Exclusion, exemption, limitation, indemnity – the significance of an advice A legal and economic view

CATARINA AF SANDEBERG*

Introduction

An important feature of the law over last decades has been the development and extension of negligence liability.[1] This development has had an impact on many areas of legal liability. One of these areas is the liability of professional advisors towards their clients and others affected by their acts or omissions. This development has impelled an increase of litigation, inciting professionals – encouraged and sometimes directed by their regulatory bodies, to take protective measures such as clauses limiting their liability, arranging indemnity insurance for their own protection, etc. All this has created an awareness and expectation that professionals are, in principle, responsible for their mistakes and expected to compensate those who suffer loss as a consequence of their mistakes.

The value of disclaimers is well known. The British case of *Hedley Byrne v. Heller*[2] *is widely spoken of as a precedent on negligent misstatement. However, the holding to that effect is strictly obiter* as the defendant succeeded due to the inclusion of a disclaimer; the case concerned a valuation document containing an exemption of liability clause and the clause was upheld. The Swedish *Kone* case, NJA 1987 s. 692, had a similar outcome.[3] Even though both cases dealt with negligent valuation performed by a professional consultant, they have in both countries acted as seminal

* The author is working throughout 2005 on a three year project regarding the validity of exemption clauses. Catarina af Sandeberg is Senior Lecturer in Law of Business Associations and Securities Law at the University of Stockholm.

[1] An account of this can be found in Kleineman, J., Ren förmögenhetsskada (Stockholm 1987). The main case in Sweden is – however in tort – NJA 1987 s 692. Also note NJA 1998 s. 390, commented by Hellner, J., in Juridisk Tidskrift 1998–99 p. 150 and 949; in Great Britain *Donoghue v Stevenson* [1932] AC 562; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Dorset Yacht Co v Home Office* [1970] AC 1004; *Anns v Merton LBC* [1978] AC 728; *Smith v Eric S Bush* [1990] 1 AC 831; *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Murphy v Brentwood DC* [1991] 1 AC 398; and *White v Jones* [1995] 2 AC 207.

[2] [1964] AC 465, [1963] 2 All E.R. 575 (H.L.)]. See also *Hadley v. Baxendale* [1854].

[3] The number of court cases dealing with exemption clauses in Sweden are relatively few. Since the Swedish legislation is set against a background of consultation and cooperation between interest groups, big business and government, many disputes are resolved before they reach court. A number of cases regarding limitation clauses in agreements between banks and customers are handled by the Swedish Consumer Agency (Konsumentverket).

precedents on exemption clauses, highlighted when a professional advisor of any kind has committed a breach of diligence or duty in pursuit of an investigation resulting in loss to the client.

Recent corporate scandals have attracted attention particularly to the role and responsibilities of insurance advisors, financial consultants, lawyers and auditors. In a row of scandals, auditors have been alleged to be negligent in auditing public companies, leading to great losses to investors. Fear of litigation and the relatively unrestricted nature of professional advisors' liability for breach of contract has resulted in proliferation of exemption clauses and the use of standard forms containing exclusions or restrictions of liability between an advisor and her[4]client. It is now relatively common to find express provisions protecting an advisor from her liability in respect of acts or omissions that would normally be regarded as breach of contract. Since the right of using such clauses is comparatively unrestricted, protection is often afforded by these clauses, which has raised questions on the propriety of such practices.

In views of the Swedish courts' rather unrestrictive construction of exemption clauses, it can be strongly argued that the current regulatory regime operates poorly in respect of fairness. The protection of clients, one of the prime concerns of contract law, is weaker than desirable. The question arises whether reliance on exemption clauses is seriously endangering the interests of the persons or companies whom the service is designed to promote.

The issue of exempting liability has several aspects: exemption in a contractual relationship and exemption with regard to third parties; exemption in standard documents and in individual agreements – whether or not documented in writing.

This article deals comprehensively with the propriety of exemption clauses, in other words whether exemption from liability to pay damages should normally be permitted to an insurance advisor, auditor, lawyer or financial consultant who has acted neglectfully in performing her professional services offered to the general public. The article also discusses economic incentives for parties to avoid disputes arising from an agreement of advising.

Standard form clauses

Professional advisors nowadays often consider exemption clauses a necessary component in their practice. Professionals such as insurance agents, auditors, financial consultants and legal advisors thus protect themselves against claims through various types of exemption clauses, also known as disclaimers or exoneration or exclusion clauses, in other words provisions to protect them from liability in respect of acts or omissions. Mass production of services in relations between enterprises such as banks and insurance companies and their customers has rendered individual negotiation unnecessary and brought about standard contracts that drastically reduce transaction costs. Various types of transaction costs can be identified: information costs, distribution costs, claims adjustment costs, control costs and dispute and liti-

[4] For convenience below female.

gation costs.[5] Standard terms are however known to be one-sided; the stipulator, who gives the advice, will impose her terms upon the other party and let her carry as many as possible of the risks involved in the transaction. A standard form may provide, for instance, that the stipulator is not bound by promises and statements that she or her agents have made during contract negotiation, unless these statements have been put down in writing and signed by the stipulator. The contract may also provide that an on-line broker is not to be held liable for costs occurring or profit lost while the server is out of function. An adhering party may remain bound by the contract, while the stipulator can postpone performance beyond the agreed time, change her performance or cancel it. There are exemption clauses which in case of the stipulator's non-performance exclude her liability or exclude or limit the adhering party's right to terminate the contract, and clauses which impose severe penalties upon the adhering party's in case of her non-performance.[6]

The result is an imbalance between the parties, often due to an asymmetry in information, where the adhering party typically has a weaker position irrespective of whether she is a company or a private customer. In extreme cases she cannot understand the written standard terms. Occasionally, for the same reason or for carelessness, she does not read them. Should she read them she does not have the negotiating power to object. The expectation is that the stipulator will fulfil her undertaking, and an attempt to have this stated would be futile. The stipulator will not permit it, and if the customer goes to another supplier she will get similar terms. It is a take it or leave it situation, where the adhering party is defenceless against the stipulator.

Examples of exclusion and limitation clauses

An exemption clause typically provides that the professional shall not be liable for a loss that has injured the contracting party other than for gross negligence, fraud, wilful default or all of those. Some clauses may however wholly exclude any duty of care, literally permitting the professional to act however negligently without risk of incurring any liability.

Besides clauses that seek to exclude or restrict liability for breach of duty or diligence, there are limitation clauses, which limit the amount that the professional can be liable to pay. Such a clause may limit or exclude certain types of loss suffered by the client, or limit liability to a specified sum, a liability cap. In a British case, *Killick v. PriceWaterhouseCoopers*,[7] the executors of a private person's estate sought summary judgment in an action against PriceWaterhouseCoopers for professional negligence.

[5] Dufwa, B., Development of International Tort Law till the Beginning of the 1990s from a Scandinavian Point of View, Scandinavian Studies in Law volume 41 (Stockholm 2001) pp. 87–182 at p 177.

[6] Lando, O., "Study of the systems of private law in the EU with regard to discrimination and the creation of a European Civil Code", European Parliament, Directorate General for Research, Working Paper, Legal Affairs Series, JURI 103 EN (June 1999), Chapter I, pp. 3–16.

[7] *Killick v. PriceWaterhouseCoopers* (No.1) [2001] 1 B.C.L.C. 65. [2001] PNLR 1.

H had owned a substantial stock in a company, BGG, and following his death BGG, in accordance with a "buy back" provision in its Articles of Association, requested that PWC prepare a valuation of H's shareholding. PWC duly produced a valuation of £2.1 per share. The bulk of the shares were subsequently sold at that price. Following the sale, a report was prepared by a second firm of accountants, which valued the shares at £4 each. Proceedings were subsequently commenced against PWC for damages in excess of £30 million. The court had to establish whether the liability could be subject to a clause in the agreement between the client and accountant limiting liability and, if so, whether such a clause fulfilled the requirements of reasonableness within the Unfair Contract Terms Act 1977.[8]

Under the heading "Terms of Business" the letter referred to the terms of business attached to the letter and continued as follows:

"Your attention is drawn to clause 7 which sets out important restrictions on our potential liability, including in the circumstances of our being held to be in breach of any contractual or tortuous obligations. It is reasonable that we agree at the outset to the maximum amount of our potential liability provided that such limitation is not unfair. You and we agree that this represents your and our joint judgment of the extent to which it is reasonable for us to bear liability in connection with this engagement. You and we agree that this maximum amount is fair in view of the scope and size of the Services and the risks we assume in carrying out the Services compared to the fees we will receive".

The terms included under paragraph 7 "Liability" the following:

"7.4 A liability cap. We will accept liability to pay damages in respect of loss or damage suffered by you as a direct result of breach of our contractual obligations or negligence ....but ....the total aggregate liability of Price Waterhouse Cooper ....resulting losses damages costs and expenses shall in no circumstances exceed £10 million."

The disclaimer in clause and cover letter was held to be not sufficiently wide to excuse negligence of the alleged magnitude.

The exemption clauses considered here aim to exclude or restrict liability to compensate a counterparty for a loss in advisory situations resulting from a wrongful advice given by a professional advisor. As mentioned above, exemption clauses occur in standardised contracts, such as contracts regarding investments, and in agreed documents. A clause in a negotiated document can however also be standardised; thus a bank would use the same wording in dealing with all customers also in an agreed document:

Example 1:
No representative of the bank shall be liable for any loss or damage which may happen to the customer at any time or from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud.

Example 2:
For your private use and without responsibility on the part of the bank or its officials.

[8] *See* infra.

Example 3:
Recipients are urged to make their investment decisions upon such investigations as they deem necessary. To the extent permissible by applicable law, no liability whatsoever is accepted for any direct or consequential loss arising from use of this document or its contents.

Legal opinions given by a lawyer may involve great values and consequently great exposure to risk, and the stipulator will aim to limit her liability in case of damage. In advisory agreements a limitation of the liability often occurs through a description of the mission and through reservations.

Example 4:
Replies are believed to be accurate but their accuracy is not guaranteed and they do not obviate the need to make appropriate searches, enquiries and inspections.

Example 5:
Pursuant to the Swedish Contracts Act, the terms of an agreement may be modified or set aside by a court to the extent that such terms are deemed to create unreasonable results, even if the circumstances giving rise thereto have arisen after the agreement was entered to.

Example 6:
This report is produced by x. All information in this report has been compiled in good faith from sources believed to be reliable. No warranty expressed or implied is made in respect to the completeness or accuracy of its contents and the report is not to be relied upon as authoritative.

A legal opinion for example by a law firm or an accounting firm may involve specific information, such as tax consequences of particular actions.[9] The validity of an exemption clause in a letter of opinion regarding a tax advice was considered by the Ontario Supreme Court of Justice in *Ontario Ltd v. di Tomaso*[10] concerning a third party claim.

A corporation provided financing to an individual part, di Tomaso, relying on representation that di Tomaso was entitled to certain tax credits assigned to a corporation as security. In a letter of opinion di Tomaso's accountants PriceWaterhouseCoopers, PWC, provided a written estimate of investment tax credits available and an opinion of the validity of scientific research and experimental development expenditures claimed by di Tomaso. No tax credits were however available and a significant portion of the financing was lost. The corporation brought action for damages for negligent misrepresentation; consequently di Tomaso brought a third party claim against PWC seeking indemnity. PWC then brought motion to strike out the third party claim. PWC claimed that it could not be sued since the letter of opinion contained an express disclaimer. PWC relied in its denial on a famous statement by Lord Reid of the British House of Lords in the above-mentioned case of *Hedley Byrne v. Heller* that a person giving information or advice can be excused from responsibility if he gives the information or advise with a clear qualification that he accepts no responsibility for it.[11]

An agreement may further contain a provision entitling the advisor to an indemnity in respect of liability to a third person for breach of duty, or in case of loss or damage to herself.

9 Kleineman, J., Ren förmögenhetsskada, p. 558 not. 99.
10 914151 *Ontario Ltd. V. Di Tomaso*, (1999), B.L.R. (2d) 159.
11 [1964] AC 465, [1963] 2 All E.R. 575 (H.L.) at 9.

Example 7:
X hereby agrees to indemnify Z against any and all loss, including loss of profits from any act occurring from this agreement.

Another category of clauses, which must be distinguished from the former, qualify the advisor's liability in some specific respect:

Example 8.
The due diligence is limited to agreements effectuated during 2003.

Qualifications occur frequently in letters of opinion and due diligence agreements, often in the form of assumptions:[12]

Example 9:
We assume:
– The authenticity and completeness of all documents submitted to us as originals;
– The conformity to original documents of all documents submitted to us as copies and the authenticity and completeness of the original documents.

In an agreement regarding financial investments a clause may limit liability to a certain type of damage, amount per incident, per series of incidences and/or per annum, and in addition, exclude:

Example 10:
– ...direct or indirect loss of profits, business or anticipated savings and indirect or consequential loss or damage.

Such clauses all have the same practical effect from the point of view of the party seeking compensation as exclusions or restrictions of liability.

The term exemption clause is often, and hereafter, used to cover all types of such exempting or restricting clauses.

Where should the line be drawn?

Historically it has not been customary for advisors to seek to limit their liability for damage caused to a party through clauses in the consulting agreement. On the contrary, there used to be an implicit understanding that exclusion of liability was against the very core of the advisory relationship, and that a contracting party should be able to confidently rely on the advice. The representative of a law firm, an insurance company, let alone a bank, has a position that creates a respect and reliance that gives her a power in relation to the client. The client scarcely regards the representative as a seller of a product comparable for example with a car. But as mentioned above, the development and extension of negligence liability had a severe impact on professional advising, leading to an increase in litigation. Auditors and accounting firms were accused of negligence in auditing company accounts. Cases concerning financial consulting involve wrongful advice on investments or taxes, or allegations of mismanagement resulting in a significant fall in value of

[12] To be distinguished from qualifications given by an auditor in an audit report.

deposited funds. Naturally, the advisor will try to exclude and/or limit her liability in advance in order to minimize such economic and legal uncertainties, leading to the many forms of exemption clauses found in practice.

Scheme rules typically exempt professional advisors from liability for negligence of a certain degree. Loss caused by negligence of a professional advisor is not unusual, and the question is to what extent the actor shall be permitted to rely on such clauses for any degree of negligence. Should a professional advisor be permitted to exclude liability for breach of duty to use care and skill in the performance of her profession? And should a financial advisor, for example, be immune from liability for a qualified opinion?

Further, if ordinary negligence is to be excusable, is "gross negligence" a sufficiently clear concept to allow courts to establish whether a professionals's conduct in a particular case has crossed the border to mandatory liability?[13]

It is sometimes stated that whether negligence is to be perceived as "gross" or "ordinary" lies in the eye of the beholder. In *Armitage v. Nurse*,[14] discussed below, Lord Millett stated:

> [While] we regard the difference between fraud on the one hand and mere negligence, however gross, on the other as a difference in kind, we regard the difference between negligence and gross negligence as merely one of degree.[15]

In a Swedish case dealing with limitation of liability in a construction agreement, NJA 1992 s. 130, the following is stated:[16]

> Within the field of tort and insurance liability it is established that the degree of negligence[17] must be severe to be considered as gross, normally it is a behaviour bordering that of wilfulness, in other words it shows a certain degree of ruthlessness or indifference that entails a considerable risk for damage. (Gvt Bill 1975:12 p. 133 and 173, 1975/76:15 p. 69 and 1979/80:9 p. 154; compare SOU [Sweden's official inquiries] 1986:56 p. 587 and 1989:88 p. 181). Not even in cases where the actor has been conscious of a risk of severe damage is the fault always considered to be gross, at least not when the case concerns adjustment of compensation due to the victim's having partly caused physical damage or adjustment of insurance compensation ….(see SOU 1989:88 p. 181 and Bertil Bengtsson, Om jämkning av skadestånd [On adjustment of damages] , 1982 p. 81).

In pursuit of any profession it is difficult to be successful in every case. Sometimes success is even out of the professional's control.[18] And apart from that, the professional cannot always guarantee success, for instance due to the complexity of the task. The problems of defining a standard that could be generally acceptable are obvious, not least when analysing the available precedents.

[13] Other difficulties may also arise, however, such as to what extent the advisor can be allowed to act in an objectively irresponsible manner. A typical example is whether a financial consultant can be permitted to speculate freely with a customers' assets. This could be perfectly acceptable in some circumstances, but not in others.

[14] *Armitage v. Nurse*, [1998] Ch 241, se infra.

[15] Ibid, at 254.

[16] Author's translation from Swedish.

[17] Swedish "vårdslöshet", author's remark.

[18] As in an unexpected change in legislation.

A professional advisor is bound by professional standards to exercise a recognised measure of skill and competence in her work. Still it would not be justified to deny professional advisors all power to modify or to restrict the extent of their liability. A line must to be drawn somewhere along the axis of culpability. The Swedish legislator recently stated:

> "A *culpa* based liability aims to target financial advisors who in any way divert from prevalent standards in his practice or judgements."[19]

Together with the culpability the fairness of the clause is frequently highlighted.

How do we then define an unfair term? A few suggestions of tools for deciding whether a clause should be considered fair or unfair are the following:

- We put the question whether the terms are "…such that they could be accepted by rational agents who, without knowing on which side of the transaction they might stand, had to imagine themselves as parties to the transaction?"[20]
- "A clause should be considered fair if it does not cause unfair surprise and if it represents a balance of risk against a price that is acceptable to the margin of aware consumers."[21]
- An unfair term is a term which "… of itself, or in combination with another term or terms of the contract, causes to the detriment of the consumer an imbalance in the parties' rights and obligations rising under the contract."[22]
- An unfair term is "any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer". [23]
- Reasonableness: Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider being reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account. [24]

[19] Prop. 2003/03:133 at 32, author translation.

[20] Brownsword, R., Liberalism and the Law of Contract, Bellamy (ed.), Liberalism and Recent Social and Legal Philosophy, Beale, H., Unfair contracts in Britain and Europé, Current legal Problems 1989, pp. 187–215 at p 206.

[21] Beale, H., Unfair contracts in Britain and Europe, Current legal Problems 1989, pp. 187–215 at p 212.

[22] Ibid at p 188.

[23] The Directive on Consumer Contracts, which provides against unfair terms in standard form contracts, defines in Art 3 (1). The Directive sets out an indicative and non-exhaustive list of terms which may be regarded as unfair.

[24] Article 1.302 (ex art. 1.108): Ole Lando/Hugh Beale (eds.), Principles of European Contract Law, Parts I and II, Combined and Revised, xxiii, see infra.

Attempts of regulation

Obviously there are restrictions on exemption clauses or duty modifying clauses, and there are statutory provisions directed to this aspect of the law. In various legal areas legislators throughout the nations have enacted laws to restrict the application of exemption clauses.

EC legislation

Within the scope of the EC Law, there should be mentioned first of all the Rome Convention on the law applicable to contractual obligations of June 1980, in force in most of the Member States. Further, in substantive law there are a number of directives within specific areas; a substantial part of the unified and harmonized contract law deals with consumer protection.[25] The Council and the Commission have also established rules on restrictive trade practices. Most of these are administrative in character, but some provide restrictions on the parties' contractual freedom. In order to ensure uniform conditions of competition, regulations providing group exemptions for certain kinds of agreements lay down a number of contract terms that are permissible and some that are not. All these measures are fragmented and rather uncoordinated.[26]

The Unfair Terms in Consumer Contracts Directive 1993/13 of the European Economic Community is aimed at striking down unfair terms in consumer contracts of sale and supply of services.

The principles of European contract law

Since 1982 the Commission on European Contract Law has been working to establish Principles of European Contract Law, PECL.[27] The Commission is a non-governmental body of lawyers from the Member States, most of whom are academics. It has received subsidies from the European Union and from various foundations and enterprises, but one of its members are appointed by any government, nor have they sought or received instructions from any government or community institutions.

The Commission presented a first draft of the Principles in 1995, and a revised draft in 1999.[28] The principles follow the Unfair Terms Directive, and the validity of a clause can be questioned in a number of cases such as incorrect information, fraud, threat and so on. According to article 4:109 (ex art. 6.109) a contract can be

[25] Directives on doorstep sales (20 Dec. 1985 no 85/577), consumer credit (22 Dec. 1986, no 85/102), unfair terms in consumer contracts (3 April 1993 no 93/13), package tours (13 June 1990, no 90/314) and time share agreements (26 Oct. 1994, no 94/47).

[26] Beale, H., ibid.

[27] Ole Lando/Hugh Beale (eds.), Principles of European Contract Law, Parts I and II, Combined and Revised, xxiii.

[28] In the second version, the numbering of the articles has changed. Old numbers are indicated by dots (e.g. art. 1.101), new numbers by colon (art. 1:101).

challenged if a party derives excessive benefit or unfair advantage of it. Regarding standard clauses Article 4:110 (ex art. 6.110) states that a clause may be declared void if it causes significant imbalance in the parties' rights and obligations arising under the contract, taking into account the nature of the performance due, other terms of the contract and the circumstances at the time the contract was concluded. PECL art 4:110 is not limited to contracts between an enterprise and a consumer but covers any contract terms not individually negotiated. Even powerful enterprises are protected. Experience shows that such a party may also inadvertently subject itself to unfair terms.

Sweden

In general, the parties are free under Swedish law to make their own deal, and courts will not interfere or question whether terms are unreasonable. This principle is, however, restricted in a number of ways. Historically no clause could relieve, release or exonerate anyone from liability for breach of duty arising from her own fraud or wilful misconduct, and sometimes not from her gross negligence.[29] The closest to codification of this principle is sec 36 in the Contracts Act.

Among legal writers it is suggested that an exeption from the restriction on the use of exemption clauses may be made where the injured party is protected by insurance.[30] The legal situation regarding damage caused by negligence not considered to be gross is however unclear, and the courts do not show a clear standpoint. One example of the courts' reasoning regarding exemption of liability can be found in the above-mentioned NJA 1987 s. 692, in which the Supreme Court stated that liability to pay damages for a person who in her occupation agrees to perform valuation of a building could be imposed "unless he has disclaimed such liability in the valuation document", which may serve as an example of the courts' reasoning regarding exemption of liability.

The main provision in Sweden to apply in these situations is, then, section 36 of the Contracts Act, which provides a general prohibition against unconscionable contract terms. The section was introduced in 1976 and provides that a contract term[31] may be modified or set aside if it is considered to be unconscionable. The section also provides that, in considering whether a term is unconscionable, the court shall have regard not only to the contents of the agreement and the circumstances at the time it was formed, but also to "subsequent occurrences and other circumstances".[32] Furthermore, where the term is "of such importance to the agreement that it cannot reasonably be required that it should stand with terms unchanged," the court has the power to modify other parts of the agreement or set

[29] SFS 1994:1512 and SFS 1984:292. The regulation of unfair contract terms in the other Scandinavian countries is broadly the same.

[30] Hellner, J., Skadeståndsrätt [Law of Damages], Stockholm 1995, p. 85.

[31] The section also applies to "terms of any other legal relationships than that of contract": sec 36.3.

[32] Section 36.1.

it aside completely.[33] This section is aimed at protecting parties who are in the weaker position in the contract, but it does not exclude application in other situations.

The second paragraph of the section provides that, in applying the section, particular attention shall be paid to the need to protect parties who, in their capacity of consumers or otherwise, have the weaker position in the contractual relationship.

Directive 93/13/EEC is implemented through the Terms of Contract between Tradesmen and Consumer Act, and Terms of Contract between Tradesmen Act, which seek to prevent the use of improper terms in contracts between tradesmen and consumers and between tradesmen. These regulations do not, however, avail a party that has already suffered iniquity, since the Market Court can merely prohibit a tradesman from using the terms in question in future agreements.

The possibility for a financial consultant to exclude liability is recently regulated in a separate act, on Financial Consumer Advising.[34] Art. 3 states that a financial advisor cannot relieve or exonerate himself from liability arising from his own fraud, wilful misconduct or gross negligence. Ordinary negligence can be exempted, however. The rules are compulsory in favour of the consumer. Thus an agreement that limits the liability to compensate the consumer is void. Notably the rules are limited to consumer relations, according to the definition in the Unfair Terms in Consumer Contracts Directive 93/13/EEC, i.e., under article 2 (b), "…any natural person who in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession."

The Swedish Consumer Agency, Konsumentverket, provides the general public with consumer affairs assistance. The Agency acts in the collective interest of consumers but in general does not resolve individual consumer disputes. The Consumer Ombudsman is responsible for ensuring that companies abide by the laws and rules in the consumer field and ensures that consumer rights are respected.

Apart from abovementioned regulation various fields of business have or may have their own rules for consumer contract protection.

United Kingdom

Exclusion clauses were recognised in British legislation through the Railway and Canal Traffic Act 1854, where a requirement of reasonableness was stated.[35] In the English legal system there are basically two sets of statutory provisions, apart from business regulations, which may have an impact on the validity of exemption clauses here discussed. Clauses of this kind are subject to the Uniform Contract Terms Act 1977, UCTA, and the Unfair Terms in Consumer Contracts Regula-

[33] English translations are from Bernitz and Draper, Consumer Protection in Sweden: Legislation, Institutions and Practice, Stockholm 1986, and The Law Commission Consultation Paper No 166 The Scottish Law Commission Discussion Paper No 119 Unfair Terms in Contracts A Joint Consultation Paper, at 180.

[34] Lag (2003:862) om finansiell rådgivning till konsumenter.

[35] Les clauses limitatives ou exonératiores de responsabilité en Europe, Actes du Colloque des 13 et 14 décembre 1990, Beale, H., pp. 155–178 at p. 161. The courts decided that the clauses were reasonable if you could give the client the choice of paying a higher interest (taux) in exchange of extended liability. *Peek v. North Staffordshire Railway Co* (1863) 10 H.L. Cas 473.

tions 1994. Section 3 (1) in connection with 3 (2) (a) of the UCTA prevents a person from excluding or restricting her liability for negligence "by reference to any contract term or to a notice", unless the term or notice "satisfies the requirement of reasonableness".[36] The reasonableness test differs according to whether the term is a contract term or a notice without contractual effect:

(1) Where it is a contract term, it must be "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made".[37]

(2) Where it is a notice, the question is whether "it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen".[38]

Schedule 2 to the 1977 Act sets out "guidelines" to which regard must be had where the reasonableness test is applied to certain contract terms.[39] These include the relative strengths of the parties' bargaining positions, any inducement to make the customer to agree to the term, and the extent of the customer's knowledge of the term.

The disclaimer in the previously mentioned case of *Hedley Byrne v. Heller* was very broad, for an opinion given "…without responsibility on the part of the bank or its officials,"[40] and despite the existing rules one might wonder whether the courts would accept it today. A recent decision indicating that it would has lead to a debate regarding the use of exemption clauses in the terms of a trust fund. In the United Kingdom it is usual that trustee exemption clauses exempt trustees from liability for anything except personal and individual fraud, the propriety of which has been questioned over the years. *Armitage v. Nurse*[41]dealt with an action by trust beneficiaries claiming damages against trustees for breach of trust.

> The case concerned a marriage settlement. The settled property consisted largely of land farmed by a company, the directors of which were the mother and grandmother of the claimant beneficiary. Following a substantial fall in the value of the land between 1984 and 1987, the plaintiff sued the trustees for breach of trust as regards the management and investment of the fund, as a result of which substantial loss had been caused.
>
> Clause 15 of the settlement provided:
>
> "No trustee shall be liable for any loss or damage which may happen to [the plaintiff's] fund or any part thereof or the income thereof at any time or from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud... ".

[36] 1977 Act, ss 2(2), 3(2), 4(1), 6(3), 7(3), 7(4).
[37] 1977 Act, s 11(1).
[38] 1977 Act, s 11(3).
[39] This only applies to contracts governed by ss 6(3) and 7(3).
[40] *Hedley Byrne v. Heller* p 5.
[41] *Armitage v. Nurse* [1998] Ch 241.

> On challenge of this clause the court held that it exempted the trustee from liability for loss or damage to the trust property "no matter how indolent, imprudent, lacking in diligence, negligent or willful he may have been, so long as he has not acted dishonestly".[42]

Prior to this case there were doubts whether liability for gross negligence could be validly excluded by the terms of a trust. The Trustee Act, 2000, does not attempt to regulate the use of trustee exemption clauses, the inclusion of which in trust instruments has become more common in recent years. The Act expressly states that the statutory duty of care does not apply:

> "… if or in so far as it appears from the trust instrument that the duty is not meant to apply."[43]

Following *Armitage v. Nurse*, it is clear that a trust deed can exclude a trustee's liability for anything other than dishonesty.[44] However negligent, lazy or misguided the trustees may have been, they cannot under a wide exemption clause be held liable for the loss that they have caused to the trust fund.

The present situation governing trustee exemption clauses has been criticised on a number of grounds,[45] which has lead to an attempt to regulate the validity of such clauses in the terms of a trust fund.[46] In an investigation by the Law Commission regarding the common use of exclusion clauses in trust instruments it appeared that exemption clauses are widely used in trust instruments, and that professional trustees in particular have come to rely upon them as affording a means of protection from liability for breach of trust. In June 1999, the Trust Law Committee issued a Consultation Paper in which it provisionally recommended that the law should preclude a trustee remunerated for her services from invoking an exemption for breach of trust arising from negligence (and worse), in all cases where the trustee cannot prove that prior independent advice was given to the settlor.

The Consultation Paper on Trustee Exemption Clauses was published in 2003. The Commission is formulating final policy in the light of the investigation, and the publication of a final Report and a draft Bill is anticipated by the end of 2005. It will then be for Parliament to decide if the recommendations should become law.

[42] *Armitage v. Nurse* [1998] Ch 241, at 251.
[43] Trustee Act 2000, Sched 1, para 7.
[44] In Scotland it is not possible to exclude liability for gross negligence, which is because Scottish law retains concepts of Roman law including the principle that 'gross negligence is equivalent to fraud or bad faith', discussed in *Midland Bank Trustee (Jersey) Ltd v. Federated Pension Services Ltd* [1996] PLR 179.
[45] "The view is widely held that these clauses have gone too far, and that trustees who charge for their services and who, as professional men, would not dream of excluding liability for ordinary professional negligence should not be able to rely on a trustee exemption clause excluding liability for gross negligence.", Lord Millett in *Armitage v. Nurse*, at 253.
[46] The Law Commission Consultation Paper No 171 Trustee Exemption Clauses, A Consultation Paper, Dec 2002.

Exemption clauses and theory of reliance

As stated above, professional advising is pursued in several different categories of professions. In an early British case was stated that

> "… a profession in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation might vary from time to time. The word "profession" used to be confined to the three learned profession; the Church, Medicine and Law. It has now, I think, a wider meaning."[47]

This statement was made in the early 1900, after which professions as auditors, actuaries and financial advisors have been developed.

Professional advising differs from other forms of professions in a number of ways. Professional advisors hold themselves out as having special knowledge, skills and experience, and charge for the services they provide. They are often expected to uphold moral and ethic standards exceeding normal honesty, and to exercise a certain duty towards the community.[48] Moreover, a professional advisor is often certified and may be connected to an organisation giving her high status. This creates a particular position of reliance in relation to the other party, leading to an imbalance between the parties, as in the case of solicitor and client, financial advisor and customer. In the Swedish preparatory works to sec 36 of the Contracts Act it was emphasized that companies and private persons offering their services professionally should not be permitted to claim the protection of wide general exemption clauses.[49] According to this reasoning, for lawyers, auditors, banks etc. who are in practice accorded such reliance, the use of such wide exemptions should be regarded as unconscionable. Companies and highly qualified servants accepting to pursue important services towards the general public at fees mirroring the significance of the service, should not normally be permitted to exempt liability at any degree of negligence in the pursuance of such tasks.[50]

In legal writings, this reasoning has been named the theory of reliance.[51] Where a person has shown justified reliance in a professional, there are good reasons to look severely upon her liability, especially when the she must have realised that the client relied on the given advice.[52] A determining factor is whether the advisor performed in a professional context and that the contractual party had justified reason

[47] Lord Scrutton in *I.R.C. v. Maxse* (1919) 1 K.B. at 657.

[48] This sometimes interferes with the interests of their client, as in the case of the obligation of auditors and lawyers to account for circumstances.

[49] Gvt Bill 1975/76:81 at 123 f.

[50] See Heuman, L., Advokatens rättsutredningar, Stockholm 1987, at 31 f., Vinding Kruse, A., Advokatansvaret, Köpenhamn 1985, at 113 f.

[51] See eg. Fuller, L., & Perdue, N., The Reliance Interest in Contract Damages, Yale L.J. 1936 at 52, Kleineman, J., Om den befogade tillitens skadeståndsrättsliga relevans, JT 2001–02 at 625, Rådgivares informationsansvar – en probleminventering, SvJT 1998 .

[52] Kleineman, J., Rådgivares informationsansvar – en probleminventering, SvJT 1998 at 187.

to rely on the advice rendered. This is the case particularly when the professional advisor must have realised that the client would rely on the given advice.[53]

On the other hand it may be discussed whether the reliance can be justified when an exemption from liability is expressly made:

> "A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not ."[54]

The inclusion of an exemption clause might act as a warning that excludes the possibility of invoking reliance and "legal liability".[55] However, in situations of specified exemptions, such as qualifications and assumptions, the situation is different.

The importance of liability based on reliance has emerged in tort as well as in contractual relations and the attitude that the person in possession of an information advantage shall be liable in case of misleading the counterparty is developing.

Economic implications

The economic impact of a change in regulation is important. We have seen that exemption clauses are widely used in advisory situations and that professional advisors have come to rely upon them as affording protection from liability for breach in diligence. Many advisors, in particular those operating in highly specialised areas, regard exemption clauses as a necessity for continuing to act as advisors. A regulation of the possibility to use exemptions would somewhat increase the risk of paying damages. An exemption clause provides security, not least from the threat of litigation.

Denying exclusion of liability for ordinary negligence might affect the general level of charges, with the premiums being reflected (like other overheads) in the fees for the services provided. It is nowadays unusual for professionals in the advising area not to be covered by insurance, and one might argue that liability insurance can be a sufficient alternative to exemption clauses.[56] Naturally insurance are of great importance in these situations, not least regarding allocation of risk. Exceptions are however always included in the policies, and there is also a question of coverage, since maximum limits may be easily exceeded.

Some clauses may, by general consensus, be fair in some circumstances, for instance because the customer may insure more cheaply than the advisor. But do we know that this is the most efficient allocation of the risk? If the clause is one excluding or limiting liability for some event which the advisor could more easily prevent than the client, would there still be adequate incentives for the advisor to take precautions if the clause were to be upheld? Which party is in the better position to effect insurance or to carry the risk? How serious is the loss and what is the relative affordability of the parties?[57]

[53] See for the instance the above mentioned NJA 1987 s. 692.

[54] Lord Devlin in *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1963] 2 All E.R. 575 (U.K. H.L.)] at 533.

[55] See Feldhusen, B., Economic Negligence, Toronto 1984, at 70 note 211.

[56] See e.g. *Mitchell Ltd. v. Finney Lock Seed Ltd.* [1983] 1 All E.R. 108.

[57] Posener & Rosenfield (1977) 6 J.L.S. 83.

A law and economics approach

Advisors traditionally try to eliminate the risk of damage costs through utterly systematic research prior to presenting any results. The requirement of information regarding all possible and impossible circumstances is thus essential. By seeking to collect objective and reliable information prior to a specific event, the advisor tries to exercise satisfactory diligence, thus minimizing the risk of an unwanted surprise.[58] Creativeness regarding the possibility of future occurrences, thoroughness etc. can help limiting the risk of cost of damage arising by unwanted events.

Economists historically have been using statistics to identify and analyze the risk of an accident occurring. However, within the legal field statistics are utilised to a surprisingly limited extent.

Other methods of calculating risks of unwanted events or results of an action are the modelling of accident sequences, matrices, checklists and flow charts.[59]

Within the discipline of law and economics the analysis must take account of differences in attitudes towards risk.[60] In economic theory the principal determining factor behind human behaviour is not the contents of the rules, but the maximization of individual utility. In this sense an individual who has alternatives chooses the alternative involving the most utility to her. An individual who has alternatives can consider what the effects of changes will be. A marginal approach considers the effects of incremental changes, where the individuals actions are governed by marginal costs and marginal benefits**.** The marginal cost is the change of costs caused by the change of action, and the marginal benefit is the corresponding change in benefits. The marginal approach suggests that one should make all the changes that increase benefits more than they increase costs (or that reduce costs by more than they reduce benefits). When all these changes have been made, one will find oneself at a point for which marginal costs equal marginal benefits. This rule for finding the best level of an activity is called the maximization principle.

Simplified, maximizing utility means that the individual aims to maximize her benefit and minimize her costs. The choices can however be affected by individual preferences, such as the inclination to surrender to rules.[61]

Prevention can theoretically be based upon the principle of maximizing utility; in consequence of the expected utility the individual has an incentive to act in a way where the cost of preventing damage falls below the costs of the (risk of) damage. However, due to individual preferences, assumptions have to be made, however.[62] The rules for assigning liability are designed to send signals to potential victims and potential injurers about how they ought to behave, given the assumption that those whose behaviour the law seeks to affect will act rationally.

[58] For example through constructing matrices of important subjects, checklists, see Wahlgren, P., Juridisk riskanalys. Med en säkrare juridisk metod, pp 42, 11.

[59] Wahlgren, P., Juridisk riskanalys. Med en säkrare juridisk metod, p. 92, Sandgren, C., Om empiri och rättsvetenskap, Juridisk Tidskrift 1995–96 pp. 1045–1046.

[60] Roos, C-M, Ersättningsrätt och rättsekonomi, Tfr 1996 pp 21–34 at 22.

[61] For a less simplified model see Schotter, A., Microeconomics: A modern Approach. NJ 2003.

[62] An individual can be more or less inclined to expose herself to risk.

Regulation is *ex ante* enforcement by administrators, liability to pay damage is *ex post* enforcements. The difference determines many of the advantages and disadvantages of both respectively. If safety regulations impose a higher standard than liability law, then a rational potential injurer will conform to the regulation in order to avoid fines.

Prevention and morality – the impact of insurance

Apart from the issue of economic prevention there is another form of prevention to consider; moral prevention. An insurance primarily transfers risk from the insured party, which can leave the insured in a situation of moral hazard; through the insurance and the decreased risk of having to pay damages she is induced to reduce precautions. If you pop out of your car for a short while you may decide not to lock it if you are assured of getting fully compensation for possible theft. You may however decide to lock the car even if you leave it only for a short while if you are aware of that your insurance will not cover a theft if the car was unlocked.

Lundstedt and Ekelöf have identified this problem of moral hazard early, claiming that the risk of liability to pay damages has a moralizing effect. Justice Conradi stated:

> "On the whole, one could say that when sanctions disappear in this way by shifting liability for damages back on large, anonymous and collective systems, most of the social pressure and morality forming in tort disappear too – not even the incentive to act carefully, as raised by the inherent risk that one otherwise might have to pay damages, remains. The demand for security on the part of both the injured party and the offender have replaced the liberal ideology that carries traditional liability in fault. This is evolution – for better or for worse."[63]

Insurance is a private system of liability law, allocating the cost of accidents according to contract. It is also a private system of regulation imposing safety standards. When insurance markets are competitive, premiums collected from policy-holders equal the sum of the claims paid to policy holders and the costs of administration. When insurance markets are complete, everyone can purchase all of the insurance that she wants against any contingency. When everyone insures completely, the victims have insurance coverage against every kind of accident. In this world fully insured people, if rational, would not care about accidents – but they will care about insurance rates.

Calculating liability

Analyzing the costs, risk of costs and costs of risk can be pursued through several methods. Within law and economics, models for calculating different costs have

[63] See Dufwa, B., Development of International Tort Law till the Beginning of the 1990s from a Scandinavian Point of View, Scandinavian Studies in Law volume 41 (Stockholm 2001) pp. 87–182 at p 140.

been developed. We can define accidental harm and administrative costs as costs to calculate liability precaution.[64] Precaution in this case refers to any behaviour reducing the probability or magnitude of an accident. Thus the goal of a liability system is to minimize the sum of the costs of precaution, accidental harm and administrative costs. When analysing insurance the thesis must be reformulated; complete insurance covers the cost of accidental harm and administration. Consequently the goal of the legislation is this. In a system of complete, competitive insurance markets, the rules of liability should be structured so as to minimize the sum of costs of insurance and of avoiding accidents.

We can compare the resulting behaviour of our advisor and client by applying a rule of strict liability versus one of no liability. The no-liability situation causes the clients to insure themselves. Under a rule of no-liability and perfect insurance markets, the social costs[65] of accidents equal the sum of the clients' insurance premiums and the cost of both parties' precautions. A rule of strict liability, on the other hand, causes the advisors to insure the clients. Under strict liability and perfect insurance markets, the social costs of accidents equal the sum of advisors' insurance premiums and both parties' precaution costs. The more efficient rule is the one that costs less.[66]

Thus the argument is that clients should bear the risk if it is cheaper for them to insure against risks of damage.

We have seen that insurance externalizes, i.e. transfers the risk from the insured party to the insurer. The externalization of the risk gives the assured an incentive to reduce precautions; *Who cares – I'm covered…*

However the reasoning presupposes another assumption, i.e. that the suffering party will be satisfied with her remuneration, getting perfect compensation through the insurance. Perfect compensation is theoretically a sum of money sufficient to make the victim equally well off with the injury and compensatory money as she would have been without the injury and the money.[67] This involves a further assumption, namely that all harm is recoverable by money. A lost business opportunity may however be lost forever and not replaceable – not to mention physical injuries.

Assuming, however, that all harm can be perfectly compensated, we can consider how to influence our respective party to avoid an unwanted result of an agreement or an action.

If the total transaction cost equals the total amount spent on precaution adding the amount of expected harm, the marginal social cost equals the marginal social benefit. A little more precaution reduces the expected cost of harm (marginal benefit). This reduction in the expected cost of harm equals the reduction in the probability of an accident. When precaution is efficient, the cost of a little more precau-

[64] Cooter, R, Ulen T., Law & Economics (Boston 2004) ch 8.
[65] The sum total of internal and *external* costs.
[66] Ibid at 344 ff.
[67] For this reasoning see Cooter, R., & Ulen, T. at 312.

tion, marginal cost, equals the resulting reduction in the expected cost of harm (marginal benefit).[68]

If our individuals act rationally we can make the following statements:[69]

- When the marginal social cost of precaution is less than the marginal social benefit, efficiency requires taking more precaution (more precaution is cost-justified).
- If precaution exceeds the efficient amount, the marginal costs of precaution exceeds the marginal social benefit.
- If precaution is less than the efficient amount, the marginal cost of precaution is less than the social benefit.
- Expected harm decreases as precaution increases.

Here is our challenge: Incentives depend upon who can take precaution and how the law allocates the cost of harm. A negligence rule imposes a legal standard of care with which actors must comply in order to avoid liability. Assuming perfect compensation and a legal standard equal to the efficient level of care, every form of the negligence rule gives the injurer and victim incentives for efficient precaution. The rule of no liability gives the injurer no incentive to take precaution. The bottom line is basically that if there is a rule of liability the individual profits from taking precaution.[70] If the victims are aware of always being perfectly compensated they have no incentive to take precaution, thus they expose themselves to risk to a larger extent.

Through allocating liability to pay damage to the party that can prevent damage to the lowest transaction cost the maximum preventive effect can be achieved. If the law does not stipulate liability, prospective injurers will not take precaution, while the victims will. A modified rule of liability in case of contributory negligence is also required for the parties to take due care.

This leads, however, into the not so easy question of where to draw the line of liability, i.e. how to determine the legal standard of care for our parties. A way of determining an efficient legal standard is through application of the Hand Rule, where an actors' duty is a function of three variables:[71]

[68] The efficient level of precaution can be found through the following equation: W (marginal social cost) = $-p'(x^*)A$ marginal social benefit. If precaution is less than the efficient amount, then the marginal social cost of precaution is less than the marginal social benefit: $(x<x^*)$ leads to $w<-p'(x^*)A$. When the marginal social cost of precaution is less than the marginal social benefit, efficiency requires taking more precaution. We say that more precaution is cost-justified. If precaution exceeds the efficient amount, then the marginal social cost of precaution exceeds the marginal social benefit: $(x>x^*)$ leads to $w>-p'(x^*)A$. In these circumstances, efficiency requires taking less precaution. This analysis describes efficient precaution for injurer or victim. We add the costs of precaution and expected harm to obtain the expected social costs of accidents: $E(SC)= wx + p(x)A$. The efficient level of precaution $x^\star$ can be found by the following equation: $w = -p'(x)A$. Developed by Cooter, R., & Ulen., T Law & Economics p. 320 ff.

[69] Ibid.

[70] Calabresi, G, The Costs of Accidents (New Haven 1970); Shavell, S, Economic Analysis of Accident law (Cambridge, Mass. 1987).

[71] Cooter, R & Ulen, T., Law & Economics p. 334 ff, Hellner, J, Skadeståndsrätt, p. 131. af Sandeberg., C., Prospektansvaret. Caveat emptor eller caveat venditor, p. 107.

- The probability of an accident;
- the gravity of the resulting injury;
- the burden of adequate precautions.

The injurer is thus negligent if the marginal cost of her precaution is less than the resulting marginal benefit. If the injurer's precaution is efficient, the marginal social cost equals the marginal social benefit. In economic terms an act is negligent when the damage caused by the act exceeds the benefit from the act.

An interesting approach is to apply game theory[72] to induce players in an agency game to adopt socially optimal, dominant strategies in concluding a consensual agreement. Baird, Gertner and Picker apply game theory to tort liability rules,[73] and the concept can equally well be applied to the relation between a professional advisor and her client. In an ideal liability regime, an additional dollar invested in precaution should always reduce expected liability by more than a dollar up to the point of socially optimal precaution. At that point an additional dollar invested in precaution will reduce expected liability by exactly one dollar. As a result of this, Baird, Gertner & Picker formulate a rule of apportionment of loss in comparative negligence: A party who fails to exercise due care should bear the liability in proportion to the amount that party failed to spend on due care relative to the amount both parties fell short of exercising due care.[74]

Applying this rule we assume a situation where a lawyer causes damage of $100 to a client if the client takes some care but the advisor none, the client spending $1 on care when she should have spent $3, and the lawyer spending nothing when she should have spent $3. The sum of additional precaution that the parties should have spent is $5. Since the client's shortcoming is 2/5 and the lawyer's is 3/5, the client should bear $40 of her own losses, and the lawyer should pay the remaining $60.[75]

Concluding remarks

There are obvious arguments pro and con restriction on the advisors ability to exclude liability. On one hand exclusion clauses do play an important role regulating and containing risk, and the freedom of contract should rule. On the other invocation of exemption clauses in advisory situations can be argued to act against the core of the agreement, since the contracting party will loose the possibility of remedy despite the fact that the advisor has failed to fulfil the agreement to the best of her knowledge. The threat of liability for ordinary negligence could lead to professionals being more cautious in the manner of exercise of their services. The possibility of relying upon exemption clauses in so far as the conduct could not be described as negligent might prove more acceptable to the insurers. Another argument is the possible inequality of bargaining power between the contracting parties,

[72] Re game theory see i e Von Neumann, J., Theory of Games and Economic Behavior (New York 1953) .

[73] Baird, D., Gertner, R., Picker, R. in Game Theory and the Law (Cambridge, Mass. 1995), pp. 9–23.

[74] Ibid p. 29.

[75] Note that the rule does not allocate liability when both parties exercise due care.

and furthermore the fact that a professional advisor with special skills or expertise should be liable for failing to meet the standards expected of the profession as a whole.

Sometimes it is held that a legal opinion is merely an opinion, not a warranty: ”A lawyer is not an insurer”, and that the opinion not being ”general assurances that the whole transaction is satisfactory”.[76] A moral aspect is however whether someone possessed of a special skill undertakes to apply that skill for the assistance of another person who relies upon such skill in the very same moment claims that she takes no responsibility for the advice rendered.

Swedish law does however not at present provide a readily available means for an injured party to claim, in case of negligence, that an exemption clause should not be invoked, and, as a result, professional advisors have considerable scope to protect themselves from liability for breach of diligence and duty. However, clearly where a statement of any kind has been qualified as to a specific matter, a person could not reasonably rely upon it without taking the qualification into account, and the qualification must provide a measure of protection.

It must be assumed that where a statement is made by a professional competent to inquire into the relevant matters, it will be implied that she was expressing a belief on substantial and reasonable grounds. In a case where the statement is not based on reasonable ground, the professional must remain liable. The clause will then only be adequate for the question whether the plaintiff acted reasonably in relying upon the statement.

The increased use of clauses of this kind in recent years has without doubt reduced the protection afforded to the counterparties in the event of breach of diligence, and there is a need to maintain a balance between the respective interests. What diverts professional advisors from other occupations is the character of the work; especially competent advising followed by special effort, both performed with particular quality and intellectuality.[77] A professional advisor shall thus pursue her work with professionalism and skill, and with due diligence.[78] Naturally it would not be justified to deny professional advisors all power to modify or to restrict the extent of their liability. But since the situation regarding the validity of a clause limiting professional advisors liability in case of negligence is uncertain, there is a need for clarification through regulation. Exclusion clauses however need to be regulated, not outlawed. The difficulty lies in defining a standard, determining when they perform a legitimate function and they are not.

[76] Wood, P., Law and practice of international finance, s. 412.

[77] Jøgensen, Stig & Wanscher, Torben, Professionelt ansvar i skandinavisk ret, Juristen 1967 at 425.

[78] NJA 1987 s. 692, Kleineman, Jan, Rådgivares informationsansvar – en probleminventering, SvJT 1998 at 185.