances willingly accepts the terms of the contract which provides for the apportionment of financial risks of that transaction, I think that it is very likely that those terms will be held to be fair and reasonable."*

The matter titled *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board*,[36] in a construction context actually upholds judiciary's attitude where it was stated by Lord Pearson in a speech with the following words: *"The basic principle [is] that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvements might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been more suitable."*

The above stated words from Lord Pearson' speech reflect the understanding that where the words used in a contract are unambiguous and clear, the courts will interfere.[37]

The counter argument to the above stated approach is that in a situation where a party has used the onerous and oppressive contract terms by taking the advantage of the unequal bargaining power of the weaker party, then law should take cognizance of such oppressive behaviour and the unequal bargaining power. To overcome this issue, over the years, the courts have tried to create a middle path with the attempt to uphold rights of the contracting parties. At one side to execute the contracts on the terms they want to agree (unless same are not against the law) and on the other side, restricting them as not to take the extreme stances which may be perceived as the unconscionable acts or the sharp actions or the practices.

Furthermore, in a well-known judgment of *L'Estrange v. Graucob,*[38], it was affirmed that the terms of a written contract would be binding once signed in case a party hasn't read contents of the contract signed. The exceptions would be in the cases of fraud, misrepresentation and *non est factum*. However, some limitations were placed in this case by a decision, as we discussed above, in *Curtis v. Chemical Cleaning and Dyeing Co.*[39] where it was decided that in case of misrepresentation of the significance of a contractual provisions, such term does not become contractually binding provision.

8. The construction of exemption clauses

8.1 Under English law

The general principle is that in order to determine the impact of an exemption provision on the contractual obligation as a whole as undertaken, it must be constructed. Over the period of time, there are number of construction principles and rules developed which assist the courts to ascertain true meanings and the intentions behind the words used in different circumstances.

Due to the imposition of unfair terms by the big corporations, has resulted into compelling the courts across the globe especially the courts operating in the common law jurisdiction such as Pakistan to evolve certain key principles on the construction of contracts to restrict application of the exemption provisions against the weak parties. However, while applying the strict interpretation principles, the courts are cognisant of the facts that their construction ambit is to interpret the contract terms to give effect to them with no power or authority mostly under the constitutional law to amend, alter or add any terms which were earlier agreed between the contracting parties. They can interpret the contract terms with no inconsistency to the rules as applicable generally to such class contracts.[40]

When the terms in a contract reflect a meaning, which appear to be ambiguous, doubtful, and not clear, then it requires a proper construction so to dig out the plain meanings of the words used.[41]

Isaacs and Rich JJ., in the matter of *Metropolitan Gas Co v. Federated Gas Employees' Industrial Union*[42] as:*"It is a received canon of interpretation that every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument. In construing an instrument; the whole context must be considered, in endeavouring to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause."*

So, where the terms used in a contract give a clear meaning, same to be followed, however, in case of any friction, uncertainty or confusion, in the term used, an alternative construction as consistent with the rules and principles which are generally applicable to the contract, be used.[43]

In *Alison Ltd. v. Wallsend Shipway and Eng. Co. Ltd.*[44], the court, while applying this rule of "strict construction" observed that: *"if a person is under a legal liability and wishes to get rid of it, he can only do so by using clear words"*. So, in other words, the liability which

is purported to be excluded must be clearly covered in the contract.[45] In this regard, where the clause is to exclude a liability of a party under a warranty breach shall not be considered to cover a breach of the condition.[46]

Similarly, when there is a clause to exclude the implied warranties or conditions, shall not exclude the terms as expressly stated in the contract.[47] A similar principle of strict interpretation to indemnity clauses would apply which obviously apply the limitations and exemptions.[48]Therefore, it is necessary for a clause to be effective, it should clearly cover the occurrence of the event.

In *Nichol v. Godts* (1854) 10 Exch.191,[49] based on the agreement some *"foreign refined rape oil, warranted only equal to sample"* was agreed to be sold by Nichol to Godts. The oil was delivered equal to the quality of the sample; however, it was not *"foreign refined rape oil, warranted only equal to sample."* The issue under consideration was whether there was a breach of condition and whether such breach entitles the buyer to refuse the delivered oil? It was held that such delivery has resulted into breach of a condition and the buyer was entitled to not to accept the goods delivered which were not corresponding to the description but with the sample.

8.1 Under Shari'ah

We have seen that the majority of Islamic jurists have taken the view that the implied term: "*shart' a-salamah min al-u'yub*" cannot be excluded by means of "*shart' a-salamah min al-u'yub*." However, we have also observed some obscurity regarding the position of some jurists on the point. For instance, Imam Shafi' and Ibn Hanbal have been reported to have expressed other contradicting views which are in line with the position of the *Hanafi* school (excepting Zufar) that *shart' al- baraah* is a valid exemption clause.

However, even if we accept the *Hanafi's* as the correct view in Islamic law of sales, that in principle exclusion of this kind of liability is permissible, we still find the jurists who hold so, have placed very strict limitations on the power of sellers to make effective exclusion of liability in this respect. First, that general or ambiguous language is not considered sufficient to effect exclusion. Expressions such as "*yabra' min kulli a'yb*" (seller not liable for any defect), or "*a'la alla tarudd bi-a'yb*" (on condition that you (buyer) shall not return or reject (the goods) for defects.), and the like are considered too ambiguous to exclude liability.[50] The exclusion language must refer to a particular named fault in the goods available at the time of contracting.[51] Second, that the excepted and named defect must be known by seller to actually exist in the goods at the time of sale. Third, that the defect existence must be brought to the actual knowledge of the buyer by the seller. However, still *Hanafis* validate exemption clauses even if they are wide and ambiguous and whether the defect is known to the seller or not or whether the seller makes the defect known to the buyer or not[52]

In conclusion, with the *Hanafis* excepted again, the seller's liability for latent defects is either in-exemptible in principle or otherwise practically rendered in-exemptible

where this is permissible in principle. According to Imam Abu Hanifah (عليه الله رحمة), an exemption clause excluding liability for defects, patent or latent, known or unknown to the seller or buyer, is a valid stipulation Furthermore, according to Imam Malik (عليه الله رحمة), an exemption clause excluding liability for defective quality is invalid.

To summarize the above discussion, it is stated that the exemption clause is a contractual term by which one party attempts to limit, exclude or cut down the scope of his contractual liability for a possible breach of contract for which he would have been responsible in the case such a term was not available in the contract. So, with the exceptions discussed above, when a party signs a written contract, he is bound by contract terms whether same he read, understood or not.

9. Examples of incorporation

Here we will practically see as how exemption clauses are being incorporated in standard printed contracts by various corporate entities in Pakistan such as travel, insurance, banks and general retail industry practices.

In travel industry in Pakistan, the most relevant for this discussion are the contracts frequently executed in the form of tickets with the passengers of buses where the passengers are generally issued tickets where the terms and conditions including the exemptions clause are printed on back of the tickets mostly in fine print and there is no reference of the same on the front page. The most common types of exemption clauses as available in the passenger tickets state that: (a) company shall not be responsible for any loss / damage to hand luggage, (b) the liability of company shall be limited in terms of its insurance policy in case of any accident, (c) in the event of an accident and/or tragic incident, the company shall not be responsible for any loss of money/ jewellery/ precious items etc., and (d) in case of force majeure, the company shall not be responsible for any delay/ cancellation in departure/ arrival of buses. No claim/ damages shall be applicable in such cases.

Similar examples are available in the banking and insurance contracts such as the challan forms, Visa debit card forms and the insurance policies, the terms and conditions are printed on back of it in a very fine print having the exemption clauses but there is no reference of the same on the front page.

These standard printed forms are usually developed by the professionals who are experts in their area of practice by investing time and money.[53] The developed forms are full of legal jargons which provide little understanding to the customers who are always in hurry in completing the transaction.[54] While considering the above realities as perceived by the customers while dealing with the standard printed forms and doing a cost-benefit analysis especially on the costs related to reviewing, interpreting and further making a comparison of the offered terms with the competition, generally feels no benefit on reding the same and proceeds with the forms.[55]

For better understanding, let's take the common example of a banking transaction related to opening of an account or even travel ticket. To begin with the process, the customer is offered a form with lots of terms printed in fine mode on back of its and is required to fill the blanks with the required details. While considering this a laborious job, the customer only fills the key blanks and rest are filled by the banking officer and in cases where the customer is an illiterate person, all filling is done by the banking officer, so, the customer just signs the same or puts his thumb impression without going into the detail as what is printed on the back of the form.

When we go into the background and history of the same, we come to know that this practice was adopted by the banking and insurance companies in the beginning and thereafter taken over by the companies, public-sector corporations, railways, buses and laundry shops with big brand names and now the standard form contracts are everywhere. The old-styled way of negotiating contracts with each individual has been replaced with these standard form contracts which are made available to the customers in fancy mode with uniform printed terms and conditions in colourful booklets.

The concept of the agreeing on the terms of the contracts in a formal mode has become a story of the past and this new model, only the acceptance is done manually and in case the contracts are available in electronic form, then the terms can be accepted through electronic acceptance mode by just clicking the "ACCEPT" button with no option to negotiate the available terms and conditions. This is the reason that these types of contracts have been named as the adhesion contracts.[56]

Looking at the above discussion on principles of contract, these clauses raised several issues and questions including: first to see whether it is necessary to take reasonable steps to notify about the exemptions clauses as as available on the back side of the document? On this point, there has been instances where the courts have insisted on certain notice standards. The example of these contracts could be seen normally as the printed tickets or a receipt or in a notice form as brought to the attention of the contracting party while entering into a contract.

In *Parker v. South Eastern Railway Co.* and *Chapelton v. Barry Urban Development Council (UDC),*[57] it was held that in case no reasonable steps are taken to notify the exemption clauses as available on the back side of the document, the exemption clauses shall have no binding effect. The court decided that the notice of terms and condition would be the notice of its existence and would also be sufficient notice, it was further held that irrespective of the fact that the plaintiff did not read the printed terms but he was bound by them as a reasonable notice of the printed terms was sufficiently given by the defendant to the plaintiff and can be considered as sufficient notice related to the terms printed in the document.

In *Chapelton v. Barry Urban Development Council (UDC),*[58] it was held that the exemption clause was incorporated into the contract as no reasonable person would

consider the ticket a nothing more than a receipt and would expect the ticket a contractual document. In fact, the notice from the UDC was an offer and taking the deckchair would amount to the acceptance of that offer and UDC cannot introduce new terms once the contract is formed.

In *Thornton v. Shoe Lane Parking Ltd. (SLP)*,[59] the key question for the court was that whether the defendant brought to the attention of the claimant when the exemption clause was incorporated and how and what was the time when the contract was made. It was held that an adequate step would be to give a proper notice of the terms and conditions as printed on the document to the offeree by the contracting party delivering a document. The courts' dealings and approach to the issue of the exemption provisions has been very strict resulting into less successful cases related to claim on the basis of the exemption clauses.[60]

The timing when the notice of the printed term is given is very important. The case of "*Olley v. Marlborough Court Ltd."*[61] sets an example of this issue where it was held by the court of appeal that the notice displayed at the hotel room was ineffective, not part of the contract between the parties as it came into her notice post the contract was made and the subsequent notice with exemption clause doesn't affect her rights.

In *Spurling Ltd. v. Bradshaw*,[62] the defendant used to get services of a warehouse in order to store his goods for several years which was owned by the plaintiff. The court held that the defendant must have been aware of the exemption clause from the earlier executed contract, hence, the exemption clause form part of the contract and he is liable to pay the agreed price. It is necessary that its intention to make part of the contract and reasonable notice of the existence of the term is given to the other contracting party in order to incorporate a term into a contract by the "course of dealings".

On the issue of notice regarding terms and conditions printed in red type on front of Bill of Lading, the case titled *International General Insurance Company of Pakistan Ltd. v. British India Steam navigation Co. Ltd.*,[63] resolved that the notice to the consigners of the conditions as printed in red type on the backside of the Bill of Lading was given by the shippers sufficiently. It was further held that appellants' contention that no proper notice of the printed condition on the Bill of Lading was given doesn't sustain.

In above case, the judgment cited was in the matter of *Pakistan International Airlines Corporation v. Salahuddin Ahmed*,[64]where the question was that whether the notice containing certain terms and conditions printed in English language on the tickets of the passengers can be considered as sufficiently given, it was held by the court that as in Pakistan the commonly understood languages were the Urdu and Bengali, so, failure to print such conditions in Urdu and Bengali languages would cause trouble and in this situations, it would not be possible for the court to decide that the exemption conditions from the liability were sufficiently and clearly brought to the notice of the travelling passengers.

In a similar matter of *Arif v. Hamid Ali,*[65] related to ejectment, it was held that the rent agreement was regulated by the terms and conditions printed on back of the rent receipt issued to tenant by the landlord, and as there was an absolute silence of the tenant about such tenancy terms and conditions which were printed on the back of the rent receipts. Such rent receipts were issued to the tenant from time to time which tantamounted to his acquiescence in the said terms and conditions.

So, from the above case laws referred under the English and Pakistani jurisdictions, the key principles extracted are that, while using standard printed contracts if the terms and conditions are printed on the backside of the contract, all possible reasonable steps, such as giving a proper notice and explaining the consequences of the exemption clauses, should be taken in order to have those clauses effective.

The second issue is to see if it is possible to solve the problem and counter these abuses and exploitations through effective statutory and judicial controls in Pakistan by following Shari'ah and English contract law principles, the important thing to note is that when we talk about a developed legal system in a state, then one of the key organs is the judicial organ. Such organ's core function is to adjudicate the matters of the citizens related to their sights and obligations. In that developed legal system, primary source of law is the legislation pursuant to which the judiciary adjudicates the matters, however, when it comes to the law development, a lot has taken place through the judicial decisions with the particular role of the honourable judges. The judicial judgments therefore, are mostly relied upon as the chief role of a judge is to decide the dispute which is placed before him on merits and judiciously. Under the common law, the doctrine of precedent, also kwon as the doctrine of *stare-decisis*, the judges also look in to the similar nature of the cases which have been decided by the apex court or by same court.[66]

While considering the legislation, the legislative control of standard printed contracts appears to be no comprehensive to overcome the issue of misapplication or misuse of the standard printed contracts having exemption provisions. To address this problem and the incomprehensiveness of the legislation, the judiciary has accepted the challenge of dealing with the problems of these types of agreements.[67]

In *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.,*[68]it was held by the court of appeal that the second condition was not incorporated into the contract as there were no reasonable steps taken by the Interfoto form bring into the notice of Stiletto such an unreasonable, unusual and onerous term. On the principle of *quantum meruit,* £3.50 per transparency per week were awarded to the plaintiffs.

In *British Crane Hire v. Ipswich Plant Hire Ltd.,*[69] the court held that the defendants were liable for the expenses as incurred in recovering the hired crane with the reasoning that in vases where the contracting parties have equal bargaining power then terms which are normally available in the similar industry contract as agreed by the firms, would be added based on the common understanding between the

contracting parties, hence the defendants to bear the costs incurred for the crane recovery.

Furthermore, several laws have been passed by the Parliament in the U.K. to address the problems created by the standard printed contracts and one of the key legislations is called the "Unfair Contract Terms Act 1977" ("UCTA, 1977") to control the unfair terms in the contracts.[70] The UCTA, 1977 further deals with the exemption provisions available in the contracts to limit or exclude the liabilities or the remedies that are generally available to the effected parties in case of the breach of contracts by the other the parties. The scope of the provisions of UCTA, 1977 is only those exemption provisions which exclude or limit commercial liabilities of the contacting parties and fall under its active sections and its scope does not extend to review all types of the exemption clauses.[71]

In commercial law in Pakistan, the Contract Act, 1872 occupies the most significant place and without it, carrying any commercial transaction, trade or a business activity would not have practically convenient. As enacted during the British era in the sub-continent, the CA, 1872 is based on the common law principles, hence, the courts in Pakistan also cite (where relevant) the English courts judgments.

When a promise is made by a party, the provisions under the CA, 1872 help in determining the circumstances in which such promise would become binding under the law on the parties to comply with. Knowingly or unknowingly, it is very common entering in to a number of contracts by all of us. When a contract is entered into, some rights and obligations are created on the parties to the contract and then the CA, 1872 come into play to enforce such rights and obligations of the contracting parties. But, there is need for an extension in this old legislation in the form of a new special law in Pakistan which may be based on the principles as enshrined in the UCTA, 1977 which extend controls on exemption or limitation of liability provisions to address the modern trends of closing contracts in the standard form.

The third issue to see as how courts in England and Pakistan interpret the exemption clauses in case of ambiguity and where conditions are formed in such a way as to mislead or defraud the other party and it is general principle of the law of contract that if in case in terms of the contracts, when there is an ambiguity[72] which creates any doubt in the scope and meaning resulting into exclusion of liability of the party drafting the contract, the onus would be on such party to prove that the words were clearly described with no ambiguity in the contract.

A several impressive interpretative devices have been developed due to the change in judges attitude doing against the person seeking to claim the benefit of on the exemption provisions and in favour of the individuals against whom the claim has been raised such as the rule of *Contra Proferentem*. The words "*Contra Proferentem*" are derived from a Latin maxim "*verba chartarum fortius accipiuntur contra proferentem"*,

which means that in case of any doubt in the meaning of a written contract, the party who put them forward, the words used to be construed against that party.[73]

In *Muhammad Shahnawaz vs. Karachi Electric Supply,*[74] Munib Akhtar, J, explained the principle of contra proferentem by stating that that where the employer was the drafter of the contract: *"…any ambiguity or doubt in the scope of the power should be construed against the employer and in favour of the employee."* It was further held that that the rule of *contra proferentem* would apply in order to remove the ambiguity in the Clause 1.2 of the contract which conferred a power on Karachi Electric Supply Company to alter the termination clause of the contract.

In *Bari Rice Mills Limited vs. Passco,*[75] and *Muhammad Amin Brothers (Pvt.) Limited vs. Pakistan Agricultural Storage and Services Corporation Limited,*[76] the Lahore High Court highlighted the scope of the principle: *"… Principle of contra proferentem can be resorted to if there is an ambiguity which makes the contract difficult to ascertain the intention of the contracting parties …."*

The principle of *contra proferentem* has also been discussed in detail in England and below we refer to some of the case laws mainly from the U.K. reiterating the principle that where there occurs any ambiguity related to scope and meaning of the exemption condition, it will not go against the other party to that contract but will go against a party imposing such exemption provision and relying on the same.

This principle was upheld in "*Rutter v. Palmer"*[77] where it was further observed *"it is for the party who seeks to protect himself against liability to which he would otherwise be subject, to prove that the words clearly and aptly describe the contingency that has in fact arisen."*

In "*Lee John and Son Grantham Ltd. v. Railway Executive",*[78] the plaintiffs stored some goods in a railway warehouse which was let by the defendants to the plaintiffs. An exemption clause was added in the lease deed exempting the defendants from the liability related to the *"loss or damage causes by act of neglect of the company or their servants or agents or not, which but for the tenancy hereby created.... would not have arisen"*. The defendants' stance was that they are not liable due to the exemption clause in the lease deed for which the court held that the company was liable as the words "but the tenancy hereby created" were confined to the liabilities which arose only by reason of the relationship of landlord and tenant created by the lease and it goes against the grantor of the lease and doesn't exempt them from the liability.

In *Akerib v. Booth,*[79] it was stated that the goods in the above case were not in the hands of the defendant for packing when damaged, so, considering the ambiguity in the words, the defendants were not covered by the exemption clause entitling the plaintiff with the claimed damages.

10. Conclusion

In summing up the discussion about the exemption clauses in Pakistan's corporate industry standard printed contracts such as insurance, travel and banking industry

standard printed contracts, in today's fast and technology-oriented world, it is hard to avoid the modern techniques of doing business such as in the field of contracts, one of the key developments relates to the use of the standard printed contracts as the aim of these contracts is to meet the swift businesses needs where all the terms and conditions are in pre-printed form and the customer just need to sign on the dotted lines of the contract and the contract is complete to be executed. However, as discussed in detail above, such type of contracts includes in a "fine print" a large number of terms and conditions limiting or excluding liability of the suppliers in the widest possible terms. Though the use of these contracts with the obvious benefit is to save time of the contracting parties while having business dealings, but, this also is open to abuse as the individual cannot alter those terms containing the exemptions from the liabilities mostly in favor of the business entity; they are there for the buyer to take or leave.

However, (i) it is possible to control one-sided dictation of these exemption clauses through standard printed contracts inserted on the prominence of contractual freedom, (ii) in England and Pakistan (though little case law available), the courts interpret the exemption clauses in case of ambiguity and where conditions are formed in such a way as to mislead or defraud the other party, (iii) with the exceptions stated, the standard printed contracts retain contractual concepts of mutuality in the contracts' formation, assumption of balance and meeting to minds i.e. *consensus ad idem* and the standard printed contracts containing exemption clause are *"a prendre ad laisser" i.e.* "to take it or leave it" documents, the case laws in Pakistan does not provide and further detail on the same, (iv) in case where the terms and conditions are settled between the parties are actually contrary to law then courts can set aside and same is the case under Islamic contract law principles, and (v) the UCTA, 1977 does give options to the customer who has no choice but to sign a standard contract containing terms and conditions containing exemption and limitation of liability clauses printed on the back side.

Also, from the already decided cases, some more conclusions can be drawn as discussed above related to the incorporation of the exemption clauses in standard printed contracts and their binding effects on the customers, such as (i) exemption clauses must include the elements of reasonableness and meet the requirements under the UCTA, 1977, (ii) the exemption clauses in the form of an express notice, must be brought to the attention of the contracting party before or while entering into a contract, (iii) if the contract does include the exemption clauses, a specific indicator in the form of red hand pointing towards such provisions to be added along with the printing of these clauses in red font while considering the fact as considered in *Thornton v. Sheo' Lane Parking Ltd.* where Lord Denning held that: *"In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it - or something equally startling.",* (iv) if in case there is a condition which implies certain

exemptions or provides certain exclusions, it has been suggested that in below lines, an indicator be added: *"there must be clear indication which would lead an ordinary sensible person to realize that a term (exempting from a liability) as a result of negligence on the part of the occupiers of the premises."*

Similarly, the principal function of commercial law in Shari'ah is to ratify or re-evaluate those applications and meanings which were existing (i.e. pre-Islamic) during the time of Holy Prophet (ﷺ) or were existing pre and post Muslim conquests and not to create a new system of commercial law to ensure their validity and equity to both parties in each commercial contract, in accordance with Islamic legal principles.[80] Islamic law of contract is an important branch of the commercial laws.[81]

While endorsing the above, *Fiqh al-mu'amlat* is an important branch of Islamic law that regulates commercial relations among the members of an Islamic society. A great deal of attention has been paid by the classical jurists to the field by devoting special chapters in their books on the sale, hiring, *waqf*, gifts, partnership, surety, assignment of debt, mortgage and other commercial contracts. They have also identified the disapproved business practices and unlawful modes of acquisition of property and disposition thereof. The aim of all this exercise is to enable Muslim individuals to practice the Islamic teachings in their economic lives and observe *halal* and *haram* in all their commercial activities.[82]

Islam strongly promotes and encourages involvement of the people in trade and commerce related activities but also reminds them and gives a warning that such involvement in trade and commercial activities by the people should not make them negligent form their responsibilities and duties of Allah Almighty, who has created them.[83]

This makes the understanding clear that so long as the trade and commercial activities are done in line with the teachings of Islam with no negligence towards the duties of Allah Almighty and their fellow human beings as caring for the well-being of the human being, protecting the *maslahah* and preventing them from harm and evils are the supreme objectives of the teachings of Islam.[84] Furthermore, as *maslahah* acts as one of the sources of Islamic law, it recognizes the importance of repelling harm and protecting the public interest.[85] It also recognizes the fact that ensuring justice is one of the fundamental elements of the public interest and same principles to apply while using exemption clauses in the corporate industry standard printed contracts.

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