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Chapter 17

Stipulated sums and limitation clauses

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I. INTRODUCTION

The law governing stipulated sum clauses and limitation clauses in India has long been complex. In part, this is because these clauses bring into direct conflict two principles, both of which are fundamental to contract law: the principle of freedom of contract, and the principle that the law provides full compensation for breach. But it also reflects the fact that these clauses are used in a very wide range of transaction types, ranging from employment contracts to complex cross-border commercial transactions. Although the judiciary has shown a clear understanding that the law must have the flexibility to deal differently with different types of transactions, the doctrinal tests on which they rely are not well suited to giving weight to factors specific to a particular type of transaction. The result, as this chapter shows, is a law that is not just characterised by a lack of clarity but is also frequently over-interventionist, and that contains a surprisingly large number of different approaches to deciding when these clauses are enforceable. These approaches draw not just on the statutory provisions themselves, but also on broader ideas of unconscionability, inequality of bargaining power, and public policy.

Against this background, this chapter seeks, firstly, to discuss the different approaches that the courts have taken to stipulated sums and limitation clauses (collectively referred to in this chapter as ‘remedial clauses’). Secondly, it seeks to identify and analyse the problems from which each of the approaches that the courts currently take to remedial clauses suffer. Thirdly, it draws on previously unexamined documents in the India Office Records on the history of the 1899 amendment to the Contract Act, to argue that the Contract Act’s legislative history gives us the basis for restating the law on remedial clauses in a way that resolves the complexity in the current law and also provides a clearer guide to the types of circumstances in which it is appropriate for the judiciary to intervene in contracts. The starting point is the relationship between contract law and the social context in which it operates; and, in particular, the social purpose which the courts’ powers to intervene in remedial clauses can and should serve. The question of whether or not contract law should seek to discharge broader social functions is a heavily contested topic in academic writing about contracts. In the Indian context, however, the question must be taken to have been settled in favour of contract law having such a social role: as this chapter shows, the Contract Act assumes that contract law should be applied in a way that is sensitive to its social context, and it seeks to ensure that courts have the legal tools needed to intervene when necessary while also protecting *bona fide* commercial transactions from judicial intervention. Put together, these points have a strong resonance with the type of factors that underpin judicial intervention in remedial clauses today, and they provide a basis for framing a more structured and systematic approach to stipulated sums and limitation clauses.

* I am grateful to participants in the symposium and to the editors of this volume for their comments on an earlier draft of this chapter. All archival material cited in this chapter is held in the India Office Records at the British Library, London.

II. STIPULATED SUMS AND LIMITATION CLAUSES: THE CURRENT STATE OF THE LAW

1. *Stipulated sums*

The law on stipulated sums is contained in four leading Supreme Court cases: *Fateh Chand v Balkishan Das*,¹ and *Maula Bux v Union of India*,² *Kailash Nath Associates v Delhi Development Authority*,³ *ONGC Ltd v Saw Pipes Ltd*.⁴ These cases have consistently held that Indian law does not distinguish between liquidated damages and penalty clauses, but adopts a single rule that applies to both types of clauses. Nevertheless, the way in which they express that single rule relies heavily on the traditional common law approach of only giving effect to a stipulated sum if it is a 'genuine pre-estimate'.

The reliance of Indian courts on the 'genuine pre-estimate' test is somewhat surprising, because nothing in the Contract Act suggest that a 'genuine pre-estimate' should be treated differently from other contractually stipulated sums. Section 74 of the Contract Act gives courts a wide discretion to disregard any contractually stipulated sum and instead award reasonable compensation of any amount up to the stipulated sum, regardless of whether the stipulation would have been treated as liquidated damages clause or a penalty at common law, and regardless of whether the plaintiff is actually able to prove loss. Why, then, have the courts adopted a test based on the classical form of the rule against penalties? The answer is that s. 74 does not answer a particularly challenging question with which courts around the common law world have struggled, namely, whether there are circumstances in which it is reasonable to award the sum stipulated in the contract, simply *because* it is stipulated in the contract, and not because an assessment of the loss caused by the breach shows the sum to be a reasonable one. The leading cases on s 74 have all involved precisely this question,⁵ and their approach to stipulated sums can be boiled down to three principles:

- (a) Regardless of whether or not a sum has been stipulated in the contract, compensation will only be awarded if loss or damage has in fact been suffered. Although s 74 gives the court the power to award reasonable compensation even where loss or damage has not been proved, the courts have taken this to simply mean that the *quantum* of loss or damage need not be proved. The *fact* of loss or damage, in contrast, must be proved. The law will not give one party a windfall if there has been no loss.
- (b) The starting point in determining what is 'reasonable' is that the court will award a sum of compensation calculated in accordance with general principles of Indian contract law. That ordinary measure of compensation is the measure of what is 'reasonable' under section 74.
- (c) If, however, the quantum of damage or loss is difficult or impossible to prove, *and* if the court, after due scrutiny, finds that the sum named in the contract is a 'genuine pre-estimate of damages fixed by both parties', the court will award the full sum named in the contract. Both conditions must be satisfied.

¹ AIR 1963 SC 1405.

² AIR 1970 SC 1955.

³ (2015) 4 SCC 136 [43].

⁴ (2003) 5 SCC 705 [64]-[65], [68].

⁵ See the cases cited at nn 1 – 4.

This approach has not, however, provided a satisfactory answer to the question of when the courts should give effect to a contractually stipulated sum. Because it draws on the *Dunlop*⁶ principles that governed English law until the recent shift of direction in *Cavendish Square*⁷ is striking, it suffers from the precise same difficulties as the *Dunlop* approach in determining when something is a ‘genuine pre-estimate’.

Two recent cases illustrate these difficulties. The first relates to a common practice in which companies include in their trainees’ employment contracts provisions requiring their trainees to pay a substantial sum of money to the company to compensate the company for training expenses in the event that the trainee does not pass probation.⁸ The second case related to a settlement agreement arising out of an allegation of forgery, which provided for the payment of a very large sum of money – US \$3.5 million – in the event of a breach of the agreement.⁹ Both, arguably, involved situations where the quantum of damage or loss was impossible to prove. On what basis, then, could a court decide whether the sum named in the contract was a ‘genuine pre-estimate’ of damages?

Case law from High Courts suggests that they have taken two routes around this difficulty. A few High Courts, and in particular the High Court of Bombay, have added a gloss to the third of the principles outlined above, stressing that the party seeking the award of the named sum must prove that the quantum of damage or loss is difficult or impossible to prove, that the court must find to its satisfaction that the named sum was a genuine pre-estimate, and that the court retains a discretion to determine whether to award the named sum, which it must exercise with reference to the injury or loss actually caused by the breach. Both cases discussed above were decided on the basis of this approach, with the court in both cases holding that the plaintiff had failed to discharge this burden of proof.

The difficulty with this approach, however, is that it relies on evidentiary difficulties to achieve what is clearly intended to be a substantive position, which is hardly satisfactory. Equally, it arguably sets the bar so high as to make it virtually impossible to clear—and, in doing so, makes no distinction between commercial contracts negotiated with the benefit of full legal advice, and contracts marked by a high degree of asymmetry. An approach which treats the reasonableness of a sum stipulated in a contract between two evenly matched commercial concerns, or between two high net-worth individuals, as being in principle no different from a sum stipulated in contract between a company and a trainee is not easy to justify.

A second route around this difficulty, taken in a small number of cases, involves deciding the case without any reference to section 74, relying instead on the doctrine of unconscionability in Indian law—a move also seen in other common law jurisdictions such as Canada.¹⁰ The Contract Act does not expressly enact a doctrine of unconscionability. Nevertheless, such a doctrine was read into the Contract Act in 1986 by the Supreme Court in *Central Indian Water Transport Corp v Brojo Nath Ganguly*,¹¹ which held that a contract that was

⁶ *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (HL).

⁷ *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67.

⁸ *Sandhya Nayak v Larsen and Toubro Infotech*, Arbitration Petition 761 of 2015 (Bombay High Court, 5 February 2019).

⁹ *Jackie Shroff v Ratnam Sudesh Iyer* (2020) 3 AIR Bom R 161.

¹⁰ See eg *Liu v Coal Harbour Properties Partnership* [2006] BCCA 385, (2006) 273 DLR (4th) 508 [24]; *Birch v Union of Taxation Employees* [2008] ONCA 809, (2008) 305 DLR (4th) 64.

¹¹ AIR 1986 SC 1571.

unconscionable would violate public policy, and hence be void under section 23 of the Contract Act which deals with contracts against public policy. What is unconscionable is somewhat expansively defined:¹² it depends on the unfairness or unreasonableness of the clause, whether the term shocks the conscience of the court, the extent of inequality in bargaining power, differences in the economic strength, lack of meaningful choice, and so on; but the courts have been at pains to stress that commercial transactions marked by an equality of bargaining power are unlikely to be unconscionable. The High Courts of Madhya Pradesh¹³ and Gujarat¹⁴ have used the notion of unconscionability, rather than the powers conferred by section 74, in cases involving agreements signed by medical students which committed them to spend a certain period of time as a resident in a named hospital and required them to pay a substantial sum of money if they failed to do so.

The attractions of unconscionability are easy to see. Unlike the current approach to section 74, it does permit a substantial degree of context-sensitivity, and it enables the courts to consider the extent to which the approach taken in relation to commercial contracts produced by symmetric or equal bargaining should be the same as that taken in other contexts. Yet it is not clear whether unconscionability applies to bodies other than public bodies that are part of the state as defined in Article 12 of the Constitution: although the concept has been applied to wholly private bodies, dicta suggest that it should be confined to public bodies. Equally, the fact that unconscionability as applied in these cases is rooted in public policy rather than the specific provisions of section 74 also raises questions in relation to the appropriateness of applying it to an area such as stipulated sums which are the subject of a specific statutory provision.

2. Limitation clauses

The position in relation to limitation clauses can be discussed more briefly. The Contract Act does not directly provide for any rules in relation to limitation clauses, either to permit or to restrict them. Nevertheless, Indian courts have developed a range of techniques to deal with these clauses, which have been influenced by the common law approach developed in cases like *Spurling v Bradshaw*¹⁵ in relation to the extent of notice that must be given for a limitation clause to be incorporated, as well as by the approach to construction developed in the *Suisse Atlantique* line of cases.¹⁶ Whilst these individually pose fewer problems than the law in relation to stipulated sums, the question of their relationship to each other remains unresolved.

The first approach asks whether the limitation clause has been validly incorporated into the contract, if the incorporation is by notice rather than through a signed document. The Contract Act itself does not deal directly with incorporation, but the Indian courts have

¹² The Law Commission of India in its 199th report (2006) recommended putting the doctrine on a statutory footing, but no government has taken this recommendation up, although private members' bills to do so are periodically introduced in Parliament (and one is currently pending). Please refer to Shivprasad Swaminathan and Veda Singh, chapter 9 of this volume. [Cross ref Chapter on unconscionability]

¹³ *Anshul Jain v Medical Education Department*, Writ Petition 7982 of 2019 (Madhya Pradesh High Court, 13 May 2020).

¹⁴ *Shitanshushekhhar Manoharlal Sharma v State of Gujarat*, Special Civil Application 18840 of 2014 (Gujarat High Court, 12 April 2019).

¹⁵ [1956] 1 WLR 461 (CA).

¹⁶ *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL).

consistently applied a body of rules derived from English law and substantially identical with it. Notice of the clause must be given prior to the time of contract, with the result that clauses contained in post-contractual documents, such as receipts or consignment notes, do not form part of the contract and are have no legal effect.¹⁷ The courts also consider the nature of the document containing the term and the extent of notice that was given. A notice contained on the reverse of a laundry receipt, for example, will not be binding if the owner of the laundry did not draw the customer's attention to the clause,¹⁸ and the rule also applies to other types of documents such as tickets.¹⁹

A second approach to limitation clauses is derived from the *Suisse Atlantique*²⁰ rule in English law. Under this approach, courts read down exclusion clauses which conflict with the main purpose of the contract. The aim, as the Supreme Court described it in *Skandia Insurance v Kokilaben Chandravadan*,²¹ is to ensure that the exclusion clause 'does not cross swords' with the contract's main purpose. The court will, accordingly, try to 'harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose.' As in English law, this is a rule of interpretation rather than a substantive rule, and effect will be given to a clearly worded clause no matter how onerous the result. A number of cases have, for example, arisen out of a standard term in public sector construction contracts, under which public bodies are not liable to compensate contractors for any losses arising out of construction delays caused by the public body, if the contractor has been given an extension of time for completing the project. The courts have generally tended to give full effect to these clauses.²² Where statutory policies are also at play, as in motor insurance contracts, courts will go further in reading down exclusion clauses to make them conform to the statute.²³ As in English law, the courts also draw on the *contra proferentam* rule to read down limitation clauses.²⁴

A third technique uses the doctrine of unconscionability set out in *Brojo Nath Ganguly*,²⁵ discussed above, to hold exclusion clauses void under section 23. Much as with stipulated sums, the application of unconscionability to exclusion clauses is influenced by context. In insurance cases, for example, the courts have read in a duty on insurance companies, based on the duty of utmost good faith, to explain all exclusions to the assured, and have held exclusion clauses void where this has not been done.²⁶ A far more interesting field of application of unconscionability has been in housebuilding contracts. Developers of residential housing appear to not infrequently introduce a standard term in their contracts under which is written in the form of a liquidated damages clause, but in reality operates to cap the liability of the developer at a very low amount in the event of delay. Clauses of this type have come up before the consumer courts

¹⁷ *Road Transport Corporation v Kirloskar Brothers* AIR 1981 Bom 299; *Road Transport Organisation of India v Barunai Powerloom Weavers' Cooperative Society Ltd* (1997) 2 OLR 106.

¹⁸ *RS Deboo v Dr MV Hindlekar* AIR 1995 Bom 68.

¹⁹ *Special Secretary to the Government of Rajasthan v Vedakantara Venkataramanna* AIR 1984 AP 5.

²⁰ *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL).

²¹ AIR 1987 SC 1184.

²² See eg *Ramnath International Construction Ltd v Union of India* AIR 2007 SC 509; *ONGC v Wig Brothers* (2010) 13 SCC 377.

²³ *BV Nagaraju v Oriental Insurance Co* (1996) 5 SCC 71.

²⁴ *Iffco Tokio General Insurance Co v Permanent Lok Adalat (Public Utility Service), Gurgaon* 2011 SCC OnLine P&H 11047.

²⁵ *Central Indian Water Transport Corp v Brojo Nath Ganguly* AIR 1986 SC 1571.

²⁶ *Modern Insulators v Oriental Insurance Co Ltd*, 2002 (2) SCC 734; *Iffco Tokio General Insurance Co* (n 24).

on several occasions, and their response in every instance has been to use the doctrine of unconscionability to hold the clause void for unconscionability.²⁷

A final, and somewhat startling, approach was taken by the High Court of Delhi in a 2010 decision, *Simplex Concrete Piles v Union of India*.²⁸ The High Court in this case held that section 73 created a legal right to compensation for breach which, as a matter of public policy, cannot be waived:

It therefore is a matter of public policy that the sanctity of the contracts and the bindingness thereof should be given precedence over the entitlement to breach the same by virtue of contractual clauses with no remedy to the aggrieved party.

Any clause which sought to exclude liability would, therefore, be void for 'being against public interest and public policy'.

This approach has thus far exerted a rather limited influence over subsequent cases, and it is to be hoped that it stays that way. The approach resembles the doctrine of substantive fundamental breach with which the English experimented in the 1970s, and is likely to suffer from problems similar to those which that doctrine created.²⁹ There is little in the language of section 73 or in its history that suggests that the Contract Act was intended to prohibit exclusion clauses. Given that 19th century English law already had statutes which limited exclusion clauses in specific circumstances,³⁰ it is likely that if the Contract Act had been intended to create a general policy on exclusion clauses, it would have done so expressly.

III. TOWARDS A DIAGNOSIS: REDISCOVERING THE SOCIAL FUNCTION OF CONTRACT LAW

Drawing on case law from elsewhere in the common law world is an obvious way to deal with difficult questions, and it is unsurprising that the Indian courts have done so. Nevertheless, case law and scholarly writing from other jurisdictions should be approached with some caution when dealing with remedial clauses in Indian law. The Contract Act makes a number of deliberate departures from common law rules, including in relation to remedial clauses. Crucially, and as this section discusses in more detail, these departures were made not just in the interest of simplifying the law, but were also based on a clear view as to the role of contract law in responding to social concerns.

There are several reasons why it is worth engaging with these aspects of Indian law at this point of time. The growing move across the common law world away from the 'genuine pre-estimate' test make it likely that Indian law, too, will shift away from that test in due course. Rather than simply following the path taken by English law, it is worth investigating why the Contract Act sought to depart from English law in the nineteenth century, and examining whether those factors have any relevance to the path Indian law should take in the present day. As this section will argue, both these questions should be answered in the affirmative. A closer

²⁷ See eg *Smita Uban v Pioneer Urban Land* 2020 SCC OnLine NCDRC 1094.

²⁸ 2010 SCC OnLine Del 821.

²⁹ See *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL), which abolished the doctrine in English law, for a discussion of its background and the difficulties to which it gave rise.

³⁰ For an overview, see Jeannie Paterson and Elise Bant, 'Contract and the Challenge of Consumer Protection Legislation' in TT Arvind and Jenny Steele (eds), *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Oxford: Hart Publishing 2020).

examination of the historical origins of the discretion conferred by section 74, and the purposes that underlay it, suggests a very different path that Indian law can and should take, which will resolve not only the problems with the current state of Indian law itself, but also problems from which the common law elsewhere continues to suffer.

This section begins by discussing the ways in which the Contract Act departed from the common law rules on stipulated sums (subsection A). It then draws on the legislative history to show that these departures were animated by an underlying view that saw contract law as having a central role in responding to social problems (subsection B), and concludes by arguing that this social role remains relevant in the present day (subsection C).

1. Section 74 and the 19th century common law

The Contract Act made several changes to English contract law as it stood in the 19th century.³¹ Section 74 was one of these changes. As prior work has discussed, the section sought to avoid the technicalities of the distinction between penalty clauses and liquidated damages in English law.³² Instead, it set out a single rule applicable to all clauses providing for a named sum to be payable on breach, regardless of whether they would have been considered liquidated damages clauses or penalty clauses in English law. In effect, it abolished the distinction between liquidated damages and penalties and the distinction between relief against forfeiture and against penalties.³³ In addition, it departed from English law by giving the courts a broad discretion to award any sum they consider reasonable in place of the stipulated sum. This departure is of greater importance than the first, and it therefore merits some explanation.

Nineteenth century treatises demonstrate that English lawyers saw the rule against penalties as being grounded in a legal principle that contracting parties were, in general, entitled to no more than compensation for the loss that could be proven to have been suffered in consequence of the breach. Liquidated damages formed a narrow exception to that rule. Contemporary treatises suggest that this exception was seen as a pragmatic concession to evidentiary problems. Both Addison and Chitty linked liquidated damages to contractual covenants whose nature was such as to make the precise amount of damages occasioned by their breach uncertain.³⁴ Liquidated damages, on this view, were enforceable because it was likely that the damages incurred by breach would be more than merely nominal, but nevertheless be ‘of an uncertain character’, making it desirable to permit the parties to ‘by their contract, assess and fix them beforehand.’³⁵ Treatises on equity tended to draw on a slightly broader range of factors, but they also agreed that a clause would be enforceable as a liquidated damages clause if it covered contractual stipulations ‘the damages from the breach of which cannot be measured’, or where ‘there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of contract.’³⁶ In such a case, parties were

³¹ For an overview, see Warren Swain, *The Law of Contract: 1670—1870* (Cambridge: Cambridge University Press 2015) 262—270.

³² Shivprasad Swaminathan, ‘De-Inventing the Wheel: Liquidated Damages, Penalties and the Indian Contract Act 1872’ (2018) 6 *Chinese Journal of Comparative Law* 103.

³³ Australian law has recently made a similar shift. See *Andrews v ANZ Bank* [2012] HCA 30.

³⁴ Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (T Chitty ed, 3rd edn, London: S Sweet 1841) 866. The rule continued to be described in similar terms into the 20th century.

³⁵ CG Addison, *A Treatise on the Law of Contracts and Rights and Liabilities Ex Contractu* (London: W Benning 1847) 176.

³⁶ EHT Snell, *The Principles of Equity* (1st edn, London: Stevens and Haynes 1868) 273.

permitted ‘to fix a given amount of compensation in order to avoid the difficulty.’³⁷ Liquidated damages clauses, in other words, were only enforceable because they were a pragmatic way of dealing with the fact that it would be hard to ascertain how much loss certain types of breaches had caused.³⁸

The Contract Act took a very different route to resolving this evidentiary problem, by eliminating the need to reflect the actual loss in determining how much compensation to award. Instead, section 74 gives the court discretion to award any sum, not exceeding the sum named in the contract, which it considers to be ‘reasonable’ compensation. In other words, unlike the position at English law or s 73 of the Contract Act on the award of damages generally, both of which requires courts to award exact compensation for the loss, Indian courts have a broad power to award any compensation they consider reasonable, including in situations where no loss is proved to have been caused by the breach.³⁹ This departure is of considerable significance because it obviates the need to have a special rule applicable to situations where damages are difficult to quantify and, thus, to treat ‘genuine pre-estimates’ any differently from other stipulated sums. The question in every case, instead, ought to be the reasonableness of the sum stipulated. It is open to a court under section 74 to refuse to enforce a clause which provides for the payment of an amount that is unreasonable, even if damages are difficult to measure. Equally, it also leaves open the possibility of enforcing a clause providing for the payment of a penalty as long as it is reasonable. Most significantly, it creates a new possibility—unknown to 19th century common law, or to modern English law—of awarding a third sum which is neither the sum stipulated in the contract nor the precise amount of the actual loss, but a sum that is reasonable given the nature of the harm suffered by the plaintiff as a result of the breach.

The importance of this possibility will be discussed in greater detail in Section IV, but it is evident that it makes the importation of the ‘genuine pre-estimate’ test problematic, and it suggests that there is a need to reconsider whether the current reading of section 74 is the correct one. As the next subsection discusses, this is reinforced by the legislative history of section 74, which shows that the discretionary power conferred by that section was intended to give the courts the ability to respond to the social problems posed by asymmetric or imbalanced social and economic relations.

2. *Balancing legal, social, and commercial considerations*

The initial draft of the Contract Act suggested abolishing the rule against penalties in its entirety and replacing with it a rule making the stipulated sum always payable.⁴⁰ Clause 50 of the draft bill annexed to the Commissioners’ Second Report on the Substantive Law of India provided that ‘when a contract has been broken, if a sum is named in the contract itself as the amount to be paid in case of such breach, the amount so named shall be paid accordingly’.⁴¹ The illustrations to the draft clause, too, unambiguously repudiated the rule against penalties. The

³⁷ *ibid* 274.

³⁸ Other matters that would later become central—such as the question of whether or not the clause was *in terrorem*—do not play an important role in nineteenth century English treatises.

³⁹ The reference to cases where no loss is proved to have been caused by the breach is likely to have been intended to refer to situations of debt. A creditor seeking to recover a debt can recover the amount of the debt and stipulated interest without having to prove anything beyond the fact of breach.

⁴⁰ India Office, *Papers showing the present position of the Question of a Contract Law for India* (HC-239, 1867-68) 5-6.

⁴¹ *ibid* 16.

paradigmatic example of a penalty clause in late 19th century England was a bond requiring the borrower to pay double the original sum in the event of default.⁴² Illustration (a) to clause 50 used precisely this scenario but inverted the outcome: a contract which immediately doubled the debt if the borrower failed to repay it on the due day would be fully enforceable.⁴³

Strong objections were raised to this proposal by judges of first instance in different provinces, who argued that it would cause considerable practical difficulty and have adverse social consequences. Judges responding to the proposals argued that social conditions in India made it necessary to legally protect individuals against the consequences of ‘over-reaching contracts’, not least by restraining the power of money lenders over borrowers.⁴⁴ These arguments about the social consequences of the Commissioners’ proposal to abolish the jurisdiction to relieve against stipulated sums ultimately convinced the Legislative Council to choose a different course.

These social problems were not trivial, and the history of the 1899 amendment to section 74, which put the section in its current form, gives a clear picture of what they were, and what purpose the discretion conferred by section 74 was intended to serve. The original version of section 74 enacted in 1872 could be circumvented by requiring a party to provide a penal bond which would be forfeited in the event of breach. Because this was not a stipulated sum, several courts had held that it did not fall within section 74. In 1899, the statute was amended to expand the court’s power beyond clauses stipulating a sum, to also cover ‘any other stipulation by way of penalty’.

The immediate reason for the amendment was the problem of agricultural debt. The colonial government had repealed the Usury Laws in 1855, making any contractually stipulated interest rate enforceable.⁴⁵ Procedural and remedial laws compounded the problem. The Code of Civil Procedure 1859, which applied outside the presidency towns, gave creditors an unrestricted power to imprison debtors for unpaid debts,⁴⁶ and permitted all property to be attached and sold in satisfaction of the debt with no reservation for necessities.⁴⁷ The consequences were troubling, and were described by the Deccan Riots Commission as in effect enabling creditors to ‘compel his debtor to work for him as a slave’.⁴⁸ In 1879, the government sought to deal with the problem through a special enactment, the Deccan Agriculturalists’ Relief Act 1879, but the regime it created failed to address this problem. A Government Commission appointed to enquire into the problem suggested amending the Usury Laws Repeal Act 1855 to give courts a wide discretion to reduce unconscionable interest rates,⁴⁹ and amending the Contract Act to clarify how undue influence applied to agreements to pay interest.⁵⁰ The 1899 amendments to sections 16 and 19 of the Contract Act gave effect to the latter recommendation. The government was, however, unwilling to create a special power in relation to interest, and

⁴² EHT Snell, *The Principles of Equity* (A Brown ed, 4th edn, London: Stevens and Haynes 1878) 332.

⁴³ India Office (n 40) 16.

⁴⁴ See esp IOR/L/PJ/5/15, Comment from Canoba; *ibid*, Comment from Deputy Commissioner of Delhi.

⁴⁵ Usury Laws Repeal Act 1855, s 2.

⁴⁶ Code of Civil Procedure 1859, s 201.

⁴⁷ Code of Civil Procedure 1859, s 205.

⁴⁸ Deccan Riots Commission, *Report of the Commission appointed to inquire into the causes of the riots in 1875* (C (2nd series) 2071, 1878) 40.

⁴⁹ *ibid* [77].

⁵⁰ *ibid* [41].

instead chose to amend section 74, expanding the courts' powers over stipulated sums to cover a wider range of penal stipulations.

Administrative and judicial officials welcomed the proposed amendment's 'highly advantageous' character in dealing with pressing social issues, and particularly 'the removal of inequalities so common in India where the poor man is generally at the mercy of the rich man from whom he has borrowed money.'⁵¹ The expansion of the powers under section 74 was thought to be 'just and necessary for the equitable decision of many cases which come before judicial officers'⁵² and for dealing with cleverly worded contractual stipulations.⁵³ It was imperative for the courts to be able to 'protect the agriculturist from the unfair dealings and rapacity of the money-lender', and the revision to section 74 would introduce a much-needed reform enabling them to do that.⁵⁴

As this demonstrates, section 74 was intended to serve a *social* function. The fact that oppressive agricultural lending was a social problem which required a remedy was a significant factor in the amendment of section 74, and the power it gave courts was seen as a tool to respond to that problem. The problem had arisen from the introduction into India of common law rules without adequate consideration being given to their social consequences. It was, therefore, only logical to resolve that problem by giving courts the power to be more socially responsive in applying the law.

This social function, however, was not unlimited. The historical record shows that the drafters of the amendment were also anxious about protecting freely agreed commercial transactions. The statement of objects and reasons accompanying the Bill said so explicitly, and in his speech introducing the Bill to the Legislative Council, Sir John Woodburn, the Bill's initial sponsor, explained that the primary reason for choosing to amend the substantive law of contract, rather than the law regarding interest, was to avoid the risk that courts would 'interfere largely with legitimate trade'. High rates of interest could in some circumstances be 'perfectly legitimate', and they should be enforced as long as the parties 'enter upon an engagement in equal terms'. This, it was felt, could be achieved by giving the courts more discretion:

in the direction of varying the terms of a contract which they believed to be inequitable, so that they may not be required... to give a creditor judgment for sums which they actually consider to be unconscionable.⁵⁵

When the Bill returned to the Council after consideration by a Select Committee, Mackenzie Chalmers, who had taken over responsibility for the Bill following John Woodburn's appointment as Lieutenant-Governor of Bengal, stressed that the Committee had gone to some lengths to show that the Bill was not 'intended in any way to apply to, or to affect, *bona fide* business transactions'⁵⁶ or to 'interfere with freedom of contract where the parties to a contract

⁵¹ IOR/L/PJ/6/483, File 1213, Comment from the Chief Commissioner of Coorg.

⁵² IOR/L/PJ/6/488, File 1748, Comment from the Commissioner of Ajmere-Merwara.

⁵³ IOR/L/PJ/6/483, File 1213, Comment from Coorg District Judge.

⁵⁴ IOR/L/PJ/6/488, File 1748, Comment from Pritchard.

⁵⁵ Governor General's Council Proceedings of 21 March 1898, *Gazette of India Part VI* (Calcutta, 26 March 1898) 294.

⁵⁶ Governor General's Council Proceedings of 17 February 1899, *Gazette of India Part VI* (Calcutta, 18 February 1899) 28.

are really free and contract with each other on a footing of equality.⁵⁷ Respondents to the consultation on the draft Bill, including judges, similarly worried that the change would 'lower the standard of commercial morality by relaxing the bonds of contract and encouraging litigation to avoid bargains which ought to be carried out.'⁵⁸ It was not the law's role to assist individuals 'who deal recklessly when they are in a proper state of mind and have grown in worldly experience'.⁵⁹ Members of the legislative council, too, expressed worries about the sweeping nature of the Bill,⁶⁰ and feared it might be 'applied by ill-informed courts to classes of contracts it was never intended to apply to.'⁶¹

Two concerns underpinned this. The first was the risk of encouraging speculative litigation and undermining the security of commercial transactions.⁶² As one respondent put it, any alteration to the general law of contract ran the risk of 'offering new opportunities for doubtful litigation to an already over litigious people', causing 'gross injustice' to ordinary merchants and adding 'to the terrors with which litigation tends to paralyse all dealings' in India.⁶³ The second was that judges in smaller towns and districts in the provinces were less experienced than the judges of the presidencies, and would be more easily swayed to favour borrowers.⁶⁴

The final form of the amendment reflected these concerns. It sought to protect genuine commercial transactions by circumscribing the 'general lines' on which courts should proceed without leaving them (as Chalmers put it) 'free to wander at will over all English and American jurisprudence'.⁶⁵ The point was to legislate not against money-lenders, but against unconscionable bargains,⁶⁶ and the introduction of the terminology of 'penalty' as well as the specific examples discussed in the illustrations were intended to highlight the fact that the discretion conferred by the section was not a general discretion to relieve against financial hardship, or to intervene merely because a bond contained hard stipulations. Several judges, in commenting on the draft amendment, had pointed to the hardship that acceleration clauses (which provided that the whole debt immediately fell due if a single instalment was missed) caused borrowers.⁶⁷ The contrast between illustrations (f) and (g) to the final section were a specific response to this: a mere acceleration clause was enforceable, but an acceleration clause which also doubled the amount payable was not. This balance between enabling intervention to deal with social harms, while also upholding commercial freedom in bona fide transactions, was fundamental to the scheme of the amendment, which sought to ensure that the courts exercised their discretion in a manner that did not interfere with commercial transactions where parties were on an equal footing in terms of bargaining power.

⁵⁷ Governor General's Council Proceedings of 20 January 1899, *Gazette of India Part VI* (Calcutta, 21 January 1899) 10.

⁵⁸ IOR/L/PJ/6/497, File 2310, Comment from H.F. Aston (District Judge, Satara).

⁵⁹ IOR/L/PJ/6/496, File 2269, Petition from the Panchayat of Ghotki, Sind.

⁶⁰ Proceedings of 17 February 1899 (n 56) 37 (Ananda Charlu).

⁶¹ *ibid* 37 (Evans).

⁶² *ibid* 28 (Maharaja of Darbhanga).

⁶³ IOR/L/PJ/6/450, File 1205, Letter No 1505-96 from the Secretary, Bengal Chambers of Commerce to the Officiating Secretary to the Government of Bengal, 6 November 1896.

⁶⁴ Proceedings of 17 February 1899 (n 56) 29 (Smeaton).

⁶⁵ *ibid* 39 (Chalmers).

⁶⁶ *ibid* 40 (Chalmers).

⁶⁷ See eg IOR/L/PJ/6/488, File 1748, Comment from Khandekar (Judicial Assistant Commissioner, Ajmere-Merwara); IOR/L/PJ/6/497, File 2310, Comment from James (Commissioner, Sind).

3. *Implications for the present day*

Understanding the purpose underlying the section 74 is not just of historical interest. It also matters to how we understand the law in relation to remedial clauses today. The Contract Act, like many other laws around the world, was transplanted from the jurisdiction in which it originated to a new social and cultural context.⁶⁸ Legal transplants almost inevitably involve a significant degree of adaptation and alteration.⁶⁹ The history of section 74 sheds light on precisely such an adaptation. Yet, as the discussion in this section has shown, the courts' reliance on the 'genuine pre-estimate' test has led section 74 to fall well short of the outcomes its drafters envisaged. It has led the courts to interfere in fully negotiated transactions between parties of equal bargaining power, in sharp contrast to the intention that underlay section 74. At the same time, it has provided an inadequate basis for the courts to intervene in transactions where intervention is arguably required, and compels judges to either use a legal fiction to set a very high evidentiary bar, or to resort to a completely different doctrine such as public policy.

These issues because contract law in India continues to apply across a broad range of contexts. Cases that would elsewhere be decided on the basis of a special statutory regime fall to be decided under the ordinary principles of contract law in India, and a significant proportion of the case law on stipulated sums or limitation clauses arises out of such contracts. Employment contracts, for example, are subject to an extensive system of statutory regulation in England but, in India are largely governed by the ordinary law of contract. The same applies to a considerable proportion of consumer contracts. Although consumer courts in India operate a special regime for product liability⁷⁰ and have a higher degree of remedial flexibility than the ordinary civil courts, when it comes to any issue beyond liability for defective products (and, possibly, defective services),⁷¹ they operate under the general law of contract. India also incorporates a somewhat distinctive approach to defining a consumer: a self-employed individual is considered a consumer even in relation to contracts entered into for the purpose of their business.⁷² A contract between the self-employed owner of a clothing store and a transport company is, as a result, treated as a consumer contract in Indian law.⁷³ Equally, the wall of separation between public law and private law set up in English cases like *Re Racal*⁷⁴ and *O'Reilly v Mackman*⁷⁵ has no counterpart in Indian law, and it is far from uncommon to see arguments and decisions in cases involving public sector contracting juxtaposing principles of contract law with principles of administrative law or constitutional law.⁷⁶

The consequence is that Indian contract law operates a very different context from English law. The steady retreat of general contract law in England from a significant number of areas of interaction means that the courts can refocus principles on the needs of commercial

⁶⁸ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, Athens: University of Georgia Press 1993).

⁶⁹ TT Arvind, 'The "Transplant Effect" in Harmonization' (2010) 59 ICLQ 65.

⁷⁰ Consumer Rights Act 2019, ss 82-87.

⁷¹ S 2(34) of the Consumer Rights Act defines 'product liability' to include deficient services, and 'product seller' is similarly defined to include a service provider by s 2(37), but the wording of ss 82-87 is not particularly well suited to services, and suggests that the draftsmen had physical products in mind.

⁷² *ibid*, s 2(7)(ii)(a).

⁷³ See eg *Tridev Express Cargo v Ipsita Shah*, Revision Petition 27 of 2020 (National Consumer Disputes Redressal Commission, 25 February 2020).

⁷⁴ [1981] AC 374 (HL).

⁷⁵ [1983] 2 AC 237 (HL).

⁷⁶ See eg *Anshul Jain* (n 13).

transactions.⁷⁷ That option is not tenable in the Indian context, where the transactional context, and the nature of the social and economic relations to which a transaction relates, matter in a way they do not elsewhere. Whatever the desirability in purely normative terms of the positions in relation to freedom of contract that have been taken elsewhere in the common law world,⁷⁸ in the Indian context emphasis has to be placed on the purposes which the statutory discretion created by section 74 was intended to serve.

The complexities of the case law arise from the complexity of the contractual landscape in India—and, in particular, the very wide range of contexts and transaction types in which remedial clauses are used, and the very different situations they present in relation to the parties' relative bargaining power. This makes the bright-line approaches and binary categories that dominate this area of law elsewhere less suited to India. As the next section discusses, re-grounding the law in an approach that assigns appropriate weight to social context and the social function of contract law has the potential to resolve the issues that make the current approach to section 74 unsatisfactory, as well as the problems Indian courts have faced in relation to limitation clauses.

IV. RETHINKING THE LAW

What, then, can we learn from the history that is of relevance to the present day? The most important lesson is that it is both feasible and appropriate for the judiciary to move the law onto a different path which is more in keeping with the original purpose which section 74 intended to serve. A discretionary power is, at its heart, a legal tool; and a central task for the courts in dealing with powers conferred by a long-lived statute is maintaining and improving the tools it provides to adapt them to the changing context.⁷⁹ This task can be easily achieved if courts have close regard to the operational context of the discretionary power,⁸⁰ and to the social function it was intended to serve within the framework of the statute that created it. If section 74's actual effect has been materially different from the effect it was intended to have, the answer is a change of direction to bring the law closer to the manner in which it was intended to function. Legal theorists have paid considerable attention to this task, and their work provides us with a ready methodology for going about it.⁸¹

What direction, then, should the law take? This chapter argues that four basic insights must lie at the heart of any approach to remedial clauses in Indian law. The first is that the Contract Act is by design concerned not just with markets but with society. The history

⁷⁷ Although, as Lord Burrows JSC has recently pointed out, the growing separation between general contract law and specific bodies of law in relation to areas such as employment contracts is not necessarily a positive development. See Andrew Burrows, 'Preservation, Removal and Freezing of the Common Law by Statute' in TT Arvind and Jenny Steele (eds), *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Oxford: Hart Publishing 2020).

⁷⁸ See eg Sarah Worthington, 'Common law values: The role of party autonomy in private law' in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Oxford: Hart Publishing 2016).

⁷⁹ See esp K Llewellyn, 'The Normative, the Legal and the Law-jobs: the Problem of Juristic Method' (1940) 8 Yale Law Journal 1355, 1392.

⁸⁰ TT Arvind and Jenny Steele, 'History, Context and the Problem of Juristic Method: The Chancery Amendment Act 1858 and the Law of Contract' in TT Arvind and Jenny Steele (eds), *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Oxford: Hart Publishing 2020).

⁸¹ For an overview, see TT Arvind, 'Vilhelm Lundstedt and the social function of legislation' (2013) 1 The Theory and Practice of Legislation 33.

discussed above demonstrates that in structure, purpose, and intent, section 74 resembles neither an English statute nor a civilian code as much as it resembles the US Uniform Commercial Code—a law that was explicitly drafted to permit a more socially and contextually aware form of judging.⁸² The fact that contracts were used in a wide variety of transactions, some of which reflected social asymmetries, was widely understood, as was the fact that the law needed to adopt a position that would let the courts be responsive to the legal needs created by asymmetric transactions, while also adopting a more hands-off stance when it came to more balanced market transactions.

Secondly, the law must also be cognisant of the fact that any approach to penalty clauses will be applied by not just by the courts themselves, but also by other actors. To some extent, this is already recognised in practice. The superior courts have expressly sought to temper the propensity of the consumer courts to err in a more pro-consumer direction; and the case law of the Bombay High Court on section 74 is characterised by a sense of exasperation with the propensity of arbitrators to routinely award stipulated sums without entering into the broader enquiry on reasonableness which the Contract Act requires.⁸³ Making the law's social purpose fully effective in such an environment will require the courts to give greater weight to law's hortatory function, seeking to induce those who draft remedial clauses to do so in a manner which adheres both to the letter and the spirit of the law, rather than devoting their energies to circumventing the law through clever drafting.⁸⁴ To do so, it must provide an avenue which permits parties to stipulate sums in their contract if they have legitimate commercial reasons to do so.

Thirdly the law must be sensitive to the fact that in some contexts, stipulated sums can and do serve legitimate commercial purposes. An awareness of these purposes led English law to move away from the old penalties-liquidated damages distinction in *Cavendish Square*⁸⁵ and as the history discussed above has shown, it guided section 74 well over a century before it entered English law. The literature on contracting gives several examples,⁸⁶ and Indian law should be more open to giving them weight when they occur in fully negotiated transactions entered into between parties of approximately equal standing, and where they serve a mutual purpose or provide mutual benefit. In keeping with the hortatory function, the law should encourage parties to be transparent in drafting contracts by expressly setting out the specific (and not generic) mutual purpose the clause serves, the basis on which the stipulated sum was calculated, and the specific (and not generic) reason why it is reasonable under the circumstances. Consider, for example, demurrage clauses, which have posed considerable problems under section 74.⁸⁷ On its face, there are good reasons to permit a party to seek to set

⁸² For a fuller discussion, see William Twining, *Karl Llewellyn and the Realist Movement* (2nd edn, Cambridge University Press 2012).

⁸³ See eg *Sandhya Nayak* (n 8).

⁸⁴ The nature and importance of the hortatory function of law is discussed more fully in the work of Professor Atiyah. See esp PS Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' (1980) 65 *Iowa Law Review* 1249.

⁸⁵ *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 [32], and in particular the reference to the 'legitimate interest' which a penalty may be designed to protect.

⁸⁶ See eg Solène Rowan, 'For the recognition of remedial terms agreed *inter partes*' (2010) 126 *LQR* 448; CJ Goetz and RE Scott, 'Liquidated damages, penalties, and the just compensation principle' (1977) 77 *Columbia Law Review* 554; IR Macneil, 'Power of contract and agreed remedies' (1962) 47 *Cornell Law Quarterly* 495.

⁸⁷ *Ultratech Cement Ltd v Sunfield Resources Pvt Ltd* 2016 SCC OnLine Bom 10023.

a higher price for having to remain in possession of the other party's goods for a period beyond what was contractually agreed; and there is an obvious mutual benefit to both parties in continuing to have the goods attended to and not abandoned. The approach suggested here would place the focus on the question of whether the price is reasonable; while giving the parties the ability to set out in the contract the basis for the stipulated sum. Other clauses—for example, the payment of compensation for early termination of an agency—will be approached similarly.

Fourthly and finally, the law must be expressly cognisant of, and responsive to, the fact that the cases that come before the courts continue to reflect a broad variety of transactions, ranging from employment contracts to contracts for maritime salvage. This requires the courts to go beyond the distinction between consumer and commercial transactions that is often made in English law.⁸⁸ As the 1899 amendment recognised, and as the agricultural loans that were prompted it instantiate, transactions that are commercial may nevertheless be characterised by an imbalance between the parties, just as non-commercial transactions may be perfectly balanced.⁸⁹ Jenny Steele and I have recently argued that English contract law embeds not just two, but four distinct approaches to contract law, which respond as much to structural asymmetries—that is to say, to market structures and propensities in a particular field—as they do to transactional asymmetries.⁹⁰ The concerns that underlay section 74 require distinguishing between, for example, a contract engaging a trainee (which is unlikely to ever be entered into between parties dealing on an equal footing) and a contract between two evenly matched commercial parties seeking to settle a long-running dispute (which will save in exceptional circumstances involve parties dealing on an equal footing)—something existing approaches struggle to achieve.⁹¹ Equally, section 74 permits the courts to combine this with the remedial flexibility permitted by the section, in that the courts faced with an asymmetric transaction can award compensation on a discounted scale, depending on the extent of inequality and its impact on the final form of the contract: unlike the position at English law, Indian courts are not restricted to the binary option of either allowing the stipulation or disallowing it entirely.

The approach can be summarised in the form of four propositions, which are offered here by way of a restatement of the law.

- 1) The purpose of an enquiry under section 74 is to identify a reasonable sum to be awarded by way of compensation for breach. Depending on the circumstances, this may be the sum named in the contract, the actual loss suffered by the innocent party, or a different sum which is lower than the named sum.
- 2) The sum named in the contract will be treated as reasonable compensation only if all the following conditions are satisfied. If any of them are not satisfied, the named sum will be treated as exceeding the amount of compensation that is reasonable and a lesser sum will be awarded:

⁸⁸ JN Adams and R Brownsword, 'The ideologies of contract' (1987) 7 *Legal Studies* 205.

⁸⁹ See eg the discussion of the market for agricultural loans in South India in *Proceedings of 17 February 1899* (n 56) 42-46 (Rees).

⁹⁰ TT Arvind and Jenny Steele, 'Remapping contract law: Four perceptions of Markets' in TT Arvind and Jenny Steele (eds), *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Oxford: Hart Publishing 2020).

⁹¹ See the discussion in Section II(A) above.

- a) The transaction is a bona fide commercial transaction between parties with comparable bargaining power,
 - b) The named sum serves a legitimate commercial purpose which is expressly set out in the contract or is otherwise identifiable from the contract, and is proportionate to the importance of that purpose to the party to whom the named sum is payable on breach,
 - c) Where the clause is framed in terms of a formula rather than a specific amount, the application of that formula does not produce effects that would have been outside the parties' reasonable contemplation at the time of contracting, and
 - d) Although the breach must affect the interests of the innocent party for the named sum to be payable, it need not cause economic loss: the courts should recognise that in a bona fide commercial transaction the loss of a contractual right can itself be the loss that the clause was intended to remedy.
- 3) If the sum named in the contract is not reasonable compensation because one of the above conditions has not been met, the court will award the actual loss suffered by the innocent party if it can be quantified in accordance with the usual principles of contract law.
- 4) Where the circumstances of an individual case make it impossible to specify the actual loss suffered in that particular case—for example, in relation to delayed completion in construction contracts—the court will estimate reasonable compensation with reference to the types of loss that a breach of that type has a propensity to produce. This may be assessed from broader sectoral evidence, or from evidence of market conditions. Where such evidence is unavailable, a court may use the named sum as a starting point, and reduce it to take account of the impact of any inequality between the parties on the contract, or to make it more proportionate to the purpose it was intended to serve, or otherwise to make it more reasonable. This process of adjustment of the named sum is of particular importance in cases where the relationship between the parties is asymmetric either due to transactional factors or due to social or structural factors.

Whilst the approach outlined above does depart from the 'genuine pre-estimate' test, it is submitted that it nevertheless comes far closer to embodying the spirit of the intent behind section 74, and will also do a much better job than the current approach of balancing the socially directed objective and policy behind section 74 with the commercial concern of non-interference in freely negotiated commercial transactions.

Whilst the discussion in this section has focused on stipulated sums, it is equally applicable to limitation clauses. Limitation clauses serve a commercial purpose but also create potential issues much like stipulated sums. The gradual moves by Indian courts to extend unconscionability to limitation clauses arguably reflect their recognition of this similarity, but it nevertheless runs the risk of disturbing a mutually agreed and commercially reasonable allocation of risk. Given this, the approach suggested above can also guide the manner in which unconscionability is applied to exclusion clauses including, critically, by stressing the importance of the principle that the courts should not disturb a bona fide allocation of risk in a freely negotiated commercial transaction and should, accordingly, give effect to exclusion clauses in all such contracts.

V. CONCLUSION

This chapter has argued that the approach of the courts to section 74 of the Contract Act requires reconsideration. The general move in the common law world away from the 'genuine pre-estimate' approach provides an opportune moment to do so. As this chapter has also argued, the language of section 74, and the less-differentiated character of contract litigation in India, make it inappropriate to simply follow the approaches taken in other common law jurisdictions. A distinctively Indian approach is needed.

This chapter has argued that the historical background to section 74 indicates what the broad contours of such an approach could be. Any approach should take account of the different contexts in which stipulated sums are used, the social function of contract law in relation to those contexts, in particular in relation to systemic asymmetry, and the broader need to strike a balance with the imperative of non-interference in *bona fide* commercial transactions. These principles are important, and they matter not just to the question of the approach to stipulated sums, but also more broadly for understanding the approach which the Contract Act takes to the question of the relationship between law, contract, and broader social concerns. The 150th anniversary of the Contract Act is an appropriate time to engage more closely with them.