# LIMITATION CLAUSES: A HISTORICAL AND COMPARATIVE ANALYSIS UNDER BOTH NATIONAL AND FOREIGN LAWS

*Marija Cachia*

**ABSTRACT**[977]

This article seeks to analyse grounds of validity of limitation clauses under both Maltese law and foreign law. Lack of uniformity in both local and foreign law highlights the importance of court judgments on the matter.

An outline of the historical and philosophical development of European contract law is given in the first section in order to determine when and for what reasons limitation clauses began to be inserted in contracts on a regular basis. The second section focuses on case law and pieces of legislation of the respective States, together with works of various jurists and legal authors on the matter. Moreover, EU law is examined, since its scope of harmonization of the laws of its Member States creates the possibility of bridging any differences in existence between said Member States in relation to limitation clauses. The third section deals with Maltese court practice and pieces of legislation emphasises the grounds of validity found under Maltese law and which legal system, if any, is the major influence vis-à-vis limitation clauses.

This study comes to the conclusion that, in some cases, Maltese law follows other legal systems mentioned in the legal analysis and that, in some other cases, it takes the lead in providing grounds to determine the validity of limitation clauses. It highlights the importance of uniformity and regulations to create congruency in judgements. This study is adapted from a Research Project, entitled 'Limitation Clauses Reducing and Excluding Liability', submitted by the author in April 2016.

**KEYWORDS:** LIMITATION CLAUSES – EXCLUSION OR REDUCTION OF LIABILITY – STANDARD FORM CONTRACTS – VOLONTA THEORY – AFFIDAMENTO THEORY – COMPARATIVE LAW

[977] This article was reviewed by Dr Jonathan Thompson LL.D.

# LIMITATION CLAUSES: A HISTORICAL AND COMPARATIVE ANALYSIS UNDER BOTH NATIONAL AND FOREIGN LAWS

*Marija Cachia*

## 1. Introduction

Limitation clauses are commonly found in most commercial contracts used in everyday trade.[978] The aim of such clauses is that of excluding or reducing liability of one or more parties in a contractual agreement, thereby encouraging the party in whose favour the clause is inserted in the contract to enter into such an agreement. The historical and philosophical development of contractual law throughout Europe has however led to issues regarding the validity or otherwise of this clause especially within the ambit of protection of the weaker party and the increased usage of Standard Form Contracts.

## 2. Historical and Philosophical Development

Historical and philosophical development of contractual law in Europe has affected a number of States in different ways, causing particular States to promulgate specific legislation or to have their respective judges develop different methods to cater for the validity of limitation clauses. In certain cases, the historical and philosophical development of a number of States was analogous, thus resulting in similar rules and court decisions to be present within said States, as will be discussed in more detail below.

The first historical and philosophical development concerns the advent of *La Teoria della Volontà*, known also as the *Will Theory*. This theory enshrined the principle of *pacta sunt servanda*: parties are deemed to be equal and bound by the contract presumed to have the power of law. Therefore, whatever is contracted between the two parties is deemed to have been consented to by both. In fact, the traditional viewpoint of contractual law is that the agreement reached contains terms and conditions which are deemed satisfactory by both parties, and this is why limitation clauses were deemed to adhere to this theory.

[978] Philippe Le Tourneau, *Droit de la Responsabilité et des Contrats* (6th edn, Dalloz Action 2006) 345: One must note at the outset that limitation clauses and exemption clauses are not synonymous. Whilst limitation clauses essentially limit the liability of the party, or the compensation one party would be liable to pay to the other in cases of contractual breach, exemption or exculpatory clauses fully exempt from liability or compensation the party in whose favour the clause has been inserted in the contract. Limitation clauses and exemption clauses have not been used interchangeably throughout this article. However, the cited cases and doctrine which make reference to either type of clauses are to be taken to apply to both types of clauses, since any academic viewpoint or judgment dealing with invalidity of one, may, in practice, invalidate the other.

In fact, liberalism in the 18th century signified the shift in focus from the authority of the ruler, to the word of the individual, and allowed clauses excluding or reducing liability to flourish under the 'protective umbrella of freedom of contract.'[979] Since the French political philosopher Jean-Jacques Rousseau emphasised the 'birth of modernity' in Europe,[980] and his teachings influenced in part the thought process that made the French Revolution possible, it is clear that the *Volontà* Theory signified as well the birth of modernity within the ambit of contractual law.

The use of limitation clauses was accentuated in the 19th century by the Industrial Revolution and rapid development of mass contracts, generally called standard form contracts, which were often used by traders and included non-negotiable terms and conditions applicable to all persons who would enter into a contractual agreement with the said trader. As stated by Eörsi: 'the exculpatory clause was being increasingly used not only for standardisation of contract terms but also for exploitation of economic power.'[981] Since such contracts facilitated trade in general and were a business necessity, their validity came to be accepted by courts of law. The Maltese judgment of ***Rizzo vs. Dawson*** highlights the fact that standard form contracts were accepted in Malta and that the debate on the validity of these contracts under Maltese law was present here as well.[982]

Although theoretically every person was deemed to be free, the new superior professional class of traders had the resources, the money and the power to infiltrate the political class and therefore had the means to impose its will on the rest of the people. Hence, the equality advocated by the *Volontà* Theory was practically non-existent, especially through the use of unfair contractual terms. Therefore, a social policy was needed to take into consideration the severe impact businesses were having on the weaker party; whilst trying to mitigate the said impact on the consumers and cater for their protection. Hence, philosophers and legal jurists began to question the *Volontà* Theory and the *Affidamento* Theory started to spread across Europe. Whereas the *Volontà* Theory is justified in terms of liberal teachings, the *Affidamento* Theory is in line with socialist teachings. Wilson adds that the principle of freedom of contract is in line with utilitarian principles of legislation, thus 'freeing the individual from the needless

---

979 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 *The American Journal of Comparative Law* 215.

980 David Boucher and Paul Kelly (eds), *Political Thinkers: From Socrates to the Present* (2nd edn, OUP 2009) 185.

981 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 *The American Journal of Comparative Law* 215.

982 *Edward Rizzo ne vs. Lt. Col. Charles E. Dawson ne*, Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXXVII (1953) Pt 1, p 188.

restraints imposed upon him.'[983] However, he opines that a major flaw of this Benthamite theory is that, since this freedom is obviously unregulated, it is easily abused. In fact, 'liberty and equality before the law... may, where there is great economic disparity between individuals, operate as instruments of oppression.'[984]

The existence of both theories was in itself a divergence of views, with emphasis on individual autonomy on the one hand,[985] and social welfare on the other. The Theory of Trust means that the contracting parties are fair with each other and disclose everything that needs to be disclosed before they enter into the contractual obligation. In fact, the validity of the limitation clauses, the sole purpose of which used to be to prioritise the needs of the traders and put the weaker party at a virtual disadvantage, was now questionable. 'Disclaimers belong to the era of free enterprise, the rejection of disclaimers to the era of social welfare.'[986] With most European codes embracing the *Affidamento* Theory, such as the German Bürgerliches Gesetzbuch (Hereinafter referred to as 'BGB'), the 1907 Swiss Civil Code, the 1966 Portuguese Civil Code and, more importantly, the subsequent change of the Old Italian Civil Code into the 1942 version of the Code, made it clear that the *pacta sunt servanda* principle was no longer crucial.

The *Affidamento* Theory is different from the *Volontà* Theory, since it awards discretionary powers to judges in deciding cases dealing with contractual agreements and obligations. The courts were not only given the power to apply the law but even to analyse good faith and the social effect of a contract before declaring whether such contract was enforceable or not. Thus the limitation clauses could in theory be used but, if limitation of liability was made possible only to serve egoistic interests of the stronger party, the clause would be deemed null and void by a court. Consequently, the *Affidamento* Theory goes beyond the *Volontà* Theory. It is good faith and not freedom of contract that is deemed to govern the validity of contracts and contractual terms.

### 3. Foreign Laws

983 Nicholas S Wilson, 'Freedom of Contract and Adhesion Contracts' [1965] 14 The International and Comparative Law Quarterly 172, 173.

984 ibid 174.

985 Gulio Alpa and Vincenzo Zeno-Zencovich, *Italian Private Law* (Routledge-Cavendish 2007) 158.

986 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 The American Journal of Comparative Law 215 citing John G Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Law Series 1985) 106.

It is of relevance to analyse how the gradual historical and philosophical development described above created the current different legal regimes catering for the validity or otherwise of limitation clauses. One should also see how the differences between the said regimes are the result of a State's adherence to one contractual legal theory rather than to the other, thus causing a particular court to be stricter or more lenient than another when deciding cases dealing with limitation clauses.

### 3.1 *Discretionary Powers of the Courts of Law*

The basic notion of limitation clauses is that they 'change the general and normal allocation of risks between the parties, as it has been worked out by the courts and the legislatures, in favour of one party.'[987] It is not the inequality of bargaining power *per se* that creates controversy, but it is the way the stronger party abuses its position through the use of unfair limitation clauses to the detriment of the weaker party that brings into question the validity of these clauses.

Unfairness may be projected to cases where a court decision is far from being fair, even if the limitation clause in question is technically legal. In the Massachusetts Case ***Hall vs. Everett Motors***,[988] the case was decided in favour of the defendant, since the manufacturer's warranty '[limiting] the liability of the dealer and of the manufacturer for a breach of warranty to the replacement of defective parts'[989] was deemed valid. Despite this outcome, '[The courts] hope that should a similar case arise under the Uniform Commercial Code [the courts] shall not be bound by precedent.'[990]

Conversely, in ***Henningsen vs. Bloomfield Motors Inc***,[991] the clause limited liability for breach of warranty in case of replacement of defective parts, yet public policy was used to invalidate the clause since the latter went against the former, and a fair result was gained. The court stressed: 'An instinctively felt sense of justice cries out against such a sharp bargain.'[992]

Courts have discretionary powers to enforce justice and fairness when deciding their cases, even with regard to cases on validity of limitation clauses. Moreover,

---

987 Eike von Hippel, 'The Control of Exemption Clauses: A Comparative Study' [1967] 16 The International and Comparative Law Quarterly 591, 592.
988 (1960) 165 N E 2d 107 (Mass).
989 Eike von Hippel, 'The Control of Exemption Clauses: A Comparative Study' [1967] 16 The International and Comparative Law Quarterly 591, 592.
990 ibid.
991 (1960) 161 A 2d 69; this case concerned remuneration for personal damages.
992 ibid.

the need for the validity of limitation clauses to be in line with principles of public policy and for cases to have a fair outcome is prominent in most European States and not limited to US case law, as will be seen hereunder. Furthermore, certain States abide by rules particular to their respective legal system, thus showing differing issues arising in different legal systems and differing solutions used by the courts in their discretionary powers to solve issues on validity of limitation clauses in their juridical territory. The legal systems analysed hereunder are usually used as sources in our local jurisprudence. The resulting inventory of this comparative analysis will indicate to what extent, if any, the basic principles of limitation clauses and the leading problems thereof have in some way or another been transferred to the local legal context and practice.

### 3.2 *France*

Clauses excluding or reducing liability are accepted under French law since it abides by the *pacta sunt servanda* principle.[993] Damages under French law are liable only when foreseen or could have been foreseen when entering into the contract, provided that there was no intentional breach that caused the non-fulfilment of the obligation.[994] The French Civil Code also states that contractual agreements must be performed in good faith.[995] Thus there exists no strict adherence to the *pacta sunt servanda* principle since good faith must be observed when performing the contract and the clauses thereof.

Although the Code states that damages are to be paid either due to non-performance or delay in performing the contract, provided there being no *force majeure*,[996] limitation clauses are the exception to this rule, since they are allowed by Article 1150. However, limitation clauses may be considered invalid for various reasons. For example, '[c]lauses excluding [or limiting] liability in delict have always been held to be invalid on the ground that delictual liability is a matter of *ordre public*.'[997] Invalidity in relation to public policy is nevertheless questionable since it would arguably be hindering the liberty of the parties to contract in whichever way it pleases them, thus constituting a serious legal contradiction.[998] Nevertheless, the rule that invalidity may occur on grounds of *ordre public* remains the norm abided to by the courts.

---

993 Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (European Law Publishers 2004) 161.

994 Code civil de France, art 1150.

995 ibid art 1134.

996 ibid art 1147.

997 Barry Nicholas, *French Law of Contract* (Butterworths 1982) 227.

998 Jean Carbonnier, *Droit Civil: Les biens; Les obligations*, vol 2 (Presses Universitaires de France 2004) 2230.

Other reasons for invalidity are if limitation clauses are unknown and unaccepted by the party against whom these clauses are inserted in the contract,[999] in case of disguised disclaimers, called *indemnités dérisoires,*[1000] when the victim is not allowed reasonable time to exercise his rights,[1001] and in cases of injury to the person. In the latter cases, *liber homo non recipit oestimationem*.[1002] However, under French law, such clauses are allowed in particular agreements between surgeons and patients.[1003] This is an exception to the rule, as the exemption clause does not give the debtor the right to hurt the creditor but aims to limit damages and interests due to a victim in the case of an accident.[1004]

Were the clause to specifically limit or exempt liability in cases of *faute dolosive,*[1005] or *faute lourde,*[1006] the court would deem such clause to be null and void.[1007] Nicholas opines that the nullity in case of gross negligence is probably 'a residue of the original dislike of [limitation] clauses, based on the fear that the removal of the risk of liability would encourage negligence or recklessness.'[1008] The reluctance to deem limitation clauses valid is evident not only through French case law,[1009] but also through French legislation, as seen in specific types of contracts, such as contracts in maritime transport and hotel contracts.[1010] Rather than working on Article 1150 to clearly validate limitation clauses, and showing exactly how and to what extent they are valid exceptions to the rule under Article 1147, the regulation of the few instances of non-validity of limitation clauses was preferred.

In 1978, a more general approach provided that in all contracts of sale between professionals and consumers, any limitation of liability clause is void, as per Article 35 of the *Loi Scrivener*.[1011] This is due to the fact that a limitation clause which grants an excessive advantage to its beneficiary due to his economic

---

999 Cass com 24 janv 1984 Bull civ IV n 23 Gaz Pal 1984, 1 pan 57, note Chabas.
1000 Cass com 4 mai 1959 Gaz Pal 1959 2 191.
1001 Le Tourneau (n 1) 347.
1002 Henri Roland and Laurent Boyer, *Adages du droit français* (4th edn, Litec 1999) 191: Free man is not susceptible of appraisement.
1003 Cass com 19 oct 1965 D 1966 238; RTD civ 1966 308 obs Rodière.
1004 Philippe Le Tourneau, *Droit de la Responsabilité et des Contrats* (6th edn, Dalloz Action 2006) 339.
1005 Willful damage.
1006 Gross negligence.
1007 Barry Nicholas, *French Law of Contract* (Butterworths 1982) 228, citing Cass com 25 6 1959, D 1960 97.
1008 ibid 228.
1009 Joanna Schmidt-Szalewski, *Droit des contrats* (Litec 1989) 577.
1010 Jean Carbonnier, *Droit Civil: Les biens; Les obligations*, vol 2 (Presses Universitaires de France2004) 2224.
1011 Barry Nicholas, *French Law of Contract* (Butterworths 1982) 228.

power might be considered abusive.[1012] Nevertheless, the generality of this regulation is debatable, since the prohibition is effectively present only vis-à-vis one type of contractual transaction.

Besides the limited number of cases in which the law assimilates *faute professionnelle*[1013] to *faute dolosive*, judicial practice tends to bring slight negligence closer to gross negligence where professionals are involved. Therefore the efficacy of limitation clauses in this area diminishes considerably.[1014]

French law in relation to limitation clauses is still evolving. In 2010, in the ***Faurecia*** case,[1015] it was stated that a limitation clause is deemed invalid when it contradicts the essential scope of the obligation assumed by the debtor.[1016] Up to this point, there had been no clarification whatsoever on whether the mere breach of an essential obligation of the contract was sufficient to deem a limitation clause unwritten. A previous 1996 case, ***Chronopost***,[1017] held that the mere breach was equal to a contradiction of the scope of the contractual agreement. The Cour de Cassation in ***Faurecia*** pronounced that the mere breach is not enough. The clause has to devoid the essential obligation of the contract of all substance in order for it to be deemed invalid. This may be linked to the Doctrine of Fundamental Breach, to be discussed in more detail below.

The ***Faurecia*** case also emphasised that gross negligence may also render a limitation clause null and void. In such case, the gross negligence cannot result solely from the breach of the contract, but must be deduced from the gravity of conduct of the debtor.

### 3.3 *Italy*

Italian law, like French law, adheres to the Roman axiom of *culpa lata dolo aequiparatur*:[1018] Gross negligence is equal to fraud, thus considering null those clauses limiting liability in cases of gross negligence. The 1942 Italian Civil Code holds that any agreement which preventively excludes or limits the

---

1012 Jean Carbonnier, *Droit Civil: Les biens; Les obligations*, vol 2 (Presses Universitaires de France 2004) 2224.

1013 Professional negligence.

1014 Philippe Le Tourneau, *Droit de la Responsabilité et des Contrats* (6th edn, Dalloz Action 2006) 341.

1015 *Sté Faurecia sièges d'Automobiles c/ Sté Oracle France* [2010] IV Bull 115 (Cour de Cass Ch Commerciale).

1016 ibid.

1017 *Sté Banchereau c/ Sté Chronopost* [1996] IV Bull 261 (Cour de Cass Ch Commerciale).

1018 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 The American Journal of Comparative Law 218.

responsibility of the debtor for wilful damage or gross negligence is null.[1019] This particular provision also invalidates limitation clauses that violate duties arising from rules of public policy.[1020] The latter source of invalidity is generally adhered to under Italian law since *l'ordine pubblico* encompasses interests of persons other than the debtor and the creditor in the contractual agreement,[1021] thus providing a minimum degree of protection of rights. In fact, Article 1229(2) is commonly used in cases regarding medical negligence and family law contexts.[1022] This concept however raises debates, mostly because of the difficulty in identifying the exact scope of application of the concept of *ordine pubblico*.[1023] This concept is also used in cases of limitation clauses where violation of personal or physical integrity is involved, since the validity of such clauses would be in breach of *l'ordine pubblico*, as found under French law.[1024]

Article 1229 in itself caters for various situations, some of which are not expressly found under French law. Firstly, clauses limiting liability of producers for damages resulting from dangerous goods are null.[1025] Secondly, Italian courts deem as valid those limitation clauses providing for *force majeure* specifically in contracts of carriage of goods.[1026] Additionally, although wilful damage or gross negligence are absolutely prohibited from being catered for by a limitation clause, the same prohibition is not extended to cases of vicarious liability.[1027] Moreover, it may be possible for null clauses to be converted into valid clauses in the case of partial irresponsibility, depending on the nature of the parties' contractual will. This possibility seems solely present in Italy.[1028] However, similar to French law is the vexatious nature and nullity of limitation clauses in consumer contracts whose aim is to damage the consumer.[1029]

---

1019 Codice Civile Italiano 1942, art 1229(1).

1020 ibid, art 1229(2).

1021 'Clausole di esonero da responsabilità' (2011) Brocardi <http://www.brocardi.it/codice-civile/libro-quarto/titolo-i/capo-iii/art1229.html> accessed 17 July 2016.

1022 Rita Fera, 'Clausole di esonero della responsabilità, clausole di manleva e i gentleman's agreements art 1229' (2009) Diritto-Civile <http://www.diritto-civile.it/Le-Obbligazioni/Clausole-esonero-responsabilita.html> accessed 17 July 2016.

1023 Germana Carlotta Adriano, *Clausole di esonero e di limitazione della responsabilità civile* (ARCANE editrice Srl 2009) 25, citing Cass, 24 aprile 1962, n 818, in Riv dir nav, 1963, II, p 120, con nota di A Cassese.

1024 Mario Bessone, 'Les Clauses de Limitation et d'Exclusion de la Responsabilité en Droit Italien' in Assocazione italiana di diritto comparato (ed) *Rapports nationaux italiens au IXe Congrès international de droit comapré* (Giuffrè 1975) 145-146.

1025 ibid.

1026 David Lucas, *Shipping & International Trade Law* (2nd edn, Practical Law 2014) 202.

1027 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 The American Journal of Comparative Law 218.

1028 Oscar Boschetti, 'Notes on Exemption Clauses under Italian Law' (1985) Int'l Bus L J 487.

1029 Rita Fera, 'Clausole di esonero della responsabilità, clausole di manleva e i gentleman's agreements art 1229' (2009) Diritto-Civile

### 3.4 *Germany*

As already discussed above, Germany shifted away from the *pacta sunt servanda* principle towards the *Affidamento* Theory. In fact, statutory prohibitions in the BGB in relation to limitation clauses constitute a perfect example of the departure of German law from the principle of freedom of contract:[1030] 'A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.'[1031] Clauses limiting liability for damage to the person of another party and clauses limiting liability for instances of gross negligence are deemed to be null.[1032]

Therefore, it is not surprising that the German courts are reluctant to accept the validity of limitation clauses. Nevertheless, they have accepted their usage and their validity in certain cases, for example when a bank makes use of such clause to exclude its liability for damages caused by a subsequent loss of capacity of the customer.[1033] Interestingly, the BGB contains various provisions that legalise and regulate a number of limitation clauses in different contracts, including innkeeper contracts,[1034] travelling agreements,[1035] public auction brochures,[1036] and limitation of liability in the filing of an inventory by a co-heir.[1037]

Similarities obviously exist between Italian and German law, given their shared history. Even under German law, vicarious liability does not make a limitation clause invalid,[1038] while breaches of public policy invalidate the limitation clause.[1039] However, no adherence to the Roman axiom *culpa lata dolo aequiparatur* was present in West Germany.[1040] Conversely, in a particular judgment,[1041] it is expressly provided that in modern contracts, where the debtor acts wilfully or is grossly negligent, the limitation clause is ineffectual especially

---

<http://www.diritto-civile.it/Le-Obbligazioni/Clausole-esonero-responsabilita.html> accessed 17 July 2016.

1030 Norbert Horn, Hein Kötz, Hans G Leser, *German Private and Commercial Law: An Introduction* (Clarendon Press 1982) 85.

1031 German Civil Code BGB, art 134.

1032 ibid art 309.

1033 Norbert Horn, Hein Kötz, Hans G Leser, *German Private and Commercial Law: An Introduction* (Clarendon Press 1982) 85.

1034 German Civil Code BGB, art 651h.

1035 ibid art 702.

1036 ibid art 445.

1037 ibid art 2063 BGB; Ian S. Forrester, Simon L. Goren, Hans-Michael Ilgen, *The German Civil Code* (Fred B Rothman & Co 1975) 313.

1038 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 The American Journal of Comparative Law 219.

1039 ibid 227.

1040 ibid.

1041 BGH, NJW 1976, 959 (Ls).

due to the need for performance to be executed in good faith.[1042] This makes Germany's position at par with French and Italian law.

In another case,[1043] the German court concluded that the defendant's conditions of sale did not effectively exclude liability for his fault in breaching his duty to inform. Applying the interpretational rules of uncertainty to the conditions of sale as a whole, and the wording of the exclusion clause, the court concluded that the exclusion clause did indeed cover claims for positive breach of contract. In order to obtain protection from liability, the defendant must exclude such claims in a manner clearly comprehensible to the customer.

German courts also refrain from applying limitation clauses when such clauses are used in an attempt to frustrate the contract in question.[1044] Like the French ***Faurecia*** case, this too echoes the Doctrine of Fundamental Breach, as will be discussed below.

### 3.5 *England*

There are basically three different types of exclusionary clauses under English law: true exclusion clauses which exempt liability in cases of contractual breach, limitation clauses which limit the amount of compensation to be paid in cases of such breach, and time limitation clauses which act as a form of prescription, given that actions in case of breach not brought during a stipulated amount of time are extinguished. As seen above, French courts are reluctant to recognise as legally valid the last type of limitation clause.

English law deems it necessary for limitation clauses to be examined as part of an entire contract.[1045] As in German law, wording is given great importance. If the limitation clause were to have an ambiguous meaning, the *contra proferentem* rule would apply,[1046] which means that the clause would be construed against the person who inserted it in the contract.

Interestingly, in ***Canada SS Lines Ltd vs. The King***,[1047] the English court stated that since it is unlikely that a party would include a clause reducing or excluding liability in the case of negligence, when negligence is specifically excluded or where the wording is wide enough for negligence to be excluded, the exemption

---

1042 German Civil Code BGB, art 242.
1043 BGH, NJW 1967, 1805.
1044 Basil S. Markesinis, Werner Lorenz, Gerhard Dannemann, *The German Law of Obligations*, Vol 2 (2nd supp, Clarendon Press 2001) 464.
1045 *Darlington Futures Ltd vs. Delco Australia Pty Ltd* (1986) 161 CLR 500.
1046 *R & B Custom Brokers Co Ltd vs. United Dominions Trust Ltd* [1988] 1 WLR 321.
1047 [1952] AC 192.

clause would essentially be valid. This shows a departure from the position taken by the laws of the other States analysed above, naturally posing the question as to which States influenced Malta most in this context.

Limitation clauses are intrinsic to the UK consumer protection regime, specifically linked to the possibility of existence of unfair contractual terms in standard form contracts.[1048] Besides being a Hobson's choice, further abuse may be found where the clauses are written in small print, where they are written in a legal language which the non-professional party might not understand, or, as under French law, where the consumer is unaware of the existence of the clause.[1049] Such cases are catered for in the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999,[1050] pursuant to Directive 93/13/EEC.[1051] What is stated to be an unfair term under these regulations is to be applied to exemption clauses, since these clauses feature in Schedule 2 of UTCCR 1999 which contains a non-exhaustive list of what is to be deemed unfair terminology. A similarity with Italian law is found under this provision since the invalidity of the term does not automatically void the contract as a whole.

The adherence of English law to the *Affidamento* Theory is clear by the invalidation of a clause if it is contrary to principles of good faith, thus causing an unfair imbalance in the rights of the parties in the contract to the detriment of the consumer,[1052] as seen in ***Director General of Fair Trading v First National Bank plc.***[1053] Despite having detailed provisions regarding the invalidity of unfair terms and intrinsically abusive limitation clauses, English case law aids in creating more solid grounds which the Doctrine of Precedent will force every court to utilise in reaching its decision. In ***Office of Fair Trading v Ashbourne Management Services Ltd***, Kitchin J sets three elements to establish unfairness: that the term causes 'a significant imbalance in the parties' rights and obligations; [that it is] to the detriment of the consumer; [that it is written] in a manner which is contrary to good faith.'[1054]

---

1048 Lee Mason, 'Protecting Consumers from Unfair Terms in Standard Form Contracts: The UK Approach' [2015[ EBRL 335.

1049 ibid.

1050 Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999): prior to the implementation of this law, the invalidity of limitation clauses was always possible under the Unfair Contract Terms Act 1977, the Supply of Goods and Services Act 1982, and the Misrepresentation Act 1967.

1051 Council Directive (EEC) 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29 (Unfair Contract Terms Directive).

1052 ibid reg 5(1).

1053 [2001] UKHL 52 17.

1054 [2011] EWHC 1237 (Ch) 123.

Despite the implementation of UTCCR 1999, the Unfair Contract Terms Act (Hereinafter referred to as 'UCTA') 1977 is still relevant.[1055] Further similarities may be drawn between English law and Italian law, since a clause restricting liability for death or personal injury caused by negligence is null,[1056] whereas under the Directive and the UTCCR 1999, there is only a grey list involved, meaning the terms are not automatically voided.[1057] Interestingly, the UTCA 1977 further caters for the possibility of having two contracts: the main contract and the secondary contract. Limitation clauses cannot be inserted in the secondary contract if they cannot be inserted in the main contract.[1058]

### 3.6 *Unfair Contract Terms Directive*

Since standard form contracts feature in most Member States, enforcement through EU law was needed in order to fully protect the non-professional parties to the contract.[1059] In the Second Recital to the Preamble, the Directive makes reference to the fact that the contractual laws of the Member States differ greatly, and this difference may jeopardise the citizen 'in his role as consumer when acquiring goods and services under contracts which are governed by the laws of the Member States other than his own.'[1060] Thus the aim of this Directive is to fully protect said citizen by making Member States that transpose said Directive legislate effectively in order to prevent unfair contractual terms from being present in any contractual agreement.

In fact, the Directive tried to reach a compromise between French law and German law. Individually negotiated terms are not within the scope of the Directive,[1061] and this is not in compliance with French law. Moreover, the Directive accepts the *Affidamento* Theory by making it mandatory for contracts to be entered into and performed in good faith,[1062] and due regard is given to the bargaining power of the parties involved.[1063] Conversely, contrary to German law, 'it is unnecessary for the contract terms to be pre-formulated for a multitude of contracts, so that in addition to standard terms also pre-formulated individual

---

1055 Unfair Contract Terms Act 1977 (UCTA 1977).
1056 ibid s 2(1).
1057 Martin Ebers, 'Comparative Analysis' in Prof Dr Hans Schulte-Nölke (ed), *Consumer Law Compendium* (Universität Bielefeld 2008) 397.
1058 Unfair Contract Terms Act 1977 (UCTA 1977) ss 10 and 23.
1059 Lee Mason, 'Protecting Consumers from Unfair Terms in Standard Form Contracts: The UK Approach' [2015[ EBRL 345.
1060 Unfair Contract Terms Act 1977 (UCTA 1977) Sixth Recital to the Preamble.
1061 ibid art 3(1) and (2).
1062 ibid Sixteenth Recital to the Preamble.
1063 'Unfair Contract Terms' European Commission <http://ec.europa.eu/consumers/consumer_rights/rights-contracts/unfair-contract/index_en.htm> accessed 17 July 2016.

contracts for single use, but not individually negotiated terms, are subject to control of the Directive.'[1064]

The most common legislative instrument created at EU level to cater for consumer protection is the Directive. Such a Directive in this context is usually a minimum harmonisation Directive, thus creating a minimum threshold of harmonisation which must be achieved, thereby giving great discretionary powers to Member States to transpose the Directive into their domestic law.[1065] Problems have arisen due to different implementations of this Directive,[1066] resulting in having different levels of protection given to consumers depending on which Member State the said consumers reside in.[1067] It is yet to be seen whether this situation is going to be fixed by future enactments of EU legislation or future rulings of the Court of Justice of the European Union (Hereinafter referred to as 'CJEU').

It is to be noted that this Directive offers to the consumer remedies not usually found under contract law. In fact, the Unfair Terms Directive may be deemed to 'impinge on the very nature and substance of the contract.'[1068] The proper use and implementation of this Directive into domestic law would therefore guarantee the consumer a right to use the extraordinary remedies and better balance the powers between the professional party and the consumer in a contractual agreement. The impact on Maltese domestic law will be discussed in further detail below.

### 4. Maltese Jurisprudence on Limitation Clauses

Malta is a legal hybrid. Our Public law is mainly influenced by English law, whilst our Private law is usually influenced by Continental legal systems. It is important therefore to put limitation clauses under Maltese law in context and to analyse the impact of Continental law and Common law on the way Maltese courts have deemed these clauses to be valid or otherwise.

---

[1064] Martin Ebers, 'Comparative Analysis' in Prof Dr Hans Schulte-Nölke (ed), *Consumer Law Compendium* (Universität Bielefeld 2008) 352.

[1065] Annalies Azzopardi, 'Defining the consumer in order to protect him – the continuous duel between the notion of 'consumer' in EU directives and in the Court of Justice's free movements decisions' (2012) 22 Id-Dritt 137, 138-139.

[1066] Especially Czech Republic and the Netherlands.

[1067] Peter Rott, 'Minimum Harmonization for the Competition of the Internal Market? The Example of Consumer Sales Law' [2003] 40 Common Market Law Review 1107.

[1068] Annalies Azzopardi, 'Defining the consumer in order to protect him – the continuous duel between the notion of 'consumer' in EU directives and in the Court of Justice's free movements decisions' (2012) 22 Id-Dritt 137, 158.

### 4.1 *Specific Awareness of the Limitation Clause*

It is important to discuss consent as a condition for the contractual agreement to subsist since under Maltese law, consent is by itself an essential factor for the validity of a contract. Consent *per se* implies that when a party agrees to the contractual terms and clauses in a particular contract, then that party is fully aware of and agrees to all the terms and conditions therein.

The Maltese courts have invalidated limitation clauses in cases where, despite being technically fair and valid in their own respect, the clauses were simply not brought to the attention of the weaker party who thus agreed to the same without having had the contents thereof explained to him. This echoes French and English law where limitation clauses written in small print are deemed to be null by the courts of law. It is clear that Maltese law gives great importance not only to consent properly given by the parties, but also to the fact that the parties are fully aware of what they are consenting to.

In ***Borg vs. Calascione***,[1069] the Court said that the inclusion of clauses in a contract which exempted the defendant from responsibility if the product he delivered was not up to standard is not enough. Such clauses have to be brought to the specific attention of the other party.

Limitation clauses in a Maltese contractual scenario may be present in different shapes and sizes, not just standard contracts, and the Courts still oblige the party in whose favour the limitation clause is inserted to point it out to the other party. Terms and conditions in a contract between a hotel keeper and a guest may contain a limitation clause which has to be acknowledged by the guest in question.[1070] Even particular clauses in a brochure could be deemed to be exemption clauses, for instance that the tour agent could cancel or change any part of the tour without incurring responsibility.[1071]

In ***Micallef vs. Baldacchino***,[1072] the parties chose to remove the warranty for latent defects, which is *per se* an exemption clause. The court did not accept the validity of the exemption clause as the vendor had not referred directly to such clause when the contract was entered into, and decided that the seller was still responsible for this latent defect despite the exclusion of the warranty.

---

[1069] *Valhmour Borg vs. Major Alfred Calascione*, Commercial Court per Mr Justice Tancred Gouder 25 May 1961.

[1070] *Rosa Gemma Giordano vs. Carmelo Grech*, Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXVIII (1933) Pt III.

[1071] *Anna Maria Sammut vs. Stanley Sullivan*, Civil Court, First Hall, 16 October 1995.

[1072] *Dennis Micallef vs. Anthony Baldacchino*, Court of Appeal, Commercial Jurisdiction, 20 January 1992.

Regarding this duty to bring the clause to attention, the court takes into account certain situations, including that of traders who deal with each other on a regular basis. In such circumstances, it is unnecessary for a common clause to be pointed out each and every time.

### 4.2 *Culpa lata dolo aequiparatur*

Fraud invalidates the contract as a whole, including the limitation clauses.[1073] Hence, Maltese law adheres to the Roman axiom of *culpa lata dolo aequiparatur*, and this is confirmed in ***Borg vs. Calascione*** where the court ruled that:

> Klawsola [ta' eżoneru ma kienx ikollha l-valur] li teżonera lid-debitur mid-dolo, mill-kolpa gravi, ekwiparata għad-dolo, u mill-kolpa ljevi... ll-klawsola ta' irresponsabbilita' bħal dik in eżami ma teżimix mir-responsabilita' meta jkun hemm vjolazzjoni ta' kuntratt jew ta' dover; u jekk jiġu stipulati espressament biex jeżoneraw mid-dolo u miż-żewg gradi ta' kolpa fuq riferiti, ikunu nulli, billi kuntrarji għall-prinċipju ġenerali tal-morali, bażi tal-ordni pubbliku.[1074]

This case also brought out the similarity between Maltese, French and Italian law, in that clauses exonerating the party from *dolo* and gross negligence are deemed to be contrary to public policy. Whereas English courts may allow validity in case of negligence in certain instances, Maltese law does not.

In ***Camilleri vs. Mifsud***,[1075] the Court stated that the doctrine followed by Maltese jurisprudence does not deem all limitation clauses to be valid, especially not to the extent that they allow the *assicurazione delle colpe proprie*.[1076] This point is followed by ***Rizzo vs. Ellul Sullivan***,[1077] and later by ***Spiteri vs. Abela***.[1078]

---

[1073] Civil Code, Chapter 16 of the Laws of Malta, s 981.

[1074] *Valhmour Borg vs. Major Alfred Calascione*, Commercial Court per Mr Justice Tancred Gouder 25 May 1961 p 816: 'Exemption clause would not have the power of exempting the debtor from dolo, gross negligence, equivalent to dolo, and from slight negligence... the exclusionary clause as in this case does not exempt from responsibility when there is violation of contract or duty; and if expressly stipulated to exonerate from dolo and the other two grades of negligence referred to above, they are null since they are contrary to general principles of morality, the basis of public order.'

[1075] *Paul Camilleri et noe vs. Paul Mifsud et*, Court of Appeal, Commercial Jurisdiction per Mr Justice William Hardin, Mr Justice A. J. Montanaro Gauci and Mr Justice Luigi A. Camilleri 8 March 1957.

[1076] ibid p 621.

[1077] *Joseph Rizzo noe vs. Edward Ellul Sullivan* noe, Court of Appeal, Commercial Jurisdiction per Mr Justice Carmel A. Agius, Mr Justice Hugh Harding and Mr Justice Carmelo Scicluna14 October 1987, p 472.

[1078] *Frans Spiteri noe vs. Godwin Abela noe et*, Civil Court, First Hall per Mr Justice Philip Sciberras 31 January 2003, p 8.

Interestingly, in ***Causon vs. Abela,***[1079] the Court stressed that cases in which the defendant had to use the diligence of a *bonus paterfamilias* could never be catered for by a limitation clause.[1080] Negligence also invalidated the limitation clauses in ***Atlas Insurance Limited vs. Schembri Bros (Burdnara) Ltd,***[1081] and ***Camilleri vs. Pisani noe et***.[1082]

### 4.3 *Doctrine of Fundamental Breach*

Our Courts have tried to limit the effect of limitation clauses in contracts by also referring to the Doctrine of Fundamental Breach,[1083] which originates from English law. Despite not having a specific name under Maltese law, our Courts have used this method in a way which is synonymous with English court practice. In fact, our Courts quote Charlesworth in saying,

> If you undertake to do a thing in a certain way... and have broken the contract by not doing the thing contracted for in the way contracted for... you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.[1084]

The basis of this doctrine is disallowing the clause limiting or excluding liability to be used as a means of avoiding the performance of the contract in question. Minor breaches do not invalidate the clause. However, a fundamental breach would force the courts to ignore the existence of the limitation clause, since one cannot fail to perform the contract on the strength that one shall not be responsible for damages due to the existence of such clause.[1085]

---

1079 *Leslie Causon noe vs. Godwin Abela noe*, Civil Court, First Hall per Mr Justice Joseph R. Micallef 7 October 2004, p 18.

1080 This was also stated in *Dr Simon Micallef Stafrace noe vs. Godwin Abela noe et* per Mr Justice Phillip Sciberras, Civil Court, First Hall, 9 December 2002.

1081 *Atlas Insurance Limited vs. Schembri Bros (Burdnara) Ltd*, Court of Magistrates per Mr Justice Michael Mallia 28 November 2005, p 4.

1082 *Silvan Mart Raymond Camilleri v Alfred Pisani noe et*, Civil Court, First Hall per Mr Justice Geoffrey Valenzia 13 November 1995, p 1321: The court here referred to a number of UK judgments and the Italian Civil Code, and held that an exemption clause (even if implied and not written) is never acceptable when the harm is the result of *dolo* or gross negligence.

1083 *Eucaristico Zammit vs. Eustrachio Petrococchino CBE ne*, Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXXVI (1952) p 324.

1084 ibid p 324, citing James H. Charlesworth, *The Law of Negligence* (2nd edn, Sweet & Maxwell 1947) 615.

1085 *John Bonello noe vs. John Ripard noe*, Court of Appeal per Chief Justice Silvio Camillero, Mr Justice Tonio Mallia, Mr Justice Joseph Azzopardi 25 October 2013: this was also stated in *Biagio Muscat v Anthony Falzon*, Court of Appeal, Inferior Jurisdiction per Mr Justice Phillip Sciberras 12 May 2003.

In ***Farrugia vs. Camilleri***,[1086] the defendant pleaded an exemption clause which stated that he was not responsible for any natural defect in the marble tiles which he delivered to the plaintiff. However, in this case, the defect was so significant that it amounted to the non-performance of the contract by the defendant and therefore he was not entitled to utilise that clause.[1087]

Other cases offer a more original twist to the general situation of non-performance of a contract. In ***Demajo vs. Santucci,***[1088] the Court adhered to this doctrine because the painting sold at an auction, believed to be the works of a particular painter, had in fact been painted by another artist. The exemption clause pleaded by defendant, declaring that the auctioneer was not to be held responsible for the truth of the description of the item auctioned, was deemed to be not applicable by the Court, since there was a difference between what had been offered in the catalogue and what had actually been given. This was equated with non-performance of the contractual obligation.

The doctrine of fundamental breach is also to be linked with the duty to bring the effects of limitation clauses to the attention of the individual. In ***Camilleri vs. Pisani***,[1089] the Court ruled that, when there is a high element of risk, the plaintiff was duty-bound to ask the client to fully accept the conditions of risk. In this case there was non-performance of the obligation, thus the doctrine was applied and the plaintiff could not rely on the clause. The same result was obtained in ***Grixti vs. EUROSAT Malta Ltd***,[1090] notwithstanding the fact that the defendant had warned the plaintiff that there was no guarantee that all channels could be viewed by making use of the sky card he sold him.

This position is therefore linked to English law, where, if a person is in fundamental breach of contract, he could not rely on a limitation clause 'otherwise apt to protect him'.[1091] In ***Harbott's 'Plasticene' Ltd vs. Wayne Tank & Pump Co Ltd,***[1092] Lord Denning said that if 'the breach frustrates the contract' the contract is null. Automatically the limitation clause is null as well. However, this particular ruling was controversial. The doctrine of fundamental breach was

---

1086 *Angelo Farrugia vs. Louis Camilleri*, Court of Appeal, Commercial Jurisdiction per Mr Justice Carmel A. Agius, Mr Justice Joseph A. Herrera, and Mr Justice Giuseppe Mifsud Bonnici 1 June 1993.

1087 ibid p 9.

1088 *Pascal Demajo vs. Albert Santucci*, Court of Appeal, Commercial Jurisdiction, 7 November 1994.

1089 *Silvan Mart Raymond Camilleri vs. Alfred Pisani noe et*, Civil Court, First Hall per Mr Justice Geoffrey Valenzia 13 November 1995, p 1320.

1090 *George Grixti vs. EUROSAT Malta Limited*, Court of Appeal, Inferior Jurisdiction per Mr Justice Joseph Said Pullicino 10 January 2000.

1091 J. A. Weir, 'Nec Tamen Consumebatur... Frustration and Limitation Clauses' [1970] 28 Cambridge Law Journal 189, 190.

1092 [1970] 1 QB 447.

not applicable since the parties had discussed and catered for the specific eventuality of a fire breaking out in their contractual agreement,[1093] and therefore the ruling resulted in the departure from the English law adherence to the freedom of contract. Moreover, it was concluded that a limitation clause can be ignored if fundamental breach is proved. It is argued that such a conclusion would in practice void the limitation clause even in cases of minor breaches.[1094]
In ***Hong Kong Fir***,[1095] it was stated that a party cannot withhold its performance if the other party is in breach, unless said breach actually frustrated the contract. Since a disaster is necessary to release a contractor, then arguably a disaster is sufficient to discharge a limitation clause. This goes against the very function of a valid limitation clause whose function is to guard against liability even for disasters. Furthermore, in ***Camilleri vs. Pisani***, reference was made to UCTA 1977, whose test of reasonableness in the context of exemption clauses limited drastically the use of this doctrine in practice.[1096]

Our courts have applied the said doctrine with no apparent difficulty, despite the source being essentially English case law. However, since the Maltese judgments dealing with limitation clauses examined in this particular study in relation to this doctrine occurred mainly post 1990's, and the English cases that created legal uncertainty are from an earlier date, it may be that Maltese jurisprudence simply followed English court practice once the matter was not controversial anymore, or else, despite having English law as a source, the Maltese courts adapted the doctrine to its own legal scenario, rather than fully implemented and strictly followed the English doctrine.

### 4.4 *Limitation Clauses and International Legal Instruments*

Recent cases show that certain international legal instruments, other than English and French, are adhered to by our Courts, especially in cases of carriage by sea or by air. One of the most recent judgments is ***Lloyds (Malta) Limited vs. Air Malta plc***,[1097] where the Warsaw Convention,[1098] and Montreal Agreement,[1099] were pivotal international legal instruments used to validate the

---

1093 J. A. Weir, 'Nec Tamen Consumebatur... Frustration and Limitation Clauses' [1970] 28 Cambridge Law Journal 189, 192.
1094 ibid 194.
1095 [1962] 2 QB 26.
1096 *Silvan Mart Raymond Camilleri vs. Alfred Pisani noe et*, Civil Court, First Hall per Mr Justice Geoffrey Valenzia 13 November 1995, p 1320.
1097 *Lloyds (Malta) Limited vs. Air Malta plc*, Court of Appeal, Inferior Jurisdiction per Mr Justice Gino Camilleri 27 June 2014, p 3.
1098 Convention for the Unification of Certain Rules for International Carriage by Air (adopted 12 October 1929, entered into force 13 February 1933) 137 LNTS 11 (Warsaw Convention).
1099 Montreal Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309 (Montreal Convention).

existence of the package limitation clause present in the contract which was analysed in this case.

Article 22 of the Convention 'establishes liability limitations for international air carriers of baggage, cargo and passengers.'[1100] The Court took the wording of the clause quite seriously, and stated that the limitation clause was inapplicable since the defendant was an air 'handler' and not an air 'carrier'. Only the latter could be favoured by the package limitation clause. The ruling echoes the English and German position vis-à-vis wording of the limitation clause. The same was affirmed in ***Alexander Nandweni vs. Joseph N. Tabone nomine***,[1101] and in ***SMS Insurance Agency Limited noe vs. Air Malta et***,[1102] in line with both the Convention and Maltese Civil law.[1103] According to the court, in these three cases, the defendants: 'Huma obbligati għat-telf tal-ħaga fdata lilhom, u għall-ħsarat li jiġru fiha, meta ma jippruvawx li l-ħaġa ntilfet jew ġratilha ħsara b'aċċident jew b'forza maġġuri u mingħajr ħtija tagħhom.'[1104]

There are other situations where the Court gives a strict literal interpretation of the limitation clause. Arguably this might be due to a strict adherence to *pacta sunt servanda,* thus binding one party vis-à-vis one specific interpretation of the clause, since an extended interpretation of the limitation clause would go beyond what the parties intended and agreed to when entering into the contractual agreement. In ***Chircop vs. Dingli***,[1105] the limitation clause found in the Hague Rules was quoted: 'Neither the carrier nor the ship shall be responsible for the loss or damage arising or resulting from: (c) Perils, dangers, and accidents of the sea or other navigable waters.'[1106] In this case, the court quoted other judgments to support its decision that this particular provision containing this limitation clause concerned bulk cargo and that cars could not be protected by the clause,[1107] and neither was machinery, as in the given case. The court, in quoting

---

1100 Thomas J. Dolan, 'Warsaw Convention Liability Limitations: Constitutional Issues' [1984] 6 Northwestern Journal of International Law and Business 896, 896-897.

1101 *Alexander Nandwani vs. Joseph N Tabone nomine*, Commercial Court per Mr Justice Joseph A. Filletti, 16 March 1993.

1102 *SMS Insurance Agency Limited noe v Air Malta et*, Court of Appeal, Inferior Jurisdiction per Mr Justice Raymond C. Pace, 1 June 2009.

1103 Civil Code, Chapter 16 of the Laws of Malta, s 1133.

1104 *SMS Insurance Agency Limited noe vs. Air Malta et*, Court of Appeal, Inferior Jurisdiction per Mr Justice Raymond C. Pace, 1 June 2009, p 24: 'They are liable to compensation the loss of an object entrusted in their care… when they do not prove that this object was lost/damaged by accident or force majeure and without any blame of theirs'; this is in line with Civil Code, Chapter 16 of the Laws of Malta, s 1628.

1105 *Dr Carmel Chircop vs. Kevin Dingli*, Civil Court, First Hall per Mr Justice Raymond C. Pace, 9 January 2001, p 12-13.

1106 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (adopted 25 August 1924, entered into force 2 June 1931) 120 LNTS 187 (Hague Rules 1924), art 4(2)(c).

1107 *Avukat Dr Robert Staines nomine vs. Joseph Apps nomine et*, Court of Appeal, 24 April 1998.

John F. Wilson, emphasised this reasoning.[1108] In the case of pallets, however, the limitation clause is applicable.[1109]

Even negligence and imprudence may render the package limitation clause inapplicable to the case at had,, albeit valid *per se*, as seen in ***Atlas Insurance Limited vs. Schembri Bros (Burdnara) Ltd***.[1110]

### 4.5 *Maltese legislation*

Even domestic law provides pieces of legislation that create limitation clauses and validate their use. One such example is the Examination of Title Regulations 2012.[1111] The limitation clause found in Regulation 13 states that: 'A notary's responsibility for the examination of title shall be limited to what results from the searches, and shall be subject to any disclaimer or limitation agreed upon in a contract of engagement, or as may result from the report.'[1112] In this case, the parties that are clients to the notary with regard to a particular contract give their consent to this limitation, and the notary inserts this limitation clause in the said contract.

It is clearly a limitation clause since if there exists some information which was not uncovered by the notary during his researches and which may be detrimental to the clients, the limitation clause would kick in and the liability of the notary would be limited or exempted, as the case may be. The law is silent on this point and, to date, no actions in court have been brought regarding this issue; so it can potentially be argued that, notwithstanding the quoted law, gross negligence could still invalidate the clause.

Additionally, Regulation 14 creates another limitation clause in the case of a registration of an immovable made by the Land Registrar in the name of an ecclesiastical entity or of the Government of Malta:

> A notary shall not be responsible for a registration of an immovable made by the Land Registrar in the name of an Ecclesiastical Entity or of the Government of Malta... if, pursuant to an application for its first registration or dealing therewith lodged in the Land Registry by the Joint

---

1108 *Dr Carmel Chircop vs. Kevin Dingli*, Civil Court, First Hall per Mr Justice Raymond C. Pace, 9 January 2001,p 20, citing John F Wilson, *Carriage of Goods by Sea* (3rd edn, Longman) 196.

1109 *Dr Riccardo Farrugia nomine vs. Albert Mizzi et nomine*, Commercial Court, Superior Jurisdiction, 18 April 1977.

1110 *Atlas Insurance Limited vs. Schembri Bros (Burdnara) Ltd*, Court of Magistrates per Mr Justice Michael Mallia 28 November 2005, p 4.

1111 Examination of Title Regulations, SL 55 06.

1112 ibid reg 13.

> Office in the name of the Ecclesiastical Entity or of the Government of Malta as the case may be, the Land Registrar registers the immovable or the dealing less than two months prior to the date of publication of the notarial act, notwithstanding that in terms of the aforesaid law the date of registration is deemed to be a date earlier than the date when such application was lodged.[1113]

An exemption clause is also found in Article 593(3) of the Civil Code, where the notary is obliged to explain the effects of certain provisions of the law to the testators of a will *unica charta* and enter a declaration to that effect in the said will.[1114] The declaration would be exempting the notary from liability.

Another important piece of legislation is Chapter 378.[1115] The protection afforded to the weaker parties by the aforementioned Directive 93/13/EEC was included in Maltese law by means of this Act. Through this introduction, it is clear that our legal system is slowly allowing the *Volontà* Theory to be diluted through specific legislation and is adopting the *Affidamento* Theory instead.[1116] In fact, in ***F Advertising Ltd vs. Tabone,***[1117] the Court stated that the question of unfairness of a particular clause in a contract is independent of the will of the parties.

This Act applies only to consumer transactions and not to a wholesaler and retailer type of contract. Article 44 protects consumers from contracts containing unfair terms and includes a long list of prohibited terms comparable to the equivalent provisions found under the Directive and the applicable English Act discussed above. If such terms are included in a consumer contract, then such terms are deemed to have never been inserted. Moreover, the list is not exhaustive and the Courts may nullify other terms included in contracts if these are deemed to be unfair.[1118] This term therefore gives great discretionary powers to the Courts.

---

[1113] ibid reg 14.

[1114] Civil Code, Chapter 16 of the Laws of Malta, s 593(3): 'The notary drawing up a will *unica charta* is bound on pain of a fine of two hundred and thirty-two euro and ninety-four cents (232.94) to be imposed by the Court of Revision of Notarial Acts to explain to the testators in a will *unica charta* the meaning and effect of this article and of Article 594, and enter in the will a declaration to that effect'.

[1115] Consumer Affairs Act, Chapter 378 of the Laws of Malta.

[1116] This is evident by the insertion of condition of existence of good faith in Article 45 for unfairness not to be present.

[1117] *F Advertising Ltd vs. Anthony Tabone*, Court of Appeal, Inferior Jurisdiction per Mr Justice Phillip Sciberras, 9 January 2009.

[1118] Consumer Affairs Act, Chapter 378 of the Laws of Malta, s 44(4).

The result of such provisions is that such limitation clauses are strictly regulated, again shifting away from the freedom of contract principle by allowing the Courts to invalidate the clauses in cases of abuse. This is innovative because there is no specific power given to the court under the general law enabling the courts to strike down a particular clause on the basis of its unfairness. Unfairness is defined under Article 45,[1119] and limitation clauses may easily fall within one of the conditions found therein.

It is arguable whether the limitation clause creating an imbalance between the rights of the contracting parties to the detriment of the consumer is deemed null simply because the imbalance is deemed 'significant'.[1120] The definition of 'significant' is unclear, since it is by their very nature that limitation clauses create an imbalance. Hence, the terminology the legislator used in this context forces the courts to regulate the manner on a case-by-case basis.

## 5. Conclusion

It is clear that Maltese contract law has been heavily influenced by the adherence of European States to either the *Volontà* Theory or the *Affidamento* Theory and that the legal influence of these States on the Maltese legal system has heavily affected the manner in which our courts have dealt with limitation clauses throughout the years. A number of similarities between Maltese law and other States have clearly arisen throughout this study, for instance the way Maltese law echoes French and English law where limitation clauses written in small print are deemed to be null. Like German, French and Italian law, Maltese law adheres to *culpa lata dolo aequiparatur*, and its similarity to French and Italian law is evident since clauses exonerating the party from *dolo* and gross negligence are also deemed to be contrary to public policy.

Despite the clear influence of various different foreign legal systems, it is interesting to note that the Maltese judgments analysed are consistent when dealing with limitation clauses. The ruling in the French ***Faurecia*** case, may be equated to the doctrine of fundamental breach adhered to by our courts, since its ruling is similar to the doctrine's premise of having a breach frustrating the entire contract. What is interesting about this is that, besides having Maltese case law seemingly unperturbed by the English controversial cases regarding the topic, French jurisprudence solved its own controversy as late as 2010, whilst the position in Maltese courts has been consistent since the early 1990's.

[1119] ibid s 45.
[1120] ibid s 45(1)(a).

This point draws attention to another important conclusion. In the introduction to this article it has been argued that there is lack of legislative intervention in relation to limitation clauses given that these are the exception to the rule of having a party liable for contractual breach, and reference to this exception is found even in Maltese case law.[1121] This argument, together with the reality of Maltese courts applying the remedies in a uniform and consistent manner, further highlights the lack of need of actually having legislative intervention on the topic at hand. Were our courts to face legal uncertainty as faced by French courts in ***Faurecia***, the idea of having express regulation in relation to limitation clauses might have been more tempting for our legislator. Arguably, Maltese law, despite its hybrid nature, may in reality be more stable than other States when regulating limitation clauses, thus empowering the idea of Maltese courts being a step ahead of other courts in maintaining their *jurisprudence constante* vis-à-vis limitation clauses.

Additionally, the acceptance of international legal instruments catering for the regulation of limitation clauses by our domestic courts further signifies this apparent lack of need for domestic legislative intervention. It is a situation of having cooperative measures being decided upon by other States and the subsequent adherence of our courts to these measures provided they do not run counter to our public policy. It is clear that where transposition in our domestic law is necessary, as was clearly the case vis-à-vis Directive 93/13/EEC and Chapter 378 of the laws of Malta, such transposition also helps to modernise our laws, since such directives cater for present day realities. Moreover, subsidiary legislation such as Legal Notice 355 of 2012 catering for specific situations regarding limitation clauses creates more security and a stable position for our courts, whilst curbing their discretionary powers and securing uniformity of judgment through their adherence to written law.

It is therefore to be concluded that more studies are to be encouraged on limitation clauses, especially with regard to future court judgments that may be decided dealing with the most recent additions to our domestic law. More scrutiny is to be given to the European legal scenario, more so within the ambit of social developments, since it is an area of constant development. The EU is becoming increasingly protective of consumers and contractual agreements concerning consumers and contract law. It is therefore inevitable that new laws will ultimately be created, shaping European law in new forms, and ultimately affecting Maltese law and Maltese jurisprudence in new and challenging ways.

---

[1121] *Formosa & Camilleri Ltd vs. Sea Malta Co Ltd*, Civil Court, First Hall per Mr Justice Joseph R. Micallef, 13 November 2008, p 7.