# THE VALIDITY OF THE EXCLUSION CLAUSE IN SALES OF GOODS

## A. Freedom of Contract - The Seller's Divine Right?

The purpose of this article is to show that it would be a negation of justice for our Courts to be so influenced by the judgments in Council of the City of Sydney v. West[1] in the High Court of Australia and the obiter dicta of the Lords of Appeal in Suisse Atlantique Société d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale[2] as to uphold exclusion[3] clauses in sales of goods on the grounds of sanctity and freedom of contract. In particular it is proposed to show that a comprehensive exclusion clause, if enforced in a cash sale, may leave a buyer of shoddy, unsuitable and even dangerous goods without a remedy in New Zealand Courts, already shackled by an out-moded Sale of Goods Act; that buyers under hire purchase, being without bargaining power, can be held to ransom by such a clause, that exclusion clauses disguised as guarantees, far from giving a buyer additional protection, take away the buyer's basic rights - a state of affairs only too evident in the captive car market of this country. Finally it will be submitted that our law with regard to the exclusion of a seller's contractual obligations lags far behind that of other countries of far wider commercial interests and experience.

Tradition, indoctrination from one generation to the next, the old hypocritical shibboleths, all play their part and shadow the simple question, viz., 'did the buyer have any choice and was the seller fair'? No, we are to re-enthrone the doctrine of caveat emptor.[4] Once again there is to be "sanctity of contract", "freedom of contract", "the Courts are not to make bargains", "the law must be certain", "contracts shall be enforced to prevent disappointment of well founded expectations". In the age of the dictated or standard contract we need to be in no doubt whose expectations will be well founded. The "Imperial perspective", the viewpoint of the law maker, is to prevail over consumer perspective.

Dicey in Law and Public Opinion in England said that the principle of freedom of contract tended to be an end so remorselessly pursued that the individual was "in danger of parting by the very contract he is allowed to make with all real freedom".[5]

How revolutionary the provision of the Louisiana Code would appear in this milieu, i.e., that the test for a warranty was: would the buyer, if he had known of the defect, still have bought the product?[6]

Justice Frankfurter in United States v. Bethlehem Steel Corporation[7] protesting that the nation, although in a state of war, was being held to ransom for supplies of steel because the circumstances of the case did not fit into "a neatly carved pigeon-hole in the law of contracts", stated:

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1 (1965 - 1966) 39 A.L.J.R. 323.
2 [1966] 2 W.L.R. 944 (H.L.).
3 Exclusion clauses are frequently referred to as exemption or exception clauses.
4 Caveat emptor - let the buyer beware.
5 (2nd. ed., 1914), 142.
6 La. Civ. Code, Arts. 2520, 2531, 2545.
7 315 N.S. 289, 326 (1942).

"But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the Courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that Courts will enforce transactions in which the relative positions of the parties in such that one has unconscionably taken advantage of the necessities of the other?"

Lord Denning in British Movietonews v. London and District Cinemas Ltd., said that " the day has gone when we can excuse an unforeseen injustice by saying to the sufferer 'It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.' We no longer credit a party with the foresight of a prophet or his lawyer with the draughtsmanship of a Chalmers".[8]

The Final Report of the Committee on Consumer Protection[9] presented to the U.K. Parliament by the President of the Board of Trade stated:

426. "We now turn to the main criticism of the law of sale of goods, namely the ease and frequency with which vendors and manufacturers of goods exclude the operation of the statutory conditions and warranties by provisions in guarantee cards or other contractual documents...".

427. "The first aspect of the problem requiring notice is whether the practice is widespread. The answer is that it is universal in the motor vehicle trade, and general in respect of electrical and mechanical appliances.... We feel compelled to view the practice as a general threat to consumer interests in the sense that heavy and irrecoverable loss may fall on the consumer who is unlucky enough to get a defective article."

This year (1966) the English Law Commission and the Scottish Law Commission have set up a joint working party to consider:

"What restraints, if any, should be imposed on the freedom to rely upon contractual provisions exempting from or restricting liability for negligence or any other liability that would otherwise be incurred, having regard to the protection of consumers of goods and users of services."

In recent years much has been heard of "the wind of change" in international and political circles; in the business world there has been a complete transformation, hand craft has been replaced by mass manufacture, the individual has been replaced by the all powerful trade association, personal reputation has been replaced by intensive advertising, examination of goods has become impossible through elaborate packaging, testing has become impossible through technical complexity, the word of the seller has been replaced by the dictated trade group contract. Yet it is suggested that we should return to the simple principles of contract, which, probably, were of doubtful validity in the harsh cruel age in which they were conceived. The housewife with her automatic washer, rinser and spin dryer is to be

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8 [1951] 1 K.B. 190, 202.
9 H.M.S.O. Cmnd. 1781.

given back her cauldron on the wood stove and her wash board!

It is appropriate to consider the social climate in which a number of so called basic principles of contract were evolved. The Courts were aware of the merchants' improved status, his need of security and his importance in "this nation of shopkeepers",[10] but the view was strongly held that a large section of the population was a lower form of life with a limited right to existence and certainly with no rights to security of possession.

Thus Baron Ellenborough, the Lord Chief Justice of England in the early nineteenth century, was distinguished in commercial law and also administered with equanimity the sadistic law of his times when over two hundred offences, most of them minor, were punishable by death. When, as matter of humanity, the penalty of death was abrogated in minor offences against property,[11] in favour of flogging followed by transportation for life in circumstances of appalling horror, the Chief Justice's description of this new penalty was "a summer's excursion, in an easy migration to a happier and better climate".

These judges who attached so much to a rigid insistence on contract seemed devoid of any recognition of the individual's basic economic, physical and spiritual rights. It is contended that to ignore entirely the gross disparity between the bargaining power, if not the knowledge and intelligence of the seller and consumer, to fail to make laws in conformity with the entirely different type of merchandise being marketed today, is to fall back into a type of economic barbarism which finds some parallel in the physical savagery inflicted by the Courts from whose decision came many of the concepts used as justification for the unfair contract practice of today.

However, it is not surprising that the Judges of the High Court of Australia in the West case[12] and the Lords of Appeal in the Suisse Atlantique case[13] called for a reconsideration of the use of the doctrine of fundamental breach as a counter to the use of the exclusion clause in the dictated contract. Selective rescission, singling out of one clause in a contract and declaring this clause would have no effect but that the rest of the contract was binding, was questionable practice. So also was the growing tendency to treat all breaches of conditions[14] in contracts as fundamental breach and to consider the seriousness of the breach rather than whether the exclusion clause was making what had been definitely promised, illusory. It appears that today when adequate education is available, everyone should be able to understand the law in the sale of goods contract. It is wrong for it to be treated as the preserve of lawyers and academic commentators. Neither businessmen nor the consuming public should be called on to understand the difference between substantive rules of law and the rules of construction nor to distinguish between fundamental breach and breach of the fundamental term. If breach of a particular term is so serious as to justify the other party in repudiating the contract why should any contracting party have to make a distinction when in the Suisse Atlantique case it was stated that

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10 Napoleon's gibe.
11 Sentence of death without benefit of clergy could be imposed for damaging a shrub.
12 (1965 - 1966) 39 A.L.J.R. 323.
13 [1966] 2 W.L.R. 944 (H.L.).
14 Major terms of the contract, breach of which entitles the other party to rescind.

fundamental breach covered these three concepts:

1. Performance totally different from that contemplated by the contract.

2. Breach entitling the injured party to terminate the contract.

3. Repudiatory conduct evidencing an intention by the wrongdoer no longer to be bound.

However it must be admitted that in recent years fundamental breach has appeared in many guises with unpredictable results for all concerned - even affirmation of the contract by continued use of the goods after knowledge of the defects did not preclude the buyer from recovering the price or damages.

In Charterhouse Credit Co. v. Tolly[15] the supply of a car with a defective back axle costing £40 to £50 to repair was held to be a fundamental breach nullifying any protection given by the exclusion clause and making it possible for the buyer to recover damages although the car had been in his possession from April until October.

Likewise the earlier Court of Appeal decision in Yeoman Credit Ltd. v. Apps[16] appeared to invite rather indiscriminate use of the doctrine of fundamental breach. Here a buyer under a hire purchase agreement including the usual exclusion clause found when he first took the car away that it took one and a half hours to travel three to four miles and that it had such a series of defects that made it unroadworthy and unsafe. Nevertheless the buyer kept the car for almost four months and paid some instalments, meanwhile trying in vain to get the vendor to repair the car. Finally he rejected it and claimed back moneys paid on the basis of total failure of consideration. It was held that although there was not a total failure of consideration as the contract was one of hire (hire purchase) the breach by the vendor was nevertheless continuous, and although the buyer could not recover the moneys he had paid he was entitled to damages of £100, the amount it would have cost to put the car into good repair. Both of the cases above show a marked extension in the application of the doctrine; formerly, for the doctrine to apply there had to be a failure to supply the contract goods, but in these cases defective condition or quality was held to be fundamental breach. Surely the law becomes "curiouser and curiouser" when a person can return a car and then be paid the amount it would have cost to put it into repair had he kept it.

In neither the Suisse Atlantique case nor the West case are the facts relevant to sales of goods, but the dicta therein are important insofar as they give a critical review of the cases on which the doctrine of fundamental breach is based, and suggest limitations to its application in cases which have arisen out of the use of exclusion clauses. In the first case the dispute arose through the action of the charterers of a ship who found it advantageous to curtail a number of sailings and simply pay the reduced amount provided for lay days which was set out in the form of an agreed damages clause. The House rejected the contention of the ship owners that the failure to use the ship to its full capacity was a fundamental breach of contract although they conceded it was repudiatory conduct which would have entitled the ship owners to repudiate the charter party and the exclusion (agreed damages clause) contained therein; on the other hand,

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15 [1963] 2 W.L.R. 1168; [1963] 2 All E.R. 432.
16 [1962] 2 Q.B. 508; [1961] 2 All E.R. 281.

the House regarded the failure of the ship owners to rescind the contract as affirmation by conduct and that the consequences of such affirmation of the contract were that the whole contract, including the exclusion clause, still remained binding.

This was a clear rejection of any selective right of rescission of the exclusion clause. Either the whole contract was to be ended or the whole contract, including the exclusion clause, would remain binding. The writer of this paper sees no objection to the enforcement of an agreed damages clause which defines the allocation of risk, especially where both parties are competently advised and under no bargaining disability through lack of money.

The Lords were critical of but did not overrule the cases supporting the view that there was a rule of substantive law to the effect that no matter how comprehensive were the terms of an exclusion clause it would not protect a party responsible for fundamental breach of contract. But the necessity of providing relief against an unconscionable clause for a customer with no bargaining power was recognized. Lord Reid said:

> "But this rule appears to treat all cases alike. There is no indication in the recent cases that the Courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer."17

The view of Pearson L.J. in U.G.S. Finance Ltd. v. National Mortgage Bank of Greece and National Bank of Greece, S.A. was accepted, viz.

> "I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not to apply to a situation created by a fundamental breach of contract. This is not an independent rule of law imposed by the Court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties."18

In the writer's view this is not rejection of the doctrine of fundamental breach; it is an invitation to the Courts to adopt a different approach - treating the doctrine as a rule of construction in a gross default situation leaves the Courts considerable ground for manoeuvre, particularly as it recognized that an exclusion of liability clause is a feature of the imposed standard contract and that accordingly it should be construed strictly against the person responsible for it. Lord Upjohn said:

> "Wide words of an exclusion clause which taken in isolation would bear one meaning must be so construed as to give business efficacy to the contract and the presumed intention of the parties on the footing that both parties are intending to carry out the contract fundamentally."

Repeated reference was made by the Lords to what is generally called the main purpose rule, a classic statement of which is found in Lord Halsbury's speech in Glynn v. Margetson.

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17 [1966] 2 W.L.R. 944, 965 (H.L.).
18 (1964) 1 Ll.L.R. 446, 453.

"Looking at the whole of the instrument and seeing what one must regard as its main purpose, one must reject words, indeed whole provisions if they are inconsistent with what are assumed to be the main purpose of the contract."[19]

Treating the effectiveness of an exclusion clause purely as a matter of construction could lead to a rather inelegant competition between the Courts and the draftsmen. One wonders what the position will be if the exclusion clause is drawn so competently that there is no contractual residue for a party who has at all times been bound and carried out his obligations in toto?

With respect it must be said that there are contradictory, vague and confusing statements in the judgments, evidencing a hesitancy to go too far. However, the Lords were ready to concede that the factual situation made a great difference in the attitude to be taken to exemption clauses. Lord Reid said:

"Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are so common. In the ordinary way the customer has no time to read them and if he did read them he would probably not understand them. And if he did understand and object to any of them he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom of choice must surely imply some choice or room for bargaining."[20]

This about sums it up. Certainly a person should not be allowed specifically to promise to provide a particular thing with clearly defined attributes and then be able to claim against a person contractually bound to him that a subsequent clause in technical terms relieves him of his obligation or reduces his promise to a mere representation or statement of intention. Rose and Frank Co. v. Crompton Bros.[21] is no authority for such a proposition. It is entirely different as none of the three parties was bound legally. The rigid interpretation and literal enforcement of the terms of a contract made between a ship owner and a merchant may well be acceptable, but the same rigidity applied to a hire purchase agreement signed by a mother buying a pram may be unjust and cruel.

Suisse Atlantique may well be the delight of law examiners for years to come but its impact, in this writer's opinion, is well summed up in the words of one learned commentator in the Modern Law Review who says:

"Nor has the Suisse Atlantique contributed materially to the solution of old problems, for support can be found for and against almost every controversial proposition on this topic which could have been advanced before the case. For the time being the availability of exception clauses in particular cases will be more than ever a matter of guess work."[22]

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19 [1893] A.C. 351, 357.
20 [1966] 2 W.L.R. 944, 965 (H.L.).
21 [1925] A.C. 445.
22 (1966) 29 M.L.R. 556.

The majority decision of the High Court of Australia in Council of the City of Sydney v. West[23] has little relevance to the sale of goods as it was a case of bailment. A ticket issued by the Council parking station stated that the Council did not accept any responsibility for loss ... "however such loss be caused". A thief persuaded an attendant to issue a parking ticket giving a different car number and then drove the respondent's car away. The attendant at the entrance did not notice the different car number. The car was never recovered and the Council was held liable. The parking ticket issued to the respondent included this provision: "This ticket must be presented for time stamping and payment before taking delivery of the vehicle". Windeyer J. stated:

> "In this case the contract was broken because the appellant did not do the thing it had contracted to do in the way in which it had contracted to do it."[24]

The interest of the case arises simply from the reasoning adopted by the High Court when refusing to follow the Supreme Court, which also decided in favour of West, but on the ground that there had been a fundamental breach of the contract of bailment.

The final Court of Appeal for New Zealand is the Judicial Committee of the Privy Council and New Zealand Courts are bound by its decisions. In Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.[25] there was a contract to deliver cycle parts by sea at Singapore. The carriers delivered the goods to a person they knew was not entitled to them and without production of the bill of lading. They claimed that an extremely wide exclusion clause in the bill of lading protected them. The Privy Council based its advice first on construction of the contract and then on the main objects rule, finding that the shipping company deliberately disregarded one of the prime obligations of the contract and that such a fundamental breach should not be allowed to pass unnoticed under the cloak of a general exemption clause.

To what extent are our Courts bound by a decision of the House of Lords which is the final Court of Appeal for the United Kingdom but not for New Zealand?

In Corbett v. Social Security Commission (C.A.) Sir Alfred North referred to the duty of the Court where a later decision of the House of Lords was in conflict with a decision of the Judicial Committee of the Privy Council. He said:

> "It is one thing for this Court to declare that Courts in New Zealand are free to follow a later decision of the House of Lords which is in conflict with an earlier decision of its own, for that is purely a domestic matter. It is altogether a different matter for this Court to declare, as it is asked to do, that New Zealand Courts should follow a later decision of the House of Lords in preference to an earlier conflicting decision of the Privy Council, for this is subject to the criticism that this Court would be usurping a function which properly belongs to the Privy Council itself. At the same time, I think that it may safely be recognised that in very exceptional circumstances,

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23 (1965 - 1966) 39 A.L.J.R. 323.
24 Ibid., 331.
25 [1959] A.C. 576.

> this Court would be justified in following a later decision of the House of Lords in preference to an earlier conflicting decision of the Privy Council, and particularly so if the House had discussed the Privy Council decision and had pointed out in what respect it was of an opinion that the Board had erred. But even so, that course would only be justified if, the case involved only principles of English law, which admittedly are part of the law of New Zealand and there are no relevant differentiating local circumstances."[26]

We may regard the decision in Suisse Atlantique as an invitation to apply the rigid contractual principles of last century; I trust we shall do nothing of the sort. Suisse Atlantique seems to provide something for everybody, certainly something for those who would uphold the binding force of the exemption clause and in just as good measure for those who consider that by a liberal interpretation of the canons of construction that it should be deprived of its effect. Some commentators have hailed Suisse Atlantique with enthusiasm, proclaiming that it sounds the death knell of the doctrine of fundamental breach but, perhaps it is significant that up to the time of writing little interest in the case has been shown outside England and no comment on it has appeared in United States legal literature.

## B. The Law Relating to Sale of Goods in New Zealand

Consideration must now be given to the ordinary sale of goods transaction, hire purchase agreements and guarantees. The Sale of Goods Act provides authority for the use of exclusion clauses to free a seller from implied conditions.[27] However, the current exclusion clause does not stop at implied conditions, it purports to exclude express representations and terms of the contract. If the Courts take the view that express representations and terms in the contract can be effectively excluded, the buyer of defective goods is in a sorry plight because once more in s. 13 (3) the Sale of Goods Act makes things impossible for the disappointed buyer. Section 13 (3) provides that if property has passed to the buyer in specific goods or if he has accepted goods or part thereof, he has lost his right to reject and get back what he has paid; he has to treat the breach of any condition as a breach of warranty. This section is quite unjust. A buyer rightfully expects to be able to return goods which are entirely unsuited to his purpose. He is not competent to decide whether he has got a valid claim for damages and, if the purchase price is a moderate amount, it just does not make sense for him to employ a solicitor to advise him and take proceedings in Court on the chance of being able to get some compensation from the seller. Section 13 (3) above is strengthened in its vicious impact by the rule that property in specific goods passes at the time of the making of the contract, and that it is quite irrelevant whether the buyer has paid or received delivery so that he can examine the goods and determine if they are suitable.[28] Section 37 which provides that a buyer is deemed to have accepted goods when he does any act after delivery inconsistent with the seller's ownership, puts the buyer in the position of having accepted goods if he has handed them to somebody else for examination

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26 [1962] N.Z.L.R. 878, 901, 902.
27 Sale of Goods Act 1908, s. 18.
28 Ibid., s. 36.

or if, for example, he has tried to effect any minor repair on them. Once the goods have been accepted, s. 13 (3) prevents him from rejecting them and an exclusion clause may debar the buyer from recovering damages. If a buyer cannot plead the doctrine of fundamental breach and exclusion clauses are to be fully effective, the hapless buyer is going to be without remedy against the calculated dishonesty of a seller.

In a cash sale of goods the buyer may have bargaining power unless he is handicapped by being able to do so little business that he does not interest the seller one way or the other or unless the goods are in such short supply or are so controlled by united trade associations that he must buy on the seller's terms or not at all. But in hire purchase the buyer is asking for a credit concession and generally being unable to pay he must accept on the seller's terms. Perhaps this is why exclusion clauses are almost standard in hire purchase agreements. Admittedly the conditional purchase agreement is a sale of goods and the implied conditions under the Sale of Goods Act apply to the transaction. In a true hire purchase agreement (the bailment with an option to purchase) the buyer could well be at considerable pains to establish implied common law conditions to strengthen his case and certainly no layman could attempt this without experienced legal aid. It is improbable that a person who cannot find the money to buy the goods themselves, will be able to pay for the legal aid necessary to support him in his case. And, even if he does, there is no difficulty in devising an exclusion clause which will nullify any implied conditions which may be established. As will be seen later, other countries have found it necessary to include in their hire purchase acts implied conditions relating to the quality of the goods supplied and, more important, in many cases the parties cannot contract out of these implied conditions.

One of the most unpleasant practices to which the unsuspecting customer may be subjected is the use of the exclusion clause designed as a guarantee. The usual pattern comprises a guarantee to remedy certain defects which "in the opinion of the manufacturer" are attributable to him, i.e., the manufacturer is to be the judge in his own cause. However, this is not all, because frequently the ephemeral benefits offered by the manufacturer are made conditional on the buyer signing a guarantee form which includes a comprehensive exclusion clause. In many trades it is fair to say that a buyer is giving away much more than he is getting if he complies with the terms of the guarantee tendered to him. The un-informed layman may be side-tracked by this device and believe that he must look only to the manufacturer for a remedy and not to the retailer. It is essential that the terms "guarantee" or "warranty" should have some real significance that, in fact, the buyer should be getting some tangible, enforceable right against the manufacturer irrespective of the doctrine of privity. One of the recommendations made to the Committee on Consumer Protection (U.K.) was that the written description of goods as "guaranteed" should be treated as a "trade description" under the Merchandise Marks law.[29]

In other countries the word guarantee is of significance. In the Ontario Court of Appeal it was held that a vendor of "guaranteed used cars" must supply a car reasonably fit for the purpose and that a buyer was entitled to return and recover the price paid for a defective car, despite having signed a contract which excluded the vendor's liability for "representations, warranties, agreements or

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29 H.M.S.O. Cmnd. 1781, para. 423.

conditions statutory or otherwise".[30]

Surely it cannot be contended that exclusion clauses masquerading as guarantees are to be upheld on the ground of freedom of contract and that a manufacturer who has very carefully devised this procedure should escape from the consequences of a fundamental breach of contract.

## C. The Law as to Sales of Goods in Other Countries

No adequate survey of foreign law can be given in a paper of this type but even a rapid sampling of the law in some of the highly developed commercial countries will show how backward is our outlook. It has sometimes been claimed that New Zealand leads the world in legislation; if we are thinking of the law of sale of goods, we must be descendants of the Duke of Plaza Toro.

In New Zealand the buyer under hire purchase has no code setting out implied conditions as to title, description, quality and fitness of the goods he is acquiring, no knowledge of the significance of the type of hire purchase agreement he enters into. Even if he was able to determine his implied rights, they would almost invariably be taken away from him by an exclusion clause.

Any doubts as to equality of bargaining power and the individuals right of freedom of contract in New Zealand may be judged by the battle which has been fought for the control of hire purchase business by powerful overseas interests such as Lombard Banking Limited, London which succeeded in taking over the New Zealand Guarantee Corporation Limited in 1957 and also the moves by the United Dominions Corporation (South Pacific) Limited a subsidiary of one of the biggest London hire purchase firms.

This is not the place for a comprehensive review of hire purchase legislation, but it is appropriate to refer to the law as to implied conditions and exclusion clauses in the United Kingdom and Australia. In the United Kingdom anyone other than the owner making representations during the period of negotiation is deemed to be acting as agent of the owner.[31] Implied conditions and warranties provide that the owner shall have the right to sell the goods free of any incumbrance in favour of a third party, at the time when ownership is to pass; also implied are conditions of merchantable quality, reasonable fitness and compliance with description binding the owner whether he be a dealer or not.[32] There is no power to exclude the conditions of title and description. The condition as to merchantable quality can be excluded only in the case of second hand goods or where goods are sold subject to certain specified defects. In any case conditions of fitness and description can be excluded only if the exclusion clause was brought to the buyer's notice and the effect was explained to him.[33]

The Hire Purchase Acts 1959 - 1960 of the Australian States have substantially the same implied conditions and warranties for the protection of the consumer. Very similar restrictions on exclusion are imposed.

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30 McLachlan v. Horner [1937] 4 D.L.R. 188.
31 Hire Purchase Act 1965, s. 16 (U.K.).
32 Hire Purchase Act 1965, ss. 17, 19 (U.K.).
33 Hire Purchase Act 1965, s. 18 (U.K.); Lowe v. Lombank Ltd. [1960] 1 All E.R. 611 (C.A.).

There is a marked difference in the development of the law relating to sales of goods in the United Kingdom and in the major European countries. We have followed the British pattern. In the nineteenth century the English Courts abdicated their power to control the validity of exclusion clauses which is still widely exercised by their continental counterparts and consequently resort has had to be made to artificial devices of interpretation as exemplified in the doctrine of fundamental breach.

Two distinct methods of dealing with unconscionable or repugnant terms in contracts are used in the continental countries. Italy, Belgium and Sweden supplement the powers of the Court by fairly specific provisions in their legislation. In Italy, for example, standard conditions drafted by one party are binding on the other only if they are known to him at the time the contract is made. Terms empowering one party to withdraw from a contract must be expressly approved by the other in writing. The party to be bound must sign an acknowledgment that he has approved and also sign the contract.[34] In France, Germany and Austria reliance is placed primarily on the Courts, which can exercise a wide discretion owing to the general nature of the provisions in their codes. Thus the French Courts emphasize good faith between the parties and take the view that exclusion clauses are against ordre public or bonnes moeurs, alternatively they may refuse to uphold an unjust provision on the ground that they would be giving effect to a cause illicite. Regardless of good or bad faith on the part of the seller a buyer may rescind on the ground of erreur sur la substance.[35] The judges have a right to investigate exclusion clauses and decide their validity in accordance with the principles of good faith and public policy. An invalid exclusion clause is treated as non-existent and has no effect on the contract.[36] No exemption clause will be upheld to exclude contractual liability for faute lourde ou intentionelle (gross or intentional negligence),[37] dol (wilful misrepresentation)[38] or eviction of the buyer through the seller's defective title.[39]

The German Courts have developed a body of case law according to which exclusion clauses may be against public policy (boni mores).

Generally in Western Germany an exclusion clause imposed in a standard contract will be treated as being contrary to public policy if it is imposed in the exploitation of a monopolistic position of the seller. Exclusion clauses are permissible only within the framework of gutte sitten (public policy) and Treu und Glauben (good faith).[40]

Anyone who has stayed in the United States knows that cinema, radio and television in this country frequently present an unfairly distorted picture of American home life and the administration of justice. American law is vital and much more in step with the rapidly changing industrial and business world, than many of us realise.

It is false assumption to think the Uniform Commercial Code is in any way an idealistic, impracticable approach to the problems of

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34 Italian Civil Code 1942, Arts. 1341, 1342.
35 French Civil Code, Art. 1110.
36 Sirey 1936 1 295; 1939 1 62.
37 Dalloz/Sirey 1955 1 761.
38 French Civil Code, Art. 1174.
39 French Civil Code, Art. 1629.
40 Burgerliches Gesetzbuch 138, para. 1.2.

business. Forty-seven States have examined, criticised and subjected it to all the pressures normally exercised on proposed legislation affecting widely diverse interests and have adopted it. The original draft of the Uniform Commercial Code was commenced in 1940 by the Commissioners on Uniform State Laws and the American Law Institute and the final draft was ready in 1951. In its original form the underlying purpose, viz., fairness to all parties, order in the law and progress in the commercial world, and the recognition of the need for consumer protection were apparent, but with much of the industrial power of the United States centred in New York it was not surprising that the New York Law Revision Commission was the spear-head of an attack on its provisions and maintained inter alia that "a general prohibition of disclaimer of obligations, diligence, reasonableness and care is unsound".[41] Following this and powerful pressure by other interested parties, the final draft of the Code when it appeared in 1958 was rather a pale shadow of its original self.

Prior to the adoption of the Code the leading case Fairbanks Morse & Co. v. Consolidated Fisheries Co.[42] showed the usual method employed by the Courts to deal with a sweeping disclaimer (exclusion) clause. There was a sale of a generator described as "1-1420KVA - 1136KW @ 80% Power Factor, 3 phase, 60 cycle, 2,400 volts, 3 wire, 720 R.P.M. etc." The exclusion clause disclaimed liability with respect to purpose, suitability or operation of the equipment. The United States Court of Appeals treated the technical terms of description as express warranties which could not be negatived by disclaimer.

The same approach is reflected in s. 2.313 of the Code which provides

(1) Express warranties by the seller are created as follows:

(b) Any description of the goods which is made part of the bargain creates an express warranty that the goods shall conform to the description.

The Code then proceeds to resolve any conflict between the express warranty and warranty disclaimer clause in favour of the express warranty. Section 2.316 provides that where an express warranty under s. 2.313 cannot be construed as consistent with a warranty exclusion clause, the exclusion clause is inoperative.

The official comment sets out the purpose of s. 2.316 clearly:

"It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."

In L. & N. Sales Co. v. Little Brown Jug Inc.[43] the seller of whisky measures which proved to be unfit for the purpose was not protected by the stipulation that they were sold "without any express

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41 N.Y. Leg. Doc. 65, 23 (1956).
42 (1951) 190 F. 2d 817.
43 12 Pa. D. & C. 2d 469 (1957).

or implied warranties unless written hereon at the date of purchase".

Section 2.316 is reinforced by the very important "unconscionable" s. 2.302. This empowers the Court to refuse to enforce an unconscionable contract or to enforce the contract without the unconscionable clause or to so limit the application of the unconscionable clause as to avoid any unconscionable result.

Finally s. 1.203 imposes an obligation of good faith in the performance or enforcement of any contract, good faith being defined as "honesty in fact".

The sections referred to give the Courts considerable scope for imposing warranty liability and this is supplemented by the strict liability in tort without privity of contract which the Courts are ready to impose on the manufacturer. Thus in Baxter v. Ford Motor Co.[44] the manufacturer was held liable on the ground that it had made express representations by stating in distributed advertising material that the windscreens of its motor cars were "shatterproof". In Henningsen v. Bloomfield Motors Inc.[45] the tort character of the implied warranty of reasonable fitness for the purpose was predominant, and the contract disclaimer of practically all liability in the standard motor car guarantee was no defence to the car manufacturer where the wife of the purchaser from the manufacturer's agent was injured through defective steering gear.[46]

D. Proposed Interim Amendments

A French jurist has stated that no contract is "worthy of respect unless the parties to it are in relations not only of liberty but of equality".[47] Control of individuals by monopolies whether by dictated contracts or other means removes the competitive element from business resulting in diminished efficiency with a consequent wastage of our social resources.

In the writer's view it is hypocrisy to justify a repugnant exclusion clause in the name of freedom of contract.

This type of freedom of contract and laissez-faire must not be God-given rights of a limited section of the community. In New Zealand our statutes relating to sales of goods are more of a hindrance than a help to our Courts, and lag far behind those of the main commercial nations in the world. Amending legislation is a time consuming process and, furthermore, legislators can be put under strong pressure by influential and wealthy trading interests and much, that was robust and well conceived, may emerge as an unrecognizable shadow. The Courts are free and it is in the Courts that the weak and the oppressed must know that they will receive justice. Are the Courts then to be caught up in academic hair-splitting and technicality and blind themselves

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44 168 Wash. 456; 12 P. 2d 409 affirmed on rehearing 168 Wash. 465; 15 P. 2d 1118 (1932).

45 32 N.J. 358; 161 A. 2d 69 (1960).

46 The writer gratefully acknowledges the help he has received from Professor Diamond, University of London, Professor Kahn-Freund, Professor of Comparative Law Oxford University and Professor Sher of Stanford University in the preparation of the summary of foreign law.

47 Charmont V. 7, Modern Legal Philosophy Series, 110, s. 83.

to the obvious and true intention of the bargain? - Are they to reinforce the party who parades his precise promise and then purports to destroy it by technical obscurity not understood by the other party? If it is just that the buyer of defective goods should lose his rights to reject and recover what he has paid under s. 13 (3) of the Sale of Goods Act 1908 and also lose any right to compensation through the operation of an exclusion clause, then certainly let us have an end of the doctrine of fundamental breach.

The law as to all sales of goods must balance the interests of both producer and consumer, it must be moulded to conform with the completely changed type of goods and methods of packaging and marketing; and, above all, it must be readily understood by all as well as providing the Courts with clear authority to do natural justice. As a buyer may be willing to accept limited rights in return for a price concession, the use of exclusion clauses in a manner that is not oppressive or deceptive should be permitted. The writer cannot in this paper deal with necessary amendments to the Sale of Goods Act nor outline the provisions to be embodied in a Hire Purchase Act,[48] but submits that an interim approach to the present problems relating to the sale of new (not second hand) goods could be made on the following lines:

(a) Implied conditions as to title, compliance with express terms of identification and merchantable quality, should apply to all forms of hire purchase, with the proviso that there was to be no power of contracting out by either the original seller or his assignee.

(b) Section 13 (3) of the Sale of Goods Act 1908 should either be repealed or redrafted to be in accord with page 20 Rule 1 (the passing of propery in specific goods at the time the contract is made), s. 36 (right of examination - particularly as many goods cannot be examined at the time of purchase owing to their complicated nature or the method of packaging), and s. 37 providing for acceptance (when some act inconsistent with the ownership of the seller is done by the buyer after delivery).

(c) That if a manufacturer either in advertising, packaging or by any other means designed to reach the consumer, states that he "guarantees" or "warrants" the description, quality or fitness for the purpose of goods, such undertaking shall be binding on him irrespective of privity of contract.

(d) That no undertaking by a manufacturer or other seller of goods purporting to guarantee or warrant the description, quality or fitness of goods shall be coupled with or qualified by an exclusion clause of whatsoever kind.

(e) That subject to clause (a) above where a seller wishes to modify his liability, an exclusion clause in a standard form must be used, such clause to set out in express terms the exact implied conditions to be excluded and not to purport to exclude representations or express terms.

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48 See [1964] N.Z.L.J. 323 - 327, 372 - 378, 415 - 422, 444 - 448; [1965] 38 - 44.

(f) That such exclusion clause should appear at the top of the agreement and be signed by the buyer.

The writer of this paper is no starry-eyed idealist with a vision of a Utopia in which the foolish and the reckless can make irresponsible bargains without fear of the consequences. He does believe that the law should be the servant of the people and a true reflection of the age in which they live. Certain forms of exclusion clause, e.g., limiting times for making claims, limiting the amount of damages, excluding liability for specific and probable defects are clearly understandable and fair in the ordinary conduct of business. It is not even the clause made conspicuous by small print, it is the clause couched in such wide and technical terms that its full significance cannot be grasped, the guarantee meaningless for want of consideration, the exclusion clause disguised as a guarantee, which are so objectionable. No adequate and lasting solution is to be found in the strict application of the rules of construction or by an over-generous interpretation of the doctrine of fundamental breach. Remedial legislation must take considerable time; when it is formulated may we hope that following the American and European pattern the Courts will be given wide discretionary powers. In the meantime leave the Courts at liberty to use the few imperfect weapons still available to make men honour their word; do not prostrate them to reinforce the oppression and cynical deception so often evident in the dictated contract.

W.C.S. Leys