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## Exemption Clauses in Contracts: Historical and Comparative Law Analysis

### I. Setting the scene

In general, exemption clauses are stipulations according to which one or both parties to a contract will not be liable in the case of breach<sup>1</sup> of one or more of its (their) obligations. These clauses are also known as exculpatory, exoneration, limitation, or exclusion clauses. In the present paper I will use these words interchangeably. Exemption clauses aim to modify the rules of liability otherwise applicable in the case of breach, placing the obligor in a better position. The doctrine of freedom of contract (and the related doctrine of autonomy of will) is considered to be a fundamental principle of the law of contracts.<sup>2</sup> Autonomy of will is, in addition, a justification of the presence of exemption clauses in contracts. But also in this field of the law of contracts a considerable movement towards the limitation of contractual freedom can be seen.

Usually the law deals with exemption clauses in order to restrict their application. The most common tools for this purpose are legal rules which provide conditions for the validity of the contract's provision. Therefore, questions of the concept and validity of exculpatory clauses are interrelated, because the concept should be derived from legal rules. But the problems of validity are often mixed with questions of interpretation and incorporation of the clau-

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<sup>1</sup> In the present paper I will use the term „breach” to describe the situation where the debtor has failed to perform his obligation. I will use the term „non-performance” in the same meaning. In Civil Law countries the usual definition of non-performance is non-achieving of the due *prestatio*.

<sup>2</sup> For details see: Koetz, H., A. Flessner, *European Contract Law*, Oxford, Clarendon Press. 1997. pp. 7–15.

ses at issue therefore these topics will also be the subject of my examination. Exemption clauses are problem worldwide and the comparative law method seems to be suitable for their examination. The present study will examine the concept and the status of the exemption clauses in Civil and Common Law. For this purpose I have chosen to review how the doctrine and the judiciary resolve the issue in France, Germany and England.

## II. France

### 1. Statutory regulation and its interpretation

The French Civil Code (CC) lacks a common provision [on exemption clauses] for all types of contract. There are only rules concerning specific contracts. Historically, the first instances were contracts of sale and carriage. Art. 1643 CC provides that the seller is liable if the sold thing has hidden defects, in the case there is no provision to the contrary in the parties' agreement. Art. L 133-1 from the Commercial Code regulates the causes for exemption from liability of the carrier confining them to force major and prohibits contractual deviation from this rule. On the grounds of these provisions the doctrine admits validity of the exemption clauses. This is done two ways: (1) by in deduction from the principles of freedom of contract and autonomy of will or (2) by way of induction from art. 1643, which is considered to be just an example of the principle (of freedom of contract).<sup>3</sup>

### 2. Validity of the exemption clauses

However, the freedom to insert in a contract an exculpatory clause is limited. The doctrine and the judiciary are of the common opinion that an exemption clause cannot exclude the liability of the obligor for the willful breach of contracts in advance, whether or not accompanied by an intention to cause harm to the other party<sup>4,5</sup>. The usual explanation is that such a clause will

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<sup>3</sup> Fuhrman, G. *Der Vertragliche Haftungsausschluss im deutschen und franzoesischen rechts*. Bonn. 1970, p. 35; Ghestin, J. (Ed.) *Les Clauses limitatives ou exoneratoires de responsabilite en Europe*. Paris 1990, p. 9.; Nicholas, B. *The French Law of Contract*. London. Butterworth.1982, pp. 227-229.

<sup>4</sup> Nicholas, B. op. cit., pp. 227-229.

<sup>5</sup> Here should be noted that when in a contract of sale a professional seller deals with a non-professional buyer, the seller is always considered to know about the defects of the article sold. He cannot invoke an exemption clause because of the text of art. 1645 CC which states that if the seller knows of the defects of the article, he is, in addition liable to the restitution of the price which he received from him, for all the damages towards the buyer. This admission (the knowledge of the buyer) covers only the cases of hidden de-

contradict moral rules and public order and, consequently, it is void. Another reference is made to the prohibition of the so-called *potestative* condition (art. 1174 CC: „An obligation is void where it was contracted subject to a *potestative* condition on the part of the one who binds himself”). The *potestative* condition is an uncertain event, whose occurrence depends only on the will of the promisor. And if an exemption clause covers also a willful breach, the obligation at issue will depend on the single will of the obligor.<sup>6</sup> However this explanation does not fit the second limitation imposed on the exemption clauses – they are not effective not only in the case of a willful conduct but also in case of gross negligence. The concept of gross negligence comes from the Roman law tradition.<sup>7</sup> According to it the obligor acts grossly negligently when he acts in a way in which even the most negligent people should abstain from. The rule „*culpa lata dolo aequiparatur*” – grossly negligent conduct is identical to the intentional one dates back to the times of Emperor *Justinian*.

The notion of gross negligence or *faute lourde* has also been employed to deny the validity of exemption clauses in the cases of a breach of an essential obligation. The courts in France have declared that the obligor acts grossly negligently, when he breaches an essential obligation derived from the contract.<sup>8</sup> It should be mentioned that also the basis of this „essential obligation” theory was established following the provision of art. 1174 CC (the prohibition of contracting upon *potestative* condition). The essence of the arguments is that an exculpatory clause for a breach of an essential obligation is void because „this clause will suppress the sanction of obligation”. The important thing here is not the conduct of the obligor but the kind of the breached obligation. Sometimes these issues are interrelated but it is questionable whether they are always equivalent.

The validity of the exception clauses also depends on the kind of the infringed right. The agreements which exclude or limit the liability for injuries of the human body are considered by the doctrine and judiciary void as contradictory

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facts (not cases of other forms of non-performance) in the contract of sale. But the judiciary has interpreted the notion of the contract of sale broadly. The notion of a „non-professional” is broader than that of „a consumer”. It covers also merchants who have no experience in the field of the seller’s activity – for details see in Marsh, *P. Comparative Contract Law: England, Germany and France*. Gower Publ. 1994, pp. 173–175.

<sup>6</sup> Herbots, J. *Contract Law in Belgium*. Kluwer Law International. Deventer. 1995, p. 148.

<sup>7</sup> Zimmermann, R. *The Law of Obligations. The Roman Foundations of the Civilian Tradition*, Cape Town, Utah, Deventer. 1992, p. 209.

<sup>8</sup> Girot, C., *User Protection in IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology*. Kluwer Law International. 2001, pp. 383–389.

to the public order.<sup>9</sup> An additional argument for this position was that the conduct which causes bodily injury is usually a crime. The last argument was criticized as being a mixture of the problem of civil liability with the criminal one.<sup>10</sup>

Another restriction to the exculpatory clauses is the kind of liability at issue. French law considers the rules regulating delictual (tort) liability (art. 1382–1386 CC) as mandatory.<sup>11</sup> Even though the leading commentators (Mazeaud-Tunc) criticized the non-enforceability of exclusion and limitation clauses in the field of tort law, there are no signs that this situation will be changed.<sup>12</sup> This position is in some way softened by broadening the contractual relations through the notion of groups of contracts.<sup>13</sup>

### 3. Midway observations

Let us summarize the factors on which the enforceability of the exculpatory provisions in French contract law depends. The first of them is the disputable conduct on the part of the party in breach of contract. It is in coherence with the tradition of Roman law. A maxim from the *Digest* that is attributed to *Ulpianus*, says that the parties' agreement is not capable relieving the obligor when he acts deliberately (*D.50.17.23*).<sup>14</sup> The influence of this criterion is very strong – it covers not only the conduct of the debtor but also the conduct of the persons used by him in meeting the obligation.<sup>15</sup>

<sup>9</sup> G. Eorsi calls this approach „victim oriented” – *The Validity of Clauses Excluding or Limiting Liability in The American Journal of Comparative Law*, 1975, p. 219.

<sup>10</sup> Fuhrman, G. op. cit. p.52.

<sup>11</sup> On the contrary, in Belgian Law even the relevant statutory texts are identical (Herborts, J. op. cit. p.148).

<sup>12</sup> Mehren, A. *General View Of Contract*, IECL, vol. VII, Ch.1. Dordrecht [Etc]. Mohr Siebeck. Tubingen. Martinus Nijhoff Publishers. 1982., p.45.

<sup>13</sup> An example of a group or chain of contracts is the case where the debtor has charged another person with carrying out that obligation. Here the creditor has only a contractual claim against the substitute debtor. If there is an exclusion clause in a contract between the principal and substitute debtor, the latter may invoke it against the creditor. He is also able to invoke a clause in a contract between the creditor and the principal debtor. One of the expressed views concerning the reasons of the extension of the effect of contract is related to the exclusion clauses. Namely, the Supreme Court wanted to prevent the possibility for the creditor to circumvent the exemption clause contained in the contract with the principal debtor. For details see Tallon, D. *The Principle of the Relative Effect of Contracts and The Theory of Groups of Contract: Towards a New Reading of Article 1165 of The French Civil Code* – in: 6 & 7 Tulane Civil Law Forum, 1991/1992, p. 95.

<sup>14</sup> See also *Pomponius* – D.19.1.6.9.

<sup>15</sup> The prevailing opinion among the French scholars is that the obligor cannot exclude his liability for the deliberate or grossly negligent acts of the person he used to perform the contract – Fuhrman, G., op.cit., pp. 74–76.

The second limitation as regards the exemption clauses is the nature of the obligation for the breach for which the contractual provision is provided. If it is an essential obligation, the contractual exclusion of liability is banned. Last but not least, the kind of the suffered harm is of relevance – no contractual exclusion or limitations of damages are available for bodily injuries. The process of the formation of a contract at least for the general contract law is of no relevance to the assessment of exemption clauses.<sup>16</sup> The French doctrine and judiciary put in the same position clauses which limit only with such provisions that completely exclude contractual liability. This position is in coherence with the rule that liability for grossly negligent or deliberate conduct cannot be excluded in advance, because the *ratio* behind this provision is the moral blame towards the obligor.

### III. Germany

#### 1. Statutory regulation and its interpretation

The German Civil Code (BGB) contains provisions as regards the exemption clauses in the general part of the law of obligations. Art. 276 (2) says that the obligor cannot be relieved of liability for deliberate acts or omissions in advance. There is no need to have an intention to cause the damage, to consider the conduct at issue as intentional one.<sup>17</sup> Article 276 (2) obviously has a connection to the already mentioned Roman maxim that the parties' agreement is not capable relieving the obligor when he acts deliberately. The German legislator has followed the provision of the *Digest of Iustinian* strictly and has not accepted the assimilation of *dolus* and *culpa lata* made in postclassical Roman law.

Another provision of the BGB which is relevant to exclusion clauses is art. 278. It provides that art. 276 (3) of the BGB has no application in the cases when one is liable for „the fault of his statutory agent, and of persons whom he employs to perform his obligation.” According to this text the obligor is liable for the fault of his statutory agent and subcontractors to the same extent as for his own fault.<sup>18</sup> Art. 278 *in fine* allows the parties to insert a provision that they will not be liable for even when the persons for whom they are responsible act

<sup>16</sup> Neumayer, K. *Contracting Subject to Standard Terms and Conditions*. IECL, vol. VII, ch. XII. Dordrecht. Mohr Siebeck. Tubingen. Martinus Nijhoff Publishers, p. 62: „French domestic law still does not distinguish between pre-formulated terms and negotiated clauses.”

<sup>17</sup> Heinrichs, H. In: Palandt Bürgerliches Gesetzbuch. C. H. Bech. Muenchen. 1999, p. 331

<sup>18</sup> Historically this liability was based on the concepts of *culpa in eligendo* and *culpa in custodiendo*. But it is obvious that these concepts are a mere fiction and it is more correct to regard the liability for the other's conduct as a strict one.

deliberately. It is not in contradiction with the provision of art. 276 (3) because the liability of the obligor is a strict one, i.e. he is not relieved from his own fault. This opportunity is excluded in the case the stipulation is a part of standard form contract (art. 309 BGB) and for the executives of the legal persons.<sup>19</sup>

The BGB has also provisions concerning exemption clauses in its special part – chapters of sale, lease and work. The common feature of these provisions is that they concern defective performance (the article sold, leased on created has defects). In that situation the law prevents parties from relying on an exculpatory provision if they fraudulently concealed the defect or if they have guaranteed the quality of the thing (articles 444, 536 d, 639 BGB)<sup>20</sup>. They are based on the same idea as art. 276 (2) BGB.

## 2. Exemption clauses and standard form contracts

The BGB specifically regulates exemption clauses – a part of the standard form contracts.<sup>21</sup> These provisions were inserted in the BGB by the Modernisation Act Law of Obligations (*Schuldrechtsmodernisierungsgesetz*) in force since the 2002. But first they were invented by the judicial practice based on the famous provision of good faith (art. 242 BGB)<sup>22</sup> and in 1977 the legislator codified the case law in the *AGB-Gesetz* (Standard contract terms act). The recently enacted amendments of the BGB have been exclusively based on the provisions of the former law (*AGB-Gesetz*). They also implement the requirements of the EU directives.

The law invalidates the exclusion and limitation of liability clauses [contained in standard form contracts] for losses arising out of death or injury to the body caused by a negligent breach of duty by the debtor, his statutory agent or a person employed by him to perform the contract (art. 309 (7a) of the BGB. The provisions of the standard form contract which aim to exclude the liability for gross negligence of either the obligor or persons employed by him are also null.

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<sup>19</sup> Heinrichs, H., In: *Palandt Bürgerliches Gesetzbuch*. C. H. Bech. Muenchen 1999, p. 356.

<sup>20</sup> *Pomponius* – D.19.1.6.9.

<sup>21</sup> Art. 305 of the BGB defines standard terms as „(...) all contractual terms pre-established for a multitude of contracts which one party to the contract (the user) presents to the other party upon the conclusion of the contract. It is irrelevant whether the provisions appear as a separate part of a contract or are included in the contractual document itself, how extensive they are, what script is used for them, or what form the contract takes. Contractual terms do not constitute standard business terms where they have been individually negotiated between the parties”.

<sup>22</sup> Hippel, E. The control of exemption clauses – a comparative study. In: *The International And Comparative Law Quarterly*, 1967, pp. 591 et seq.

There is also a general rule that provisions in standard forms are „invalid if, contrary to the requirement of good faith, they place the contractual partner of the user (of standard terms) at an unreasonable disadvantage” (art. 307 BBG). In addition, the law contains a list of specific clauses which are in any case void (black list) and a list of clauses whose validity depends on an appraisal (gray list) – art. 308, 309 of the BGB. The last mentioned provisions are not applicable in the case the standard forms are presented to a businessperson, but the contract should still be in conformity with the rule of art. 307 of the BGB. The exculpatory clauses – a part of the general business conditions – are entirely barred when they exclude or limit the liability of the user towards a non-businessperson. At the same time among businesspersons exemption clauses are valid even when they are a part of the standard form contract but only in the case when good faith is not infringed. It can be seen that German law pays attention to specific features of standard form contracts – their content is usually not negotiated and it is noticeable that the process of contract formation influences the validity of exclusion clauses. In the case of consumer transaction the unconditional invalidity of the clauses at issue might be viewed as the awareness of the fact that the consumer has no ability to influence the content of the contract.

### 3. Validity and effect of exemption clauses

A valid exclusion clause deprives (fully or partly) the creditor of the right to be compensated for the damage. In German law the exemption clauses may also have an effect on tort liability. The conditions for validity are the same as for the clause whose aim is to exclude or limit contractual liability.<sup>23</sup> This conclusion is based on a fragment of art. 276 of the BGB: the provisions from that part of the code (par. 241–305) are common for the all obligations regardless of the particular source (contract, tort or unjust enrichment). It is also important to emphasize the point that the concurrence of liabilities is admissible and the creditor has a choice between his delictual and contractual claim.

There is a shared opinion among the scholars and judges that exclusion and limitation clauses should be interpreted against the drafter (*contra proferentem* interpretation<sup>24</sup>). The application of this rule is not limited to cases of standard form contracts.<sup>25</sup>

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<sup>23</sup> Mehren, A., op. cit., p. 46.

<sup>24</sup> For more about *contra proferentem* interpretation see Koetz, H., op. cit., p. 114, 115.

<sup>25</sup> Heinrichs, H., op. cit., p. 339.

#### 4. Midway observations

The limitation of validity of exculpatory provisions in German law is dominated by two ideas – the disputable conduct of the debtor and whether the clauses are or are not part of the standard form. The protection of the obligee is broadened in the case an exemption clause is a part in a standard form contract. To be enforceable the clause should satisfy the requirement of fairness (harmony with good faith). And if it is invoked towards a consumer, the clause should not be in the „black list” of the prohibited provisions.

### IV. England

The law in England deals with exemption clauses at two levels – the Common law and statute the law.<sup>26</sup>

#### 1. Exemption clauses in Common law

The legal literature in England provides a variety of definitions of exemption clauses. The starting point is that exemption clauses are terms of the contract which exclude or limit the liability of the contractor for a breach and not provisions which just define contractual duties. At the same time there is a view that the definition of an exemption clause should be broader: clause which excludes or limits liability or *appears to exclude or limit liability* for a breach of contract or some other obligation.<sup>27</sup> The latter approach is justified by the need to prevent the draftsmen's desire to formulate the exclusion clause as a clause which defines a primary obligation. Another view concerning the exclusion clause defines it as a defense. According to this theory, one should first construe the contract without an exemption clause in order to discover the obligor's duty and only then consider whether the clause provides a defense for a breach of this obligation.<sup>28</sup> The underlying idea is also to prevent an interpretation, which would construe an exoneration clause as merely defining the scope of contractual duties.

The notion of liability (as regards the exclusion clauses) is not confined to damages – it also covers the right to terminate the contract. It is also not confined to contractual liability, but it also covers tort liability.<sup>29</sup>

<sup>26</sup> Treitel, G. *The Law of Contract*. Sweet & Maxwell. 1999, p. 196.

<sup>27</sup> Halson, R. *Contract Law*. Longman, 2001, p. 301; Atiyah, P. S. *The Sale Of Goods*. Pitman, p. 183.

<sup>28</sup> Furmston, M. *Cheshire, Fifoot And Furmston's Law of Contract*. Butterworths. London. 2001, p. 172

<sup>29</sup> Treitel, G., op. cit., p. 218.



Exoneration clauses are distinguished from penal clauses, arbitration clauses and clauses, which define the duties of the parties. Penal clauses can benefit both parties, exemption clauses – only the obligor. And arbitration clauses only provide machinery for determining the rights. These distinctions are relevant to the rules which common law has developed as regards the exemption clauses.

These rules (relating to exoneration clauses) are concerned with two kinds of problems – the problem of incorporation and interpretation. To be enforceable a clause should be properly incorporated into the contract. When a contract is integrated in a document, the signature will in general be enough to incorporate the clause into the contract. An exculpatory provision may be incorporated also by notice. This is the case when a clause is contained in a document given to the other party or displayed where the contract is made. The requirements for such incorporation are the obligee's knowledge about the clause or reasonable steps undertaken by the obligor to attract the attention to the other party of the existence of the proposed term. And finally, these conditions should be satisfied prior to the conclusion of a contract. Another way to incorporate a clause into the contract is a case where there has been a previous course of dealings between the parties. Whether this tool will be relevant depends on the facts of the particular case.<sup>30</sup>

There is common opinion that exclusion clauses are construed *contra proferentem*. But courts in England are more generous towards a limitation clause and do not apply the *contra proferentem* rule with the same strictness.<sup>31</sup>

The conclusion from this review of the status of exculpatory provisions in the Common law is that there are not specific requirements for substantive validity. The parties are free to contract on terms they think most suitable. The rules created by courts aim to assure that there is a genuine consent about the clause itself.

## 2. Statutory regulation of the exemption clauses

The most important act of legislation is the Unfair Contract Terms Act (1977). For the present paper there is no need to go into details about this very complex piece of legislation, but some brief introduction would be helpful.

The title of the UCTA is said to be misleading – it concerns only exemption clauses, not any other contractual terms.<sup>32</sup> In spite of this the act lacks a

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<sup>30</sup> For details see Treitel, G., op. cit., pp. 201–223.

<sup>31</sup> P. S. Atiyah (*The Sale of Goods*. London. Pitman. 1985, pp. 185, 186) has criticized this approach.

<sup>32</sup> Halson, R., op. cit., p. 307.

definition of an exclusion clause. Some contracts are excluded from the field of application of the act, for instance, international supply contracts and contracts which concern interests in land. Certain provisions of the instrument apply only to „business liability”, which is defined as a breach of obligations, arisen in the course of business but the Act concerns both contractual and tort liability (sec. 2).

The UCTA invalidates some of exemption clauses and other subjects to the test of reasonableness. In the first group there are exclusions of liability for a negligently caused death or injures to the body, exclusions of liability for a breach of statutory implied duties of the seller or the owner as to the title in sale or hire, purchase, and for a breach of statutory implied duties of the seller or the owner as to the conformity of goods in sale or hire purchase.

As regards the requirement of reasonableness, the Act gives guidelines about the relevant factors. These are: (1) the relative bargaining position of the parties, (2) whether the customer has received an inducement to agree to the term or had an opportunity to contract with others on different basis, (3) whether the customer has known or ought reasonably to have known about the exemption clause. Also relevant is the insurance question, i.e. who has been in a better situation to insure him against the risk (sec.11 (4)).<sup>33</sup> The reasonableness of the clause should be evaluated in the time of the contract formation and one may make a conclusion that in regulating exoneration clauses the law in England concentrates on the process of the formation of a contract.

## V. Conclusions

1. Our initial definition was that the exculpatory provision was a stipulation, according to which one or both parties to a contract would not be liable in the case of a breach of one or more of its obligations. Therefore, an exoneration clause should be a clause which regulates or remedies with different words the consequences of the breach (non-performance), but not the primary contractual obligations.

The review of the status of the exemption clauses in France, Germany and England shows that in English law the concept of exemption clauses is broader and fairly vague. Usually the definitions include phrases like „clauses which appear to exclude liability”<sup>34</sup> or „clauses whose purpose is to negative terms normally applied in favor to the buyer”,<sup>35</sup> etc. Listed as examples of exclusion clauses in the textbooks are clauses varying from agreements which li-

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<sup>33</sup> Furmston, M., *op. cit.*, p. 212; see also Koetz, H., *op. cit.*, pp. 146–147.

<sup>34</sup> Halson, R., *op. cit.*, p. 301.

<sup>35</sup> Atiyah, P. S., *op. cit.*, pp. 199–200.

mit the evidences to provisions which give one party a broad discretion as regards the manner and substance of the performance.<sup>36</sup>

When observing a judge making rules, one would see that their main concern is to ensure a real agreement as to the terms.<sup>37</sup> Even the reasonableness test of the Unfair Contract Terms Act is concentrated on the process of formation – the relevant factors are the relative bargaining position of the parties, whether the customer has received an inducement to agree to the term or had an opportunity to contract with others on different basis, whether the customer has known or ought reasonably to have known about the exemption clause. The same reasons for the rejecting enforceability of exemption clauses (non-negotiation, inequality of bargaining power, test of reasonableness according to UCTA) might be equally relevant to other unreasonable and unfair contractual provisions. And I would argue that the doctrines on exemption clauses in England are much more doctrines on unfair clauses than on exemption clauses.<sup>38</sup> In the judicial practice the cases of an unfair exoneration term were more often than not cases of unfairness of other terms which special attention have attracted to exclusion clauses. Actually the English law lacks a concept of an exemption clause.

2. The situation in the Civil Law countries (in particular Germany and France) seems to be different. Both the German and the French legal systems have rules according to which, even if the process of a contract formation has been without any defects,<sup>39</sup> the exoneration clause would be void (art. 276 BGB, art. 1643 of the CC).<sup>40</sup> In these circumstances the need for a clear concept of an exemption clause is more important, because it seems obvious that the freedom of contract is limited in that specific area and one needs to know the exact boundaries of this limitation.

<sup>36</sup> Beale, H., W. Bishop and M. Furmston. *Contract: Cases and Materials*. London. Butterworths. 2001, pp. 960–961.

<sup>37</sup> Whincup, M., *Contract Law and Practice. The English System and Continental comparisons*. Kluwer Law International. The Hague 2001, p. 192.

<sup>38</sup> It is often said that UCTA has a misleading title, because it deals only with the exclusion clauses.

<sup>39</sup> The „defects” here are not only the traditional factors deviating the consent (mistake, duress and fraud) but they also cause inequality of bargaining positions whatever the reason is (economical, psychological etc.).

<sup>40</sup> The Principles of European Contract Law have also followed this approach (art. 8:109). According to the commentary art. 8: 109 applies only where there is a contractual obligation but liability is excluded in the case of non-performance (O. Lando and H. Beale, op. cit., p. 385). But one should pay also attention to the way art. 8:109 is formulated. It stresses than the invocation of the exemption clause rather, the clause itself, i.e. not the clause but the invocation of the clause by the debtor should be examined whether it contradicts to the good faith. The wording of the text suggests that the evaluation of the clause will be made at the time is raised the provision.

It will be helpful for our study to draw a conclusion from the basic Civil law – a rule that one cannot relieve itself in advance causes grave fault. It looks like the aim of the law is to deny the benefits and the protection to the debtor he would otherwise have but for the intentional or grossly negligent wrongdoing. No doubt this position has strong moral foundations. It seems coherent with the above observations that in general the contract law in France and Germany shares the proposition that exoneration provisions aim to displace optional rules of law as regards the consequences of the breach of contract due to reasons for which the obligor carries the risk.