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The Validity of Exemption
Clauses in Commercial
Contracts – A Comparison with
Anglo-American Law

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Summary

This thesis deals with the type of contract terms which normally are referred to as *exemption clauses*. Through the incorporation of an exemption clause, a seller is able to exempt or limit the liabilities or obligations non-mandatory law otherwise would give him. There is however several restrictions in law which are intended to protect the other party from abuses. First and foremost, courts can exercise general control through the application of rigid rules for allowing exemption clauses to be part of contract terms. However, even if an exemption clause is appropriately incorporated into a contract, statutory as well as non-statutory requirements of fairness may constrain a party from putting forward an exemption clause successfully.

Specifically, this thesis explores exemption clauses between parties in their course of business. Under what circumstances may a merchant rely on the validity of an exemption clause? Questions related to consumer contracts will not be dealt with.

A comparative approach will be used for analyzing differences and similarities between Swedish and Anglo-American law. Even though the principle of *pacta sunt servanda* still serve as an important foundation for both systems, the complex society of today have made it necessary to employ exceptions to this rule. This tendency is exemplified by, among other things, restrictions in Swedish and Anglo-American law for “unfair” or “unconscionable” contracts or contract terms, such as exemption clauses which are unanticipated or oppressive.

The thesis will explore statutory as well as non-statutory provisions in Swedish, English and American law. Among the statutory provisions in Swedish law, I will examine the application of 36 § AvtL in particular. In the English legislation, I will primarily focus on relevant pieces of the *Unfair Contract Terms Act 1977* (UCTA). As far as American law is concerned, the analysis is very much concentrated to section 2-302 in the Uniform Commercial Code (UCC), which deals with so-called *unconscionable* contract terms.

One conclusion is that Swedish and Anglo-American law, despite certain differences, share many important similarities. A dispute about the validity of a certain exemption clause would therefore probably end up the same way no matter if challenged in a Swedish, English or American court.

Another conclusion is that businesses in most cases can expect that exemption clauses will be enforced by courts, particularly if the bargain

positions are equal among the contracting parties and the contract in question is made in the course of a business. It is however necessary that the exemption clause is formulated in a clear and unambiguous way if the party putting forward the clause wants to be certain that it will be recognized by courts. According to the *contra proferentem rule*, terms and conditions with an unintelligible language will be interpreted in the least favourable way for the composing party.

This essay is focused on questions *de lege lata* and tries not to explore pros and cons with exemption clauses and their applicability neither in Swedish nor Anglo-American law. Similarly, the thesis is not primarily intended to judge whether it is preferable or not for a party to act in certain ways or not. It merely puts forward questions which may be relevant for the utilization of exemption clauses.

Preface

This thesis is the result of twelve intense weeks in the summer 2004. I would like to thank my supervisor Eva-Lindell Frantz for her support throughout its completion. Also, I want to thank my good friend Tomas Nilsson for his comments and suggestions.

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Abbreviations

A.C	Appeal Cases (Law Reports)
AVLK	Lag om avtalsvillkor i konsumentförhållanden
AVLN	Lag om avtalsvillkor mellan näringsidkare
AvtL	Lag om avtal och andra rättshandlingar på förmögenhetsrättens område
BGB	Bürgerliches Gesetzbuch
CISG	United Nations Convention on Contracts for the International Sale of Goods
C.P.D	Common Pleas Division
ECE 188	General Conditions for the Supply of Plant and Machinery for Export
ECP	European Contract Principles
HD	Högsta Domstolen
JT	Juridisk Tidskrift
K.B	King's Bench Division (Law Reports)
KKL	Konsumentköplagen
KtjL	Konsumenttjänstlagen
KöpL	Köplagen
MD	Marknadsdomstolen
NJA	Nytt Juridiskt Arkiv, avdelning I
NJA II	Nytt Juridiskt Arkiv, avdelning II
Q.B.	Queen's Bench Division (Law Reports)
ORGALIME	General Conditions for the Supply of Mechanical, Electrical and Associated Electronic Products
Prop.	Proposition
SkL	Skadeståndslagen
UCC	Uniform Commercial Code
UCTA	Unfair Contract Terms Act
UNIDROIT	The International Institute of the Unification of Private Law
UTCCR	Unfair Terms in Consumer Contracts Regulations

1 Introduction

1.1 Purpose

The purpose of this thesis is to examine how *exemption clauses* are treated under Swedish and Anglo-American law. In particular, I intend to focus on the validity of exemption clauses in commercial contracts, that is, when none of the contracting parties is considered to be a consumer in a legal sense. A consumer is defined as a person who is not acting in the course of a business.

A comparative approach will be used in order to determine the possible differences between Swedish and Anglo-American law. In the comparative study, English law¹ is examined in detail but I also intend to study some features of American law which does not exist in English law. Since English and American law in many aspects are related to each other, I have chosen to treat them together.² The comparison is thus primarily *bilateral*.

There are, in my view, two major rewards of studying Anglo-American law. First, the different historical traditions between Common law and Civil law make it interesting to contrast Sweden with England and the United States. Studies of other legal systems besides the Swedish provide the reader with a “helicopter” perspective which can be useful for the understanding of domestic law.³ Second, contract law – particularly commercial contract law – is highly international in its nature. It is hence valuable for lawyers practising contract law on a day-to-day basis to have basic knowledge of legal solutions in other jurisdictions.

It is not my intention to do an analysis *de lege ferenda* based on the comparison. There are always great risks when it comes to determining advantages and disadvantages with different legal solutions, especially when it comes to complex legislation such as contract law. Which model one chooses to favour is very much dependent on the perspective used: moral, macroeconomic, welfare-based etc. Rather, my aim is to put forward how the law is applied in Sweden and England/United States – using a *de lege lata* approach to discover similarities and differences in the legal systems.

¹ “English law” is defined as the law applied in England and Wales (Bogdan 2003, p 91).

² “American law” refers to federal as well as state law in the United States.

³ Compare to Bogdan (2003), p 27 + 36f.

1.2 Method and material

It is a well established fact that civil law (which also includes contract law) is very similar among the existing legal systems in the world.⁴ The content of the rules could be presumed to be the same despite differences in the legal terminology and the methods of reaching the results. This presumption, *praesumptio similitudinis*, will be contested throughout the thesis.

However, even if differences seem to exist at a first glance, one should be very careful to jump to a conclusion. In the comparative legal debate, scholars refer to *the law of substitution* as an important rule to take into account.⁵ Often, differences between the content of the legal systems are compensated by differences in other areas of law. It is hence important to have knowledge about the basic features of the legal systems which are examined.

When examining Swedish law, multiple legal sources will be used. Primarily, I will analyze statutory law and court decisions. In addition, I will use legal records, articles and literature of scholars. Especially Thorsten Lundmark's book,⁶ which specifically deals with exemption clauses, will be utilized. Other main sources are Bernitz and Adlercreutz.⁷

It is however not possible, given the limited time and space offered for the completion of this thesis, to cover the aspects relating to the validity of exemption clauses in Anglo-American law with the same precision as in Swedish. Statutory laws as well as court decisions will be analyzed. Most foreign court decisions have not been examined independently; instead, I have relied on textbooks as the primarily source of foreign law. However, the problem of accuracy and reliance is substantially reduced given that one uses multiple literatures of the latest available sources.⁸

Beatson and Treitel are two scholars who cover the English contract law very comprehensively.⁹ As far as American law is concerned, I will use

⁴ It has for example been estimated that approximately 80 percent of all civil matters would lead to the same result in a court, no matter if they occurred in the United States, Canada, France, Argentina or Japan (See Bogdan [2003], p 87).

⁵ Bogdan (2003), p 88.

⁶ Lundmark, T., *Friskrivningsklausuler – giltighet och räckvidd*. Uppsala: Iustus Förlag AB 1996.

⁷ Bernitz, U., *Standardavtalsrätt*. Stockholm: Nordstedts Juridik 1993 and Adlercreutz, A., *Avtalsrätt II* (femte upplagan). Lund: Juristförlaget i Lund 2001.

⁸ According to Bogdan, there are several advantages of studying secondary sources such as textbooks when analyzing foreign law (See Bogdan [2003], p 42).

⁹ Beatson, J., *Anson's Law of Contract* (27th Edition). Oxford: Oxford University Press 1998 and Treitel, G. H., *The Law of Contract* (Ninth Edition). London: Sweet & Maxwell 1995.

Calamari's book as one of the main sources.¹⁰ Based on a recommendation from Professor Maria Boss at University of California at Los Angeles, I will also use some concepts from Clarkson's book, which offer a good introduction to the law of contracts in American law.¹¹ It serves as the main textbook in the course "Business Law" offered at the UCLA Anderson School of Management, a course which I myself had the great opportunity to attend as an exchange student in Los Angeles 2003-2004.

1.3 Limitations

Exemption clauses are often incorporated into *standard form contracts*. Some general interpretation rules tied to these kinds of contracts will therefore be discussed. However, much of the nitty-gritty in the Anglo-American contract law is left out. For example, the *doctrine of consideration* will not be discussed because it has limited relevance as far as exemption clauses in standard form contracts between merchants are concerned.¹² Even if this essay is solely concerned with exemption clauses in commercial relationships, clauses in *consumer contracts* will be mentioned in a few words in a contrasting purpose.¹³

Since the thesis is limited to specifics in Swedish, English: and – to a lesser extent – American law, international conventions which govern specific areas of trade will not be discussed. I will concentrate on rights and obligations between the contracting parties only. Questions relating to the *privity of contract doctrine* will therefore not be discussed in this essay.¹⁴ Although, as the methods of contract interpretation directly affect the validity of exemption clauses, I have found it necessary to provide the reader with a rudimentary description of the different techniques of contract interpretation in each system.

1.4 Language and translations

One of the perhaps most difficult problems involved in comparative legal studies is translation. Translating legal definitions from one legal system

¹⁰ Calamari, J.D & Perillo, J.M., *The Law of Contracts* (Fourth Edition). St. Paul: West Group 1998.

¹¹ Clarkson et al., *West's Business Law Text and Cases* (Ninth Edition). St. Paul: West Group 2004.

¹² The interested reader may take a closer look at Beatson p 88ff.

¹³ Clauses where a seller use the phrase "befintligt skick" are outside the scope of this essay. These are very much tied to transactions between small vendors and consumers.

¹⁴ According to this doctrine, a contract creates rights and obligations only *between the parties* to the contract, and no one else.

into another is certainly a delicate undertaking and the risk for confusion is high.¹⁵ The terminological creations that have evolved in Anglo-American law do not always correspond to particular definitions in the Swedish legal tradition.

From an extremist viewpoint, it can be argued that it is impossible to translate Anglo-American legal definitions into Swedish since statutes, court decisions and the legal surroundings always differ from one country to another. However, the use of such an unorthodox perspective would probably make it much harder to provide the reader with a clear-cut general overview of the differences that this thesis seeks to analyze. The following list includes some frequently used legal terms in this thesis and their Swedish translation:

Adjust	<i>Jämka</i>
Charter party	<i>Certeparti</i>
Commercial Code	<i>Handelsbalken</i>
Consumer	<i>Konsument</i>
Control liability	<i>Kontrollansvar</i>
Course of dealing	<i>Partsbruk</i>
Exemption clause	<i>Friskrivningsklausul</i>
Mandatory law	<i>Tvingande rätt</i>
Merchant	<i>Näringsidkare</i>
Merger Clause	<i>Integrationsklausul</i>
Negligence	<i>Vårdslöshet</i>
Non-mandatory law	<i>Dispositiv rätt</i>
Reference clause	<i>Referensklausul</i>
Rescind	<i>Häva</i>
Sale of Goods Act	<i>Köplagen</i>
Unjust/Unfair	<i>Oskälig</i>
Usage of trade	<i>Handelsbruk</i>

In English and American law, a contract is said to be *voidable* if one of the contracting parties is legally entitled to rescind the contract. In American law, for example, a minor who enters into an agreement are in most cases not bound by the terms if he choose to withdraw from the transaction; the contract is then void (or illegal). If, however, the minor fails to challenge the contract within a reasonable time, he is bound by its terms.

Another category of invalid agreements are *unenforceable contracts*. Some categories of contracts need for instance to be in written form in order to be recognized by courts. The other contract party may be morally obliged to fulfil oral agreements, but because courts have set up high standards for

¹⁵ See Bogdan (2003), p 40.

reliable evidence, one cannot take advantage of legal remedies in order to force the other party to fulfil his promises.¹⁶

The distinctions between different kinds of invalidity grounds in Anglo-American law are however not always perfectly clear.¹⁷ For this reason, I have chosen to use the more general expressions *valid* or *invalid* contracts/contract clauses in this essay.

1.5 Outline

In chapter 2, I will explain what exemption clauses are and their function in market economies. In the same chapter, I will make a short presentation of various kinds of exemption clauses frequently used in contracts.

In chapter 3, I intend to deal with the characteristics of the Swedish and Anglo-American legal system, beginning with a brief historical overview. One of the most important legacies which influences not only the Anglo-American but also the Swedish legal tradition will then be studied, namely the principle of *pacta sunt servanda*. Thereafter, I will explain some basic features of Swedish and Anglo-American contract interpretation.

Next, I intend to analyze the validity of exemption clauses in each system from a dual perspective; distinguishing *disclosed* and *open* control from the legislator's side.¹⁸ As far as exemption clauses are concerned, the former kind of control could be exemplified through the rigid requirements for *incorporation* of exemption clauses in a specific agreement. The latter control is used when courts through general principles of law or statutory provisions, such as the Swedish so-called *general clause* 36 § AvtL, make invalid or adjust a certain exemption clause because of its unfair nature *in itself*. Disclosed control will be dealt with in chapter 4 whereas open control will be discussed in chapter 5.

In chapter 6, I will take a closer look at clauses exempting a party's duties under the law in case of negligence. The purpose is to offer the reader an insight in how English and Swedish courts deal with a particular kind of exemption clause commonly used in transactions between merchants. Finally, I give my conclusions in chapter 7.

¹⁶ For more detail about invalidity grounds, see Clarkson chapter 9.

¹⁷ See for example Adlercreutz (2003), p 39.

¹⁸ This separation is inspired by Bernitz and Lundmark. (See Bernitz, p 21 and Lundmark, p 41). The distinction is made for practical reasons only and it is not my intention to discuss which kind of control is most preferable. Bernitz, for example, finds open control more acceptable than hidden (See Bernitz p 54).

2 Exemption clauses – general characteristics

2.1 Definition and functions of exemption clauses

There is no definition of exemption clauses neither in Swedish nor English law.¹⁹ In the legal discourse, the term is often used without any certain explanation. Generally, an exemption clause could be defined as a contract condition which intends to liberate a party wholly or in part from his normal duties under the law. Often, the term *exclusion clause* is used interchangeable with exemption clause. The English term *limitation clause*, however, applies to clauses which merely *limit* – not totally exclude – a party's duties to a certain extent, and is often expressed in monetary terms. Most of what is said about exemption clauses applies also to limitation clauses, even if there may be reasons to treat limitation clauses less strict in some situations (See section 4.2.2).

The main purpose of an exemption clause is to allocate the risks between the parties when entering into an agreement.²⁰ Non-mandatory law suggests solutions to several problems which can arise at the time, or after, a contract is entered into. For example, what will happen if the seller fails to deliver a product within a reasonable time to the buyer or if the product he sells is defected? Though, if the parties however agree on special terms in their contract, these conditions normally prevails over non-mandatory law.²¹

In sales contracts, the *seller* normally takes the initiative to incorporate an exemption clause into the contract. Given that the buyer accepts the clause, his legal responsibility for risks tied to the product increases.²²

There are several reasons why a party may want to exempt or limit the responsibilities which non-mandatory law proscribe upon him. For example, a car dealer who for some reason is uncertain about the quality of a car he intend to sell might put forward an exemption clause which states that he do not take responsibility for any hidden defects. The buyer, attracted to the cheap offer, chooses to take the deal notwithstanding the exemption clause.

¹⁹ Lundmark, p 34.

²⁰ See for example Lundmark, p 15.

²¹ In the absence of no non-mandatory statutes or court decisions, other sources have to be taken into account, such as course of dealing or usage of trade.

²² Kihlman, p 72.

In other words, he agrees to absorb certain risks in exchange for a lower price.

2.2 Exemption clauses in standard form contracts

Exemption clauses are often incorporated into *standard form contracts*. These kinds of contracts serve important functions in today's business environment. For example, they simplify transactions and lessen the need of time-consuming negotiations between the parties. However, standard form contracts can also disfavour a contract party when harsh or surprising clauses are included in the text. The legislator must therefore find a balance between business necessities and the protection of individuals who may be taken advantage of through the usage of standard form contracts. Here, it is important to distinguish one-sided standard form contracts (often called "contracts of adhesion") from so-called *agreed documents*.²³ As the name implies, agreed documents are the result of bilateral collaboration between the parties or representatives of them. In the case of employment contracts, for example, unions representing certain employees may have agreed to the conditions set forth by the document through negotiations with organizations representing the employer. The risk of abuse is of course lower when the terms are negotiated, especially if the bargain power is balanced between the parties.

2.3 Different kinds of exemption clauses

Several attempts have been made by scholars to classify different kinds of exemption clauses. In Swedish legal discourse, Ramberg makes a distinction between *general* and *specific* exemption clauses.²⁴ The former involves all kinds of defects related to a good, whereas the latter involves only certain kinds of defects. Clauses exempting the seller's duty for defects are often viewed as an important category of exemption clauses in Sweden.²⁵

Other examples of exemption clauses are exemptions of different kinds of *negligence*, exemption of so-called *control liability*, exemption of *quality* and exemption of *remedies*. Exemption of remedies means that the other party loses or limit his right to apply countermeasures, for example to ask for compensation in situations of breach of contract.

²³ For more detail about adhesion contracts, see Rohwer p 238ff.

²⁴ Ramberg, p 250.

²⁵ In Swedish legal literature, these kinds of clauses are called *ansvarsfriskrivningar*.

There is no room for analyzing all possible kinds of exemption clauses in detail within the frame of this thesis. Though, as mentioned before, clauses exempting negligence will be highlighted in chapter 6.

Since the aim of exemption clauses is to set aside rules in *non-mandatory* law, I have chosen not to examine situations where exemption clauses are violating *mandatory* law. Exemption clauses violating mandatory law are simply invalid *per se*.

3 Characteristics of the two legal systems

The regulation of exemption clauses must be seen in light of the general contract principles which govern the Swedish and Anglo-American legal system. In this section I intend to introduce some important foundations in the legal systems which might have an influence on the validity of exemption clauses. To begin with, I will give the reader a very brief summary of the two major West-European legal traditions, namely Common law and Civil law. In short, the law as *is it interpreted by courts* has traditionally been considered the main source of law in Common law countries. In Civil law countries, however, *written laws* and *codifications* have played a more significant role.

Because of their shared legacy, one may expect that the legal solutions are fairly similar in England and the United States. It can be argued that Sweden is the “outsider” among the three countries. However, one should keep in mind that Sweden and England are members of the European Union. The process of law harmonization between the countries of the European Union may eventually lead to a common legal culture among the European countries.²⁶ Even if this argument should be taken into account, this chapter will show that we are not really there yet.

3.1 Historical overview

3.1.1 Common law

Common law has its origin in the medieval England. Early on, courts in England formed the law through the principle of *stare decisis*: previous court decisions were considered binding authorities throughout the British Empire. The principle itself serves as a good example of the dynamics in English law; it is not found in any statutory legislation but is established by court decisions. In 1966, the principle was somewhat diluted as the House of Lords concluded that it was not *formally bound* by its own decisions. Having said this, court decisions as an important source of law are still very much embedded in the Common law tradition.

One of many features in English law is the distinction between *law* and *equity*.²⁷ The practical reason for the distinction is that the rules in equity

²⁶ Compare to Mod er, JT 1999-2000, p 72.

²⁷ For more detail about this distinction, see Glendon, p 158.

has to be interpreted and applied in accordance with certain historically developed principles which not necessarily are based on common law. For instance, one “have to come with clean hands” in order to receive equitable relief, that is, behave in a lawful manner oneself before actions can be brought towards another party.²⁸

The United States adapted English law early on, and the tie is still present.²⁹ Especially in the area of civil law (the area of law which is not concerned with criminal or public law) is the English legal tradition still very dominant. For example, the distinction between law and equity also exists in American law. However, particular for the United States is federalism, which has evolved over two centuries. England does not have any written constitution in contrast to the United States. In fact, each state has its own constitution and a considerable amount of self-governance. The federal Constitution, however, allows the Congress to enact laws regulating *interstate commerce* through the so-called *Commerce Clause*. In practice, this means that the states are not authorized to pass laws which may affect the commerce adversely in any other state. The Supreme Court of the United States is the interpreter of this constitutional restriction.

Even if court decisions certainly is more important in Anglo-American law than in Swedish, this does not mean that *statutory law* is insignificant in the Anglo-American system. For example, the Unfair Contract Terms Act (UCTA) governs, among other things, the validity of exemption clauses in English law. In the United States, the Uniform Commercial Code (UCC) serves as a major law instrument for business transactions.

3.1.2 Civil law

Civil law derives from the ancient Roman Empire.³⁰ The relatively high degree of complexity in the Roman society required predictability and order. In the sixth century, a handful people started to collect Roman legal writings which eventually resulted in the *Corpus Juris Civilis* of Justinian. This work, which included four parts, is our first known comprehensive written legal source.

The Roman tradition influenced later developments in states throughout Western Europe. First and foremost, a revival of Roman law took place in northern Italy towards the end of the eleventh century. The economic expansion in this part of Europe made it necessary to develop a legal

²⁸ Bogdan (2003), p 100. Compare to Clarkson (Chapter 1).

²⁹ Louisiana, with its French legacy, is the only state which is not part of the common law tradition.

³⁰ Civil law is sometime also referred to as the “Romanist” or “Romo-Germanic” system (See Glendon, p 16).

framework for commerce. Hence, Roman law and legal science were rediscovered and the University of Bologna became the leading legal institution where the brightest students from all across Europe gathered.³¹ This was the starting point of a *reception process* throughout Europe; Germany was one of the first countries to adopt Roman law on a wider scale.

With the later development of nation states in Western Europe, legal nationalism found its expression in the form of *codifications*. In France, this is exemplified through the enactment of the *Code Napoléon* in the early nineteenth century. At the time of its promulgation, the draftsmen claimed the Code to be the first modern civil law collection. However, in form, it was closely hewed to the Justianian Code.³²

Almost one decade thereafter, the so-called *Bürgerliches Gesetzbuch* (BGB) was promulgated in Germany. The creators of this codification intended that the law volume, with its comprehensiveness and logical structure, should be able to answer basically all potential legal problems. This meant that the role of the judges was reduced to finding the applicable law that governed a particular situation and making his decision in accordance with this law.

Even if a few legal scholars have considered the legal systems in the Nordic countries as an independent group, they are most often classified as belonging to the continental law family.³³ Sweden got its own big codification through the passing of the 1734 law (the Commercial Code). Sweden's legal system is however sometimes seen as something in-between Common law and the Roman tradition. One of the reasons for this is that courts traditionally have been allowed to interpret the law in situations where no written statute is applicable. In addition, so-called general clauses have been introduced in contemporary Swedish law, that is, rules which are formulated in a general style and thus give the court a wide spectrum to consider facts in every particular case.

3.2 Freedom of contract and *Pacta sunt servanda*

In medieval England, the protection of expectations engendered by promissory agreements was generally not regarded as something the state

³¹ Glendon, p 23ff.

³² Glendon, p 33.

³³ Bogdan, p 81.

should concern itself with.³⁴ Today, the law of contracts enters into practically every aspect of our society and the principle of *pacta sunt servanda* is seen as an important aspect of a liberal market economy. When two parties negotiate the terms of a mutual agreement, they do it under the premise that the other party will fulfil the obligations he consents to.

During the last decades, other concerns has somewhat weakened the dogma of *pacta sunt servanda*, probably in part because of the more frequent use of standard form contracts. In Sweden, legislation has been enacted to protect certain groups which generally have a weak bargain position, such as consumers.³⁵ Examples are the right to rescind a contract in 37 § KKL and 47 § KtjL and the opportunity to adjust contract conditions through 36 § AvtL (See further chapter 5.1.1). The increased practice of re-negotiation after a contract has been entered into could also be seen as an example of this tendency.³⁶

A movement away from unrestricted freedom of contracts is also present in England and the United States. In the United States, this is illustrated by contracts of employment which today are controlled by a wide range of federal and state laws concerning, among other things, social insurance programs, minimum wages and working conditions.³⁷ However, the relatively market oriented so-called *employment-at-will* doctrine is still influential in employment contracts. According to this principle, the employer (as well as the employee) has a right to rescind the contract of employment *at any time and for any reason*. The rationale for this rule has traditionally been that it would be no good policy to keep the parties locked in the close relationship of employee-employer against the wishes of one of them.³⁸ However, the employment-at-will rule is being overturned in many states where the discharge is contrary to public policy and the employee can normally file a suit for wrongful discharge if certain criteria are fulfilled.³⁹

Another indication that the tide has turned away from uncompromised freedom of contracts is the increasing recognition in the United States that the bargain process has become more limited in the modern society. In many situations, individuals often have no option but to sign a standard form contract – a contract of “adhesion” – prepared by the manufacturer.⁴⁰ However, there are no federal statutes similar to the Swedish KKL and KtjL in the United States. Instead, trade customs has been codified in law through the *Uniform Commercial Code* (UCC), which has been adopted in all states.

³⁴ Calamari, p 4.

³⁵ Adlercreutz I, p 23.

³⁶ For details about re-negotiation clauses, see Lehrberg (1999).

³⁷ Calamari, p 5.

³⁸ Calamari, p 59.

³⁹ For more detail about employment law, see Clarkson chapter 33 and 34.

⁴⁰ Calamari, p 5f.

The Code governs contracts for the sale of goods, no matter if the seller is a merchant or a casual seller.⁴¹ There are no special rules for consumers.

In England, *The Unfair Terms in Consumer Contracts Regulations* 1994 (UTCCR) has been adopted to ensure that unfair terms are not included in contracts with consumers. The regulations give effect to an EU Council Directive⁴² which is intended to harmonize legislation of the member states and applies to terms which have not been individually negotiated in contracts between consumers and commercial sellers of goods or suppliers of goods or services. Their central provision is that *unfair* conditions shall not be binding on the consumer.⁴³ The Regulations operate side by side with the *Unfair Contract Terms Act*, and a party has to satisfy the requirements of both set of rules if he wants to rely on the contract terms.⁴⁴

3.2.1 Duty of loyalty

In Swedish law, as well as in English and American law, contracting parties have a duty of loyalty. This could be seen as another indicator of a movement away from unrestricted freedom of contracts. The duty is particularly important in long-lasting relationships based on trust. Even if it is not subject of general legislation in Sweden, it is considered to be an “allmän rättsgrundsats” (a legally binding principle) and is thus a source of law.⁴⁵

3.2.1.1 Swedish law

In Sweden, the duty of loyalty includes, but is not excluded to, the duty of information, notification and reasonable care.⁴⁶ According to Ramberg, the duty also includes the obligation in law for the entitled party to reduce the other party’s losses in 70 § KöpL.⁴⁷ There are several other examples of statutes where the duty is mentioned explicitly.⁴⁸ In many situations, the

⁴¹ Article 2 UCC.

⁴² 93/13/EEC

⁴³ S.I. 1994/3159, Reg. 5(1).

⁴⁴ Treitel, p 245.

⁴⁵ Nicander, p 31. There is a general provision in CISG (Article 7.1) which says that “the observance of good faith in international trade” shall be used when interpreting the Convention. The law is applicable on certain international sales. The duty of loyalty is also represented in UNIDROIT Principles, Art. 1:7 and ECP Art. 1:201 (“good faith and fair dealing”)

⁴⁶ Nicander, p 33f.

⁴⁷ Ramberg, p 245.

⁴⁸ See Lag (1991:351) om handelsagentur, 5 § 1 st and Lag (1914:45) om kommission 7, 10, 17 §§.

duty of loyalty includes an obligation for the parties to cooperate in order to achieve the purpose of the contract.⁴⁹

A duty of loyalty can however arise already before the parties have entered into a contract.⁵⁰ For example, someone who intends to buy insurance have to give correct information to the insurance company.⁵¹ More specifically, the omission to give the other party necessary information when the contract is entered into can, except from damages, also result in invalidity through the third chapter of AvtL. In terms of costs derived from entering into a contract, the general rule is that each party must pay for its own costs.⁵²

After the agreement is entered into, there is a duty of loyalty to notify the other party about circumstances which makes it impossible to e.g. deliver the good as promised. Failure of notification can make the seller unable to successfully invoke an exemption or force majeure clause in the contract.⁵³ The buyer is also entitled to compensation for the losses which could have been avoided if he would have received a notification within a reasonable time according to KöpL 28 §. On the other hand, in the case of late delivery, the buyer has to notify the seller if the buyer intends to rescind the contract or to claim compensation.⁵⁴

3.2.1.2 Anglo-American law

Anglo-American law recognize an obligation of “good faith and fair dealing” in the performance and enforcement of contracts, which also implies a duty of loyalty. The duty of loyalty can also exist in the absence of a written contract. For example, there is a duty of loyalty in so-called *agency relationships*.⁵⁵ An agency relationship is a consensual relationship formed by mutual agreement between the principal and the agent.⁵⁶ The authoritative source of the rules of agency in the US defines an agency as the “*fiduciary relationship* [a relationship based upon trust] which results from the manifestation of consent by one person to another that the other shall act in his behalf and subject to his control, and consent by the other so to act”.⁵⁷

⁴⁹ See for example Gorton, *Loyalty in Contractual Relations*, p 301.

⁵⁰ Nicander, p 46.

⁵¹ Ramberg, p 244 (Ses also Nicander, p 46).

⁵² Hellner, p 38. In other cases, see NJA 1963 s 105 and NJA 1978 s 147.

⁵³ Ramberg, p 245.

⁵⁴ KöpL 29 §.

⁵⁵ For a more detailed description of agency relationship in English law, see Gorton, p. 299.

⁵⁶ Cheeseman, p 654.

⁵⁷ § 1(1) The Restatement (Second) of Agency.

Agency relationships exist in numerous situations. An employee is for example the agent for his or her principal – the employer. Similarly, agency exists when an attorney is hired to represent a client or when an executive works for a corporation.⁵⁸ The agency institution has similarities to the Swedish construction of *fullmakt*, but agency is much wider in its applicability. An agency relationship can be present even in cases where the parties do not know about it.

An agent's duty of loyalty requires him not to act adversely to the interest of the principal. For example, the agent is forbidden to usurp an opportunity that belongs to the principal: a third-party offer must be conveyed to him. The freedom of contract is in other words directly restricted for the agent in this case. Furthermore, the agent cannot compete with the principal during the course of an agency without consent from the principal.⁵⁹

The duty of loyalty is however not limited to agency relationships. In the United States, there is an explicit rule in the UCC which states that “every duty within this Act imposes an obligation of good faith in its performance and enforcement”.⁶⁰ Since the courts often apply UCC rules by analogy, the “good faith”-principle is used also in contractual relationships outside the scope of UCC.

In contract law, the obligation of good faith and fair dealing might serve as a safeguard of the express covenants or promises of the contract. The use of this implied duty is thus consistent with our basic notions of freedom of contract.⁶¹ However, an alternative view suggests that the principle can be used to create or expand contract rights and duties.⁶² This would instead restrict the same principle.

3.3 Contract interpretation

There are some basic differences between Swedish and Anglo-American contract interpretation. In both systems, the main rule is that a contract should be interpreted in light of the *intention of the parties*. What differ are the methods the courts use in order to determine the intention. Normally, all available and relevant means of interpretation are considered by Swedish courts when interpreting contract terms. Anglo-American law, however, is characterized by a more complex set of rules regarding interpretation.

⁵⁸ The examples are taken from Cheeseman, p 654.

⁵⁹ Cheeseman, p 679f.

⁶⁰ UCC § 1-203

⁶¹ Rohwer, p 264.

⁶² Rohwer, p 269.

It has to be beard in mind that today’s frequent use of standard form contracts complicate traditional methods of interpretation. For example, a consumer who is provided with a standard form contract when buying a television or a cell phone probably does not spend a lot of time reading the general conditions. It is thus very hard for the court, when faced with a dispute regarding a certain contract condition, to determine what the parties’ intention with the particular clause was.

In Anglo-American law, certain standards have evolved in order to impose courts to consider only *objective facts* when faced with a civil dispute. The actual but unexpressed, “subjective” intention of one party is usually not relevant when determining the existence of or terms of a contract if the other party had no reason to know of such uncommunicated intention.⁶³

The so-called *parol evidence rule* serve as an illustrative example of this.⁶⁴ Even though there are a lot of exceptions to the rule, it may play a significant role in many commercial transactions. A writing intended by the parties to be the *final embodiment* of their agreement may not be contradicted by certain kinds of evidence (“parol evidence”), such as oral promises.⁶⁵ Issues of parol evidence can therefore arise when one of the parties to a written contract seeks to use evidence of prior agreements to add or modify the terms of the writing.

The parol evidence rule does however not preclude a party to a written contract from proving the existence of a separate distinct contract with the same contracting party.⁶⁶ Nothing prohibits people from having two contracts with each other.

In order to make it evident that the writing is final and complete, the parties can incorporate a *merger clause* into the contract. A merger clause typically states that the contract is the exclusive statement of all the terms agreed on. However, if a specific term or condition in the contract was not subject to “true assent” of the other party, a court can render it *unconscionable* under certain circumstances.⁶⁷ In this case, a court may allow parol evidence to show the lack of true assent notwithstanding the parol evidence rule.⁶⁸

The emphasis on written documents as a source of reliable evidence can also be exemplified by the so-called *Statute of Frauds* which requires

⁶³ Rohwer, p 19.

⁶⁴ The term “parol evidence rule” is somewhat misleading. It does neither involve a single rule nor a single concept. It involves questions about admissibility and exclusion of written as well as “parol” (oral) evidence. See further Rohwer, p 240ff.

⁶⁵ Calamari, p 122.

⁶⁶ Rohwer, p 245.

⁶⁷ Unconscionability will be discussed in more detail in section 5.3.2.

⁶⁸ Calimari, p 144.

certain documents to be in writing in order to be enforceable.⁶⁹ For example, in the United States, a contract of the sale of goods for the price of \$ 500 or more falls within the Statute of Frauds and must therefore be in writing.⁷⁰

Swedish as well as Anglo-American law employs the *contra proferentem rule*. According to this rule, the words of different documents are construed more forcibly against the party putting forward the document. The result is a less advantageous interpretation for the party who seeks to impose the exemption when there is doubt or ambiguity in the phrases used.⁷¹

In common law, the *contra proferentem* rule has been established through court decisions.⁷² In Swedish law, the *contra proferentem* rule has traditionally had a limited application as a general rule of interpretation.⁷³ However, the Swedish courts have referred to the rule in several decisions.⁷⁴ It has also been enacted in law through AVLK.⁷⁵

Related to the *contra proferentem* rule and the parol evidence rule is what in Anglo-American law is called *The Plain Meaning Rule*.⁷⁶ In England, and also in some American states, if a text or a specific term *appears to be plain and unambiguous on its face*, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any kind.⁷⁷

⁶⁹ Calamari, p 715f. In 1677, an “Act for the Prevention of Fraud and Perjuries” were adopted in England. This legislation included two sections which imposed the requirement of writing in certain types of contractual obligations. The common law jurisdictions in the United States have adopted writing requirements roughly paralleling the original English statute, even if the coverage varies from state to state. (See Rohwer, p 191ff).

⁷⁰ Rohwer, p 205.

⁷¹ This method of interpretation is called the *rule of vagueness*, or *in dubio contra stipulatorem*

⁷² Lawson, p 23. See for example in English law: *Lee (John) & Son (Grantham) Ltd. v. Railway Executive* [1949] 2 All E.R.

⁷³ Bernitz, p 50.

⁷⁴ See for example NJA 1950 s 86 and NJA 1975 s 484. The principle has also been applied on commercial contracts, see NJA 1981 s 1072.

⁷⁵ Se AVLK 10 §.

⁷⁶ See *Robetson v French* [1803], 4 East 130, p 135.

⁷⁷ Calimari, p 148.

4 Disclosed control of exemption clauses

4.1 Incorporation of exemption clauses

As described in section 1.5, courts can exercise disclosed control of exemption clauses through severe rules of incorporation of exemption clauses into a contract. First, Swedish law will be analyzed. Thereafter, I turn to disclosed control in Anglo-American law.

4.1.1 Swedish law

As we learned in section 3.3, when Swedish courts interpret contract terms, they consider all available, relevant means of interpretation. There is no parol evidence rule in Swedish law. Same weight is normally given to all contract terms, no matter if they are agreed upon orally or in writing.⁷⁸

As also have been described earlier, the basis for contract interpretation is the *common will of the parties*, but this create problems when a party sign the general conditions in a standard form contract without reading through the terms. If the parties normally use certain terms and conditions in transactions between each other, these may be incorporated in a later deal even though they have not been explicitly referred to on that particular occasion.⁷⁹ The parties' previous *course of dealing* must thus be analyzed in order to determine whether an exemption clause is part of the contract or not.

The main rule in Sweden is that contract conditions which are unanticipated or clearly disfavours one party are valid only if these have been brought to his attention or he knew or should have known about the conditions in question.⁸⁰ In most business situations, the requirement is satisfied if the conditions are referred to in a *reference clause*. A reference clause may however not be sufficient if the buyer is a consumer. This is exemplified in NJA 1979 s 401, where a wooden house was sold to a consumer and the contract referred to specific general conditions used in the industry. The conditions included an index clause which in practice would result in a 40 percent increased of price for the buyer. HD found the clause to be burdensome as well as unanticipated. The index clause was unexpected, especially since it was to be found in a part of the contract which dealt with

⁷⁸ Bernitz, p 44.

⁷⁹ Lundmark, p 99.

⁸⁰ Bernitz, p 36f.

delivery conditions, and the fact that the contract included an explicit price for the purchase.

A condition which is neither burdensome nor unanticipated can be part of the contract even if it has not been referred to or brought to the other party's attention, no matter if he is a consumer or not.⁸¹ HD has however not given any detailed rules about which kind of clauses can be part of the contract or not; the decision must be made in light of the facts in every specific case.⁸² It may be sufficient that a party knew or should have known about the clause.⁸³ The relation between the parties, i.e. if one of the parties has a weaker position, could be of importance for this question. Naturally, businesses dealing with commercial transactions on a day-to-day basis should be able to have a sense about customary terms and conditions in the specific industry.

4.1.2 Anglo-American law

In Anglo-American law, a person who signs a contract is normally bound by its terms even though he has not read them. In the English case *l'Estrange v. F. Graucob Ltd.* a proprietress of a café bought a cigarette vending machine through signing a sales agreement without reading it.⁸⁴ Even so, the court held that she was bound by an exemption clause in small print.

According to the *objective theory of contracts*, a party is bound by the reasonable impression the party creates. A party who signs an instrument may not later complain about not reading or understanding it since the signature manifests assent.⁸⁵ He has a so-called *duty to read*. In Anglo-American law, it is customary to highlight clauses which clearly disfavour the other party through e.g. another colour or a bold style.⁸⁶

In certain situations, an exemption clause will be considered incorporated in a contract only if *reasonable notice* of its existence is given to the party adversely affected by it. This is the case if the exemption clause is set out, or referred to, in a document which is simply handed out by one party to another, or displayed where the contract is made.⁸⁷ Whether the requirement of reasonable notice is met or not is determined in light of all relevant

⁸¹ NJA 1978 s 432.

⁸² Lundmark, p 101 and Bernitz p 38.

⁸³ Lundmark, p 102. This view may be advantageous since, as described earlier, many individuals do not read through specific contract terms when entering into an agreement. This solution has however not been applied (at least not explicitly) by Swedish courts in questions of incorporation.

⁸⁴ [1934] 2 K.B. 394.

⁸⁵ Calimari, p 376.

⁸⁶ Bernitz, p 36.

⁸⁷ Treitel, p 198.

circumstances.⁸⁸ Just like in Swedish law, a more strict interpretation is applied if the exemption clause contains conditions which are unusual or significantly reduces the risks for one of the parties. However, the party is bound by the conditions if he knew or believed that an exemption clause was incorporated into the contract.⁸⁹

In addition, the present position in common law is that if there has been a long and consistent course of dealing on terms incorporating an exemption clause, then those terms *may* be valid also in a case where the usual steps to incorporate the clause have not been taken.⁹⁰ Also this correspond to the Swedish regulation, notwithstanding that the wording “may” implies that course of dealing prevails over the actual conditions only in certain cases.⁹¹

In the United States, UCC § 1-205 (1) defines course of dealing as “a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct”. According to Rohwer, it might be appropriate to look upon course of dealing as the parties own private, personalized usage of trade and an established course of dealing will thus control a usage of trade where the two are in conflict.⁹²

Lastly, it is crucial that a contracting party is aware of the underlying principles in Anglo-American contract law, such as the *Parol evidence rule* (See chapter 3.3 above). Oral agreements are, according to this rule, in some cases not part of the contract.

4.2 Consequences of the contra proferentem rule

4.2.1 Swedish law

Another example of disclosed control is when courts apply the contra proferentem rule to the disadvantage of the party putting forward an

⁸⁸ *Hood v Anchor Line (Henderson Brothers) Ltd.* [1918] AC 833, p 844.

⁸⁹ *Parker v South Eastern Railway Co* [1877] 2 CPD 416, p 423.

⁹⁰ Treitel, p 200. See e.g. *Circle Freight International Ltd. v. Mideast & Gulf Exports Ltd.* [1988] 2 Lloyd’s Rep. 427.

⁹¹ English courts seems thus to have relied on the principle of *pacta sunt servanda* to a greater extent. It can though be argued that the principle is irrelevant in this situation because we are talking about what is *included* in the contract, not questions if the contract itself should be complied with.

⁹² Rohwer, p 235.

exemption clause.⁹³ The rule is however less suitable when it comes to so-called *agreed documents*.⁹⁴ It may be argued that both parties in these cases should be responsible for ambiguous writing in the contract since the terms are the result of negotiation between them (or representatives of them). This argument has particular weight in business contexts, where lawyers representing both sides are involved in the contract formation.

In the Swedish legal discourse, Adlercreutz suggests – in light of the *contra proferentem* rule – that exemption clauses generally should be interpreted narrowly.⁹⁵ This view is also represented by Bernitz.⁹⁶ Lehrberg points out that a party who intends to nullify non-mandatory law must adequately communicate this intention to the other party.⁹⁷ Grönfors suggests, at least as far as trade law is concerned, that the regulation in non-mandatory law should be presumed to prevail in the case of vagueness.⁹⁸

The purpose of a restrictive interpretation of exemption clauses in Sweden is that the legislator has an interest in protecting a party who is subject to a standard form contract.⁹⁹ It can often be presumed that there is a disparity in the bargaining power of large enterprises and consumers. It would be against public interest to impose unfair terms upon consumers or merchants with small bargain power which wholly or in part exempt the liability of the party putting forward the document.

However, many scholars also criticise the notion of a general interpretation of exemption clauses to the seller's disadvantage. According to Kihlman, a seller has a legitimate interest in reducing the risk and to end his obligations. Therefore, he suggests that a restrictive interpretation of exemption clauses should be used only if they are vague in the particular case.¹⁰⁰ Ramberg thinks that the court's restrictive construction is surprising since the Code of Land Laws ("Jordabalken") and the Sale of Goods Laws ("KöpL" and "KKL") makes the seller liable for a relatively broad scope of defects.¹⁰¹ Bernitz suggests that factors such as the balance between other obligation and responsibility for insurance also have to be taken into account when determining the soundness of an exemption clause.¹⁰²

⁹³ See section 3.3 for more detail about the *contra proferentem* rule.

⁹⁴ Lundmark p 106.

⁹⁵ Adlercreutz II, p 102.

⁹⁶ Bernitz, p 52.

⁹⁷ Lehrberg, s 106. See also Grönfors "Avtalsfrihet och dispositiva rättsregler". JFT 1988 s 317ff (p 323)

⁹⁸ Grönfors, s 27ff.

⁹⁹ Adlercreutz, p 103. See also Bernitz, p 15.

¹⁰⁰ Kihlman, s 72.

¹⁰¹ Ramberg, p 250f.

¹⁰² Bernitz, p 52.

Which perspective should prevail? It is in many cases hard for the seller to estimate all features of a good, especially if the good does not exist when the contract is entered into. In a sound market economy, the seller must be able to know which risks are associated with his business and calculate future profits with a certain degree of precision. This speaks for a more generous interpretation of exemption clauses. On the other hand, the buyer is in most business transactions also a corporation with the same interest in reducing uncertainties.

It seems like the courts partly have adopted the restrictive standard set forth by scholars such as Adlercreutz when it comes to exemption clauses with a vague and imprecise language. This can be exemplified through the decisions involving the often used phrase "befintligt skick" by the seller.¹⁰³ This terminology is traditionally used when the seller wants to exclude his overall liability for visible as well as hidden defects in the product. Exemption clauses where a seller tries to circumvent mandatory requirements of quality set forth by KKL are of course invalid *per se*.¹⁰⁴

Another example of the high standard of precision required in exemption clauses is in the area of real estate. In NJA 1975 s 545, HD acknowledged an exemption clause which was clear and precise. In contrast, the court came to an opposite conclusion in NJA 1983 s 808 because the degree of clarity was too low.¹⁰⁵

A condition in a home insurance was considered in NJA 1988 s 208. According to a term in the contract, the insurance excluded compensation for losses as a result of property left ("som lämnats kvar") in a car. The court found that the condition did not cover the situation when music equipment was stolen after it was left without observance in the car for 15-20 minutes. Since the condition was not sufficiently clear in its meaning, it was interpreted against the party putting forward it, namely the insurance company.

Even though consumers are the main beneficiaries from the application of the *contra proferentem* rule, it is clear that it is relevant also in business relations.¹⁰⁶ The validity of an exemption clause in a charter party was

¹⁰³ See for example MD 1977 nr. 20 and NJA 1975 s 620.

¹⁰⁴ See 17 § KKL. See also 10 § AVLK, which states that contract conditions which have not been individually negotiated (in other words standard form contracts) shall be construed in favour for the consumer.

¹⁰⁵ "Fastigheten överläts sådan den av köparen har besiktigats". See also NJA 1986 s 670 where another exemption clause was rendered invalid because of ambiguity.

¹⁰⁶ HD have in several decisions stated that more strict standards should apply when the buyer is a consumer, see for example NJA 1986 s 596 and NJA 1985 s 397 II.

considered in NJA 1954 s 573. HD implicitly referred to the contra proferentem rule in its opinion.¹⁰⁷

4.2.2 Anglo-American law

Just like in Swedish law, English law requires that the words of an exemption clause are clear and unambiguous. The Courts have established certain rules of constructions which normally work in favour of the party seeking to prove liability and against the party who claims the benefit of the exemption clause.¹⁰⁸ However, the application of these canons does not render exemption clauses generally ineffective. If the clause is appropriately drafted so as to exclude or limit the liability in question, then the courts *must give effect to it*.¹⁰⁹

However, the clause must *exactly* cover the liability which it is sought to exclude.¹¹⁰ Similarly to the Swedish court's restrictive interpretation of the expression "befintligt skick", English courts have decided that the provision "no warranty, express or implied" does not protect the seller from liability of breach of condition.¹¹¹ There has been a tendency towards less strict construction since the enactment of the Unfair Contract Terms Act 1977, which proscribes the requirement of "reasonableness" (See further 5.2.1).¹¹²

There are several English cases where the contra proferentem rule has been applied. The fact that ambiguous terms are construed in the way least favourable to the party relying on them is exemplified by *Houghton v. Trafalgar Insurance*.¹¹³ In this case, a five-seater car was involved in an accident while carrying six people. The driver's insurance contract contained an exemption clause where liability for damage caused "whilst the car is carrying any *load* [emphasis added] in excess of that for which it was constructed" exempted the insurance company's duty of compensation. As the clause did not extend to cases where the car was carrying too many *passengers*, the insurers were held liable.

In the United States, the contra proferentem rule also seems to have been applied in situations where a contract term is very clear and precise. In an

¹⁰⁷ "Liksom friskrivningsklasuler i allmänhet bör den nu dryftade tolkas snävt, särskilt som avfattningen av certepartiformuläret, enligt vad som upplysts, närmast utformats av en organisation vilken företrädde befraktarintressena."

¹⁰⁸ Beatson, p 165.

¹⁰⁹ Ibid.

¹¹⁰ Beatson, p 166.

¹¹¹ *Wallis, Son & Wells v. Pratt & Haynes* [1911] A.C. 394.

¹¹² Beatson, p 166.

¹¹³ [1954] 1 Q.B. 247.

Illinois case¹¹⁴ a person signed up for dance lessons and was told that he had “exceptional potential to be a fine and accomplished dancer”. However, after a car accident, the plaintiff became incapable of continuing his dancing lessons. At that time, he had contracted for a total of 2.734 hours of lessons at a total price of almost \$25.000. The agreements he had signed contained bold-styled statements such as “Non-cancellable Contract” and “I Understand that No Refunds Will Be Made under the Terms of this Contract.” Despite the clear and unambiguous terms, the court concluded that the plaintiff did not waive his right to rescind the contract. The favourable interpretation for the plaintiff had most likely to do with the fact that he was a consumer and it can thus be argued that it has limited applicability in a business context.

Even if the *contra proferentem* rule applies to all exemption clauses, the court use it less rigorously on clauses which merely *limit* liability (limitation clauses) in comparison to those which totally exclude it.¹¹⁵ The House of Lords gave two reasons for this in a Scottish case.¹¹⁶ First, it was argued that there is a higher degree of improbability that a contracting party would agree to a total exclusion of liability than to a limitation of liability. Second, it was said that limitation clauses “must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure”.¹¹⁷ Beatson finds it difficult to see why such a clear distinction should be drawn between the two types of exemption clauses and argues that exemption clauses which totally exclude liability also are related “to other contractual terms” and the other party’s opportunity to insure.¹¹⁸

4.2.2.1 Fundamental breach

Scholars have discussed whether there is a principle of “fundamental breach” in common law. Since the principle has not been fully recognized in the legal literature, it will not be analyzed in detail within the frame for this thesis. Shortly, the principle is based on the notion that every contract contains certain terms which are fundamental and forms a “core” of the contract and could thus not be affected by any exemption clause. However, there is no separate category of “fundamental breaches” against which exemption clauses cannot prevail.¹¹⁹

¹¹⁴ *Parker v. Arthur Murray, Inc.* 298 N.E. 2d 487 (Ct. App. ILL 1973).

¹¹⁵ Treitel, p 202.

¹¹⁶ *Alisa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.* [1945] K.B. 189, at p 192.

¹¹⁷ Lord Wilberforce at p 966.

¹¹⁸ Beatson, p 170.

¹¹⁹ Beatson, p 170f.

5 Open control of exemption clauses

Even if a contract term such as an exemption clause is properly incorporated into the agreement and the language of the clause is sufficiently clear, it can still be challenged through open control. In Sweden, the most important instrument in these situations is the so-called *General Clause* in 36 § AvtL. This clause gives the court a wide opportunity to adjust or make invalid unfair contract conditions if certain criteria are fulfilled.¹²⁰

Also English and American law have statutory safeguards. In the United States, there has been a tendency to treat standard form contracts differently from other contracts on different grounds, among them *unconscionability* (see 5.3.2).¹²¹ In this chapter, English and American law will be discussed separately because different sets of rules apply to each country. First, however, we take a closer look at the Swedish regulation.

5.1 Swedish law

5.1.1 36 § AvtL – the “general clause”

As mentioned, the principle of freedom of contracts and *pacta sunt servanda* has been somewhat diluted during the last decades. This is exemplified through the fact that weaker parties, such as consumers, in many contract situations have received more protection under statutory law in Sweden.

According to 36 § AvtL (the “general clause”), a contract condition can be adjusted or rendered invalid if the condition is unfair because of its content or because of circumstances, no matter if they occurred during the contract formation or later on.

Several factors influence the applicability of the general clause. A contract clause’s disparity with non-mandatory law could for example be one of the reasons for adjustment in accordance with 36 § AvtL.¹²² However, since the whole idea with exemption clauses is to modify requirements in law which otherwise would govern the parties’ activities, it seems to be absurd if

¹²⁰ Another clause with similar construction could be found in 6:2 SkL, where unfair damages can be adjusted.

¹²¹ Calimari, p 382f.

¹²² Lehrberg (1998), s 97.

courts would make invalid such clauses barely because of their inconsistency with non-mandatory law. On the other hand, non-mandatory law, just like trade usage, can serve as an indicator of the reasonableness of the exemption clause.

The purpose of the enactment of the general clause was primarily to extend the possibilities for courts to make invalid or adjust unjust contract conditions which *consumers* are subject to.¹²³ It is explicitly explained in the second paragraph of 36 § AvtL that a party's subordinate position is of particular weight when considering whether a clause is unfair or not.

In situations where the bargain position is balanced, which is often the case in many business relations, the clause is less likely to be applicable. An exemption clause in a leasing contract was considered by HD in NJA 1988 s 230. The clause exempted the remedies which could be used against the lessee in case of late delivery from the distributor or other breaches of the distributor's obligations. The lessee argued that the clause was unfair with reference to 36 § AvtL since the possibilities to successfully claim damages from the distributor for defects of the object were limited. HD concluded that the contracting parties were two merchants with equal bargain positions and therefore that the contract was not unfair.

One should however be careful to conclude that 36 § AvtL has no applicability between merchants with equal bargain positions. Special circumstances in every single case have to be taken into account. It is probably more reasonable to employ 36 § AvtL if both parties are relatively small businesses which are not represented by lawyers.

5.1.2 Restrictions in Public law – AVLN

MD (Marknadsdomstolen) can with reference to AVLN prohibit a merchant who uses contract conditions which are unfair towards other merchants, to obstruct further use of the same conditions in similar situations.¹²⁴ However, prohibition can be used only if it is necessary from a public perspective.¹²⁵ As a consequence, it is first and foremost conditions in standard form contracts which are exposed to control.

AVLN is primarily intended to protect merchants with small bargain power towards stronger corporations.¹²⁶ The law is incapable to control exemption clauses in a particular contract relationship between two parties. Rather, it attempts to influence the course of standard form contracts on the market in

¹²³ Prop 1975/76:81, p 102.

¹²⁴ AVLN 1 §.

¹²⁵ AVLN 2 § 2.

¹²⁶ AVLN 2 § 1. For consumer relations, see AVLK.

the direction the legislator finds suitable. It is not necessary that a contract has been entered into at all. The law allow in other words an indirect form of open control.

The lawmakers expressed that it is neither possible nor desirable to specify the conditions which can be subject to control.¹²⁷ A contract condition must be seen in light of the contract as a whole. Up to this point, the control has played a subordinate role, at least if decisions from the MD can serve as an indicator. There are however examples of contract conditions which have been considered unfair according to MD.¹²⁸

5.1.3 Other statutory remedies¹²⁹

Another provision which may be applicable on certain exemption clauses can be found in 33 § AvtL. In comparison to the general clause, 33 § AvtL requires a higher degree of unfairness. Additionally, the clause is less flexible in terms of its effects since it can only be used to *make invalid* contracts – not adjust contract conditions.

The provision's general character may however have some relevance also for exemption clauses.¹³⁰ If, for example, an exemption clause is in disparity with the other party's promises during the contract negotiations, the court may find that it would be unjust to enforce the contract in accordance with 33 § AvtL. Another example of a possible application of the provision is if a party releases himself from risks based on information which the other party do not have access to.¹³¹ From this viewpoint, 33 § AvtL can be seen as another example of the general duty of loyalty under Swedish law.

5.1.4 Non-statutory remedies

In cases where the contract does not contain any unfair conditions at all, it may be possible to render a contract term invalid because the buyer entered into the agreement with wrong expectations.¹³² For example, a buyer may estimate the risks on erroneous grounds when formulating an exemption clause. Not only circumstances at the time of contract formation but also circumstances which occur after the agreement is made are relevant.¹³³

¹²⁷ Prop. 1983/84:92

¹²⁸ See for example MD 1995:33.

¹²⁹ The rules of tvång, svek and ocker (28-31 §§ AvtL), give the courts limited abilities to tackle unfair contract conditions. Normally, they are used only on individually negotiated contracts (See Bernitz, p 76). They are rarely applied on commercial contract conditions and will therefore not be discussed in detail.

¹³⁰ Lundmark, p 110.

¹³¹ Ibid.

¹³² This is in Swedish law called "förutsättningsläran".

¹³³ Adlercreutz I, p 280.

Certain criteria have to be fulfilled in order to successfully apply the doctrine. The contract party's expectation must have been *significant*. The expectation and its significance must also have been realized by the other party. It is however not required that this other party understood the incorrectness of the expectation, for example that the risks were estimated in a wrong way.¹³⁴

5.2 English law¹³⁵

In England, the effectiveness of an exemption clause is subject to a number of common law limitations. These are however much reduced in importance by legislative limitations, especially the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1994 and the Misrepresentation Act 1967. Most importantly, before the enactment of these laws, courts lacked a general power at common law to strike down contract terms merely because they were “unreasonable” or “unfair”.¹³⁶

The new statutory requirement in this field of contract law can be seen as a move away from the traditional common law tradition where court decisions serve as the main source of law. One of the reasons for this “civil law-process” is that the lawmakers have attempted to make it easier for laymen, such as consumers, to understand their rights and duties under the law.

Today's statutory requirements of reasonableness and fairness – which will be discussed in more detail in the following section – might influence courts to develop similar requirements at common law. A tendency towards more consistent contract law may of course be advantageous, but the reverse has also been argued since it would extend the requirements precisely to cases from which the legislator had deliberately excluded them.¹³⁷

5.2.1 Unfair Contract Terms Act 1977

The purpose of UCTA is to limit the effects of exemption clauses, and in certain situations make them totally invalid.¹³⁸ Even if the Act governs many types of contracts, certain important contracts are excluded from its operation, such as contracts of insurance, international supply contracts and

¹³⁴ Adlercreutz I, p 281.

¹³⁵ Because of different sources of law, English and American law will be treated separately in this chapter.

¹³⁶ Beatson, p 182.

¹³⁷ Treitel, p 224.

¹³⁸ Beatson, p 182.

contracts of employment (if not in favour for an employee).¹³⁹ Only conditions which exempt or limit obligations in the *course of business* are regulated by the Act, with a few exceptions.¹⁴⁰

According to UCTA, the restriction or exclusion of liability may be rendered either absolutely ineffective, or it may be effective only if the term in question satisfy the requirement of *reasonableness*. All clauses govern by UCTA which are not explicitly prohibited are subject to the test of “reasonableness”. Since the rules are very technical in nature and also in part applies to consumer contracts, it is neither possible nor preferable to describe the prohibition rules exhaustively within the frame of this thesis. The perhaps best way for a lawyer to determine the Act’s relevance for a certain exemption clause is to apply the following test:

- 1) Is the type of clause regulated by UCTA?
- 2) If the clause is regulated by UCTA, is the clause explicitly prohibited or not?
- 3) If the clause is regulated by UCTA, but not explicitly prohibited, does the clause meet the requirement of reasonableness?

In all cases where the “reasonableness” test is applied in relation to a contract term, the question to be decided by the Court is whether the term is fair and reasonable in light of the “circumstances which were, or ought reasonably to have been, known to or in contemplation of the parties when the contract was made”.¹⁴¹

The Act has set out certain “guidelines” of circumstances to be taken into account in order to assist the Court in determining whether a term satisfy the requirement or not. These include, among other things, the strength of the bargaining positions of the parties relative to each other, whether the customer received an inducement to agree to the term, whether the customer knew or ought reasonably to have known of the existence and the extent of the term and whether the goods were manufactured, processed or adapted to the special order of the customer.¹⁴² The test of reasonableness means that decisions are likely to be made on case-to-case basis and the consequence is thus a body of law that is flexible but uncertain.¹⁴³

¹³⁹ Other contracts outside the scope of the law are commercial charterparties, contracts of carriage of goods by sea and any contract so far it relates to the creation or transfer of an interest in land, intellectual property, or the creation or transfer of securities. Most of these contracts are subject to specific legislative control, see Beatson, p 183. In the case of consumer contracts, most will be governed by the Unfair Terms in Consumer Contracts, see below 5.2.1.1.

¹⁴⁰ 1977 Act 1(3).

¹⁴¹ 1977 Act 11(1).

¹⁴² 1977 Act 11(2), Sched. 2.

¹⁴³ Beatson, p 192.

Section 3 of UCTA deals with “contractual liability” and the provisions may apply to any contract, unless it is of a type explicitly excepted by the Act. The section applies for example to contracts of sale and hire-purchase and supply contracts. However, it is only applied when 1) one of the contracting parties deals as a consumer *or* 2) the contract involves the other’s written standard terms of business, and the liability which is sought to exclude or restrict is a business liability. The latter requisite is in other words of interest since many contracts between businesses are today made by reference to standard terms and conditions printed in order forms, catalogues or price lists. Again, exemption clauses which fall under this category are valid only if they satisfy the requirement of reasonableness.

5.2.1.1 UCTA’s relevance in consumer contracts

Despite the fact that UCTA have some applicability on consumer contracts, most consumer contracts will be subject to the Unfair Terms in Consumer Contracts Regulation Act 1994 (UTCCR). The regulation applies also to all terms, not only exemption clauses, which have not been “individually negotiated”. The contract terms are subject to a requirement of *fairness*. A term will be “unfair” when “contrary to the requirement of good faith” it “causes a significant imbalance of the parties’ rights and obligations under the contract to the detriment of the consumer”.¹⁴⁴

The broader scope of UTCCR makes the protection even less certain than exemption clauses govern by UCTA.¹⁴⁵ Furthermore, it is quite unclear to what extent the test of fairness differs from the reasonableness test in UCTA.¹⁴⁶

5.2.2 Misrepresentation Act 1967

Some exemption clauses may also subject to the Misrepresentation Act 1967. Before the enactment of this statute, common law allowed limitations and exclusion of liability for misrepresentation, except in cases of personal fraud.¹⁴⁷ Section 3 of the Misrepresentation Act provides:

If any contract contains a term which would exclude or restrict:

¹⁴⁴ Reg. 4(1).

¹⁴⁵ Beatson, p 196.

¹⁴⁶ Beatson, p 197.

¹⁴⁷ Beatson, p 255. Limitations in common law still retain some practical importance in cases which are not governed by the Misrepresentation Act (See Treitel, p 222). For consumer contracts, see for example *Curtis v Chemical Cleaning & Dyeing Co. Ltd.* [1951] 1 K.B. 805.

- a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
- b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.¹⁴⁸

An exemption clause is in other words *prima facie* invalid according to the law, but the court can give effect to it given that the requirement of reasonableness as set forth by UCTA is fulfilled. A contract signed as a result of a party's oral misrepresentation of one of its terms makes that party unable to rely on that term to the extent that he misrepresented its effect.

5.3 American law

None of the above mentioned laws are applicable in the United States. Instead, the Uniform Commercial Code, UCC, serves as the main statutory source of law as far as exemption clauses are concerned. UCC is applicable on contracts for the *sale of goods*. According to section 2-105(1), "goods" means all things (including specially manufactured goods) which are moveable at the time of "identification to the contract". The key question is whether the contract involves tangible things that are movable at the time performance is to be rendered.¹⁴⁹ Besides the UCC, there are several common law regulations which may be relevant, such as the rules of *undue influence*.

5.3.1 Undue influence

In the United States, a contract might be unenforceable because of undue influence from any of the parties. Typically, there are two broad classes of undue influence cases. In the first case, one party induces a subservient party to consent to an agreement through the use of a *dominant psychological position*. Neither threats nor deception is required although often one or the other is present. In the second class, one uses a *position of trust and confidence* unfairly to persuade the other party into a transaction.¹⁵⁰ An indicator of undue influence is an unnatural transaction which results in the enrichment of one of the parties at the expense of the

¹⁴⁸ Substituted by of the UCTA 1977, s 8 (1).

¹⁴⁹ Rohwer, p 10.

¹⁵⁰ Calimari, p 322.

other.¹⁵¹ If undue influence is present, the contract is voidable. However, the doctrine is rarely used in a business context. Most undue influence involves transactions with physically weak individuals such as elderly persons or children.¹⁵²

5.3.2 Unconscionability

More relevant for exemption clauses, however, is the doctrine of *unconscionability*. The Uniform Commercial Code (UCC) contains a provision (Section 2-302) that governs contracts that were “unconscionable” at the time they were made:

- (1) 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 as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The purpose of the regulation is to make it possible for the courts to police explicitly against unfair contracts or contract clauses by looking at, among other things, adverse construction of language and if the contract or clause is contrary to public policy or to the dominant purpose of the contract.¹⁵³

The provision has been applied to numerous transactions outside the coverage of Article 2 of the UCC. It should be considered in conjunction with the obligation of *good faith* that the UCC imposes at several places.¹⁵⁴ The obligations of good faith can in fact have substantive impact in many contract situations and should therefore not only be viewed as a simple iteration of honourable intentions.¹⁵⁵ A very good example of this is that any contract term where someone exempt oneself from liabilities for deliberate breach of his fiduciary duty is ineffective.¹⁵⁶

Although consumers are the primary beneficiaries of the doctrine, businesses, particularly small businesses, can be victimized by

¹⁵¹ Ibid.

¹⁵² Calimari, p 323.

¹⁵³ Calimari, p 365f.

¹⁵⁴ Calimari, p 375. See for example Section 1-203 of the UCC.

¹⁵⁵ Rohwer, p 14.

¹⁵⁶ Treitel, p 223.

unconscionable contracts and will receive judicial protection.¹⁵⁷ Terms which courts have found unconscionable involve gross one-sidedness of terms disclaiming a warranty, limiting damages or granting procedural advantages. Often, one-sidedness is coupled with writing in small print or unintelligible language.

Superior bargaining power is however not a ground by itself for striking down a contractual term; there must be additional elements such as, for example, a lack of meaningful choice as in the case of some standard form contracts offered on a take it or leave it basis (“adhesion contracts”). Courts have demonstrated an apparent reluctance to deny enforcement to contracts for the sole reason that they are “unfair”. This reflects the importance of the notion of freedom of contract.¹⁵⁸

¹⁵⁷ Calimari, p 370f.

¹⁵⁸ Rohwer, p 317.

6 Clauses exempting negligence

6.1 Swedish law

Clauses where a party exempt himself from negligent acts are in many cases recognized by Swedish courts as long as the other party is not a consumer. In KöpL, a distinction is made between *direct* and *indirect* losses. What constitutes indirect loss is explained explicitly in the law; other losses are direct.¹⁵⁹ The idea behind two separate categories of losses is that the legislator finds it more legitimate with a stricter obligation for a party to compensate losses which are predictable than if the losses are unforeseeable.¹⁶⁰

Accordig to KöpL, the seller is responsible for direct losses to the extent they are within his control – *control liability*. The purpose of the control liability is to distribute the burden of compensation in light of what is controllable for the parties. The party is *strictly responsible* for direct losses which are within his control sphere no matter his negligence. To avoid duty of compensation the seller has to prove that 1) there is an obstacle which makes fulfilment of his duties under the contract impossible 2) the obstacle is outside his control sphere 3) he could not reasonable have expected the obstacle at the time of the purchase and 4) he could not reasonable have avoid or manage the obstacle.¹⁶¹ The seller is accountable for indirect losses in case of negligence.¹⁶²

Clauses exempting negligence are most often formulated in a general style, even if the most common way is to exempt oneself, wholly or in part, from indirect losses which are not the result of *gross negligence*. Exemption from gross negligence is namely generally considered to be unfair.¹⁶³ It has also been stated that, at least as far as consumer relationships are concerned, exemptions of a lower degree of negligence may be invalid.¹⁶⁴

The legal term “gross negligence” is however often used in Swedish law without any attempt to define what it actually constitutes.¹⁶⁵ Naturally, the degree of negligence is dependent on the circumstances in every specific

¹⁵⁹ See 67 § 2 KöpL.

¹⁶⁰ Lundmark, p 143. See also prop. 1988/89:76 p 47ff.

¹⁶¹ For more details about control liability, see Lundmark, p 156.

¹⁶² 27 §, 40 § and 41 § KöpL.

¹⁶³ Bernitz, p 88.

¹⁶⁴ See NJA II 1976:185, p 286.

¹⁶⁵ Lundmark, p 138. See for example 33 § KöpL and 24 § KKL.

case. HD stated in NJA 1992 s 130 that the meaning of a term in many cases diverges within the civil law framework.¹⁶⁶ What can be said is that a party who knowingly acts outside a standard of reasonable care (and thus understands that damages may occur) can be seen as an indicator of gross negligence.¹⁶⁷

Even if the main rule does not recognize exemptions of gross negligence, there are situations where clauses exempting gross negligence can be legitimate. An example is a contract which deals with purchase of goods and the other party are protected through insurance from defects.¹⁶⁸ Circumstances in the particular case which can be relevant for the validity of the clause are the price of the insurance and to what extent it allows coverage to potential expenses. In addition, one should not forget that usage in the industry or between the parties must be acknowledged.

NJA 1979 s 483 involved the purchase of gas pumps which displayed lower price than normal when used by customers.¹⁶⁹ The seller's general conditions included a total exemption of liability for "indirect loss", with the exception of gross negligence. HD concluded that the seller's performance did not constitute gross negligence and that the exemption was not unfair. One of the reasons for the latter was that the general conditions were the result of negotiations between organizations representing both sides. Another reason was that the Sale of Goods Act from 1905 which by then was the applicable law in the absence of special regulations was too old-fashioned and thus did not give any proper guidance (non-mandatory law can, as mentioned before, normally provide the courts with guidance). Lastly, HD found that the general conditions as a whole did not put any particularly heavy burden on either side. A contrary condition would intervene on the very foundations of the solutions used in the industry. The 1979 case is an outstanding example of a decision where the principle of freedom of contracts and *pacta sunt servanda* prevails over other concerns.

6.2 Anglo-American law

Even if the definition of the term "negligence" is not perfectly clear in Anglo-American law, it often includes a duty to take reasonable care or use

¹⁶⁶ NJA 1992 s 130, p 137f.

¹⁶⁷ There are often attempts to define "gross negligence" or "gross misconduct" in international sales contracts. For the interested reader, ECE 188 and ORGALIME can serve as examples.

¹⁶⁸ Lundmark, p 133.

¹⁶⁹ Bernitz claims that the decision most probably is relevant also today, after the enactment of KöpL 1990. (See Bernitz, p 89).

reasonable skill.¹⁷⁰ In English law, the 1977 Act provides a statutory definition of negligence which applies equally to breach of contracts and torts in Section 1(1). Negligence is defined as the breach:

- a) 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) of any common law duty to take reasonable care or exercise reasonable skill (but not a stricter duty);
- c) of the common law duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957.

Traditionally, it has been perceived as improbable in Anglo-American law that innocent parties would agree to the exclusion of the other party's negligence unless the term is very clear and unambiguous.¹⁷¹ The requirement of clearness is most obviously satisfied where negligence is expressly referred to in the exemption clause, *i.e.* uses the word "negligence".¹⁷²

With the enactment of UCTA, the ability of contracting parties to exclude themselves from negligence has been reduced even more. It is explicitly prohibited in Section 2(1) to exclude or restrict liability for death or personal injury as a result of negligence by reference to any contract term. Such a contract term is without exceptions, void and of no effect. In other cases, a party cannot exclude or restrict liability for negligence if not the term satisfies the above mentioned requirement of reasonableness.¹⁷³

Generally, there are two major obstacles in English law when a party tries to justify a clause exempting gross negligence. First, the court may apply higher standards to determine if the other party knew or should have known about the clause. Second, the clause may be considered unusual and extensive. This, in turn, gives the party relying on the clause a harder job to fulfil his burden of proof as to the clause's reasonableness.

It can be argued that a clause exempting negligence can constitute notification of a risk. According to the doctrine of *volenti non fit injuria*, a person who willingly accepts the risks of injury cannot complain when that injury occurs. Thus, subsequent use of the relevant goods or services could,

¹⁷⁰ Beatson, p 186. What constitutes "negligence" more specifically is primarily determined by judge-made law in the different jurisdictions. For the purpose of this essay, I will presume that an English case involving negligence would be decided the same way by a Swedish court.

¹⁷¹ Beatson, p 167.

¹⁷² Treitel, p 203.

¹⁷³ 1977 Act, Section 2(2), (3).

in theory, constitute an acceptance of the risk and hence a denial of the right to sue.¹⁷⁴

However, Section 2(3) prescribes that agreement to, or awareness of an exemption clause is not “of itself to be taken as indicating [the plaintiff’s] acceptance of the risk”. The subsection does not wipe out the doctrine of assumption of risk; it purely states that an exemption clause *in itself* is not sufficient to invoke the doctrine.¹⁷⁵

¹⁷⁴ Lawson, p 109.

¹⁷⁵ Lawson, p 109.

7 Conclusions

The different historical legacies have had an influence on the contemporary legal systems in Sweden, England and the United States. Each of these three jurisdictions (considering the United States a separate one) has developed different legal frameworks with unique concepts and techniques. This is reflected in, among other things, the different rules for contract interpretation. However, the question remains if the different systems are reproduced in different applications of the actual *law* or, metaphorically, one can expect a human being with the same qualities no matter the skeleton.

7.1 The validity of *praesumptio similitudinis*

Beginning with *disclosed control* of exemption clauses, the first noteworthy difference between the systems is found in the foundations of contract interpretation. A more “objective” approach is employed in Anglo-American law, whereas Swedish law generally give the same weight to written as well as oral evidence. In addition, principles like the *parol evidence rule* and the *duty to read* makes the very terms of a written contract the most important means of construction in Anglo-American law. This seems to indirectly favour the party who provides the contract terms.

However, in both systems, an unanticipated or oppressive clause must have been brought to the other party’s attention if he did not know or should have known about it. Stricter rules are employed in consumer transactions whereas merchants are presumed to take care of their own interests to a greater extent. Also, course of dealing is recognized as a possible factor to take into account in both systems where usual steps to incorporate an exemption clause into the contract have not been taken.

Furthermore, Swedish as well as Anglo-American law require high standards of precision of exemption clauses. Ambiguous terms are interpreted against the part who is putting forward the clause. Swedish scholars recognize the *contra proferentem rule* and the principle have also been employed in several court decisions, such as NJA 1988 s 208. In England, the same principle was utilized in *Houghton v. Trafalgar Insurance*.

When it comes to *open control*, both systems provide the courts with devices for challenging “unreasonable” or “unfair” exemption clauses. In Sweden, the main instrument against unfair clauses is found in 36 § AvtL.

In England and the United States, open control of exemption clauses is utilized through the statutory requirement of *reasonableness* in UCTA and the rules in UCC about unconscionable contracts.

As mentioned, courts in the United States rarely strike down contract terms only because they are “unfair”; the principle of freedom of contract seems thus to be stronger than in England and Sweden. However, this does not necessarily have to be true. It is for example not impossible that courts in the United States use disclosed control to a greater extent when faced with a dispute about the fairness of a condition.

The perhaps most striking difference between the systems in terms of open control is the Swedish regulation AVLN, which does not have any counterpart neither in English nor American law. This regulation has however not played any significant role for the validity of exemption clauses, even if it may have an indirect “detering” effect on merchants when they are formulating contracts.

To sum up, the similarities outweigh the differences between the systems as far as the rules which govern exemption clauses are concerned. Also when looking at a specific form of exemption clause, namely those which are exempting negligence, courts have developed fairly similar approaches. This kind of exemption clause is in both systems generally looked upon with suspicion; exemption of gross negligence is for example considered unfair in most cases. However, since one always has to look at the specific circumstances in every single case, courts have much leeway when determining whether a certain clause is justifiable or not. It is therefore hard to compare differences and similarities between the systems with perfect accuracy.

7.2 Guidelines for businesses

Even if there are situations where exemption clauses may be invalid, it is probably safe to conclude that the main rule is that exemption clauses generally are recognized and will thus in most cases be enforced by courts. When it comes to contracts between merchants with equal bargain positions, the reasons for adjustments by courts are even fewer. This is exemplified by NJA 1988 s 230 (the leasing contract) which in fact seems to be the only significant decision from later years involving open control of exemption clauses between businesses in Swedish law.

However, several steps can be taken if a business which intends to utilize an exemption clause wants to play it safe. For example, the degree of disparity between non-mandatory regulation or usage of trade and the distribution of

rights and obligations proposed by the exemption clause in question may serve as an indicator of the clause's fairness. That courts may want to turn to non-mandatory law for guidance is clear from NJA 1979 s 483. At that time, the court considered the Swedish Sale of Goods Act from 1905 too old-fashioned. However, this does not prevent courts to determine the validity of an exemption clause through a comparison with the 1990 law.

The dynamics of contract negotiations are often very complex and it may be questioned if contracting parties always should seek perfect precision in all terms and conditions. It is not seldom time consuming and expensive with contract negotiations, especially if lawyers are representing each side in the process. Deliberate ambiguity in certain terms can sometimes be seen as an attempt to achieve a better overall deal even though the risk involved with potential disputes increases. The parties are the best judges as to the consequences of the risk allocation. However, if one want to rely on a specific term, such as an exemption clause, it is crucial with a clear and unambiguous language.

Unanticipated and burdensome exemption clauses must, as have been explained, be brought to the other party's attention in Swedish as well as Anglo-American law. Even if the requirement is less strict when it comes to parties which make their contract in the course of a business, it may be advisable to formulate the exemption clause under a separate heading in the contract which explicitly indicates that *exemption* is intended. One of the reasons for the court's decision to render an index clause invalid in NJA 1979 s 401 was that the index clause was placed in a part of the contract which dealt with general *delivery conditions*.¹⁷⁶

7.3 Proposals for further research

Many related questions which have not been fully covered within the frame for this thesis deserve more attention and may inspire other students interested in contract law. An example is exemption clauses in consumer contracts. There is much more state intervention tied to these kinds of contracts, and the student may thus want to limit the analysis to *open control* by courts. Another interesting subject (although more remote from exemption clauses specifically) is the different models for contract interpretation in the Swedish and Anglo-American legal systems.

¹⁷⁶ This decision should however not be over emphasized since it dealt with a consumer contract.

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