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Questioning the 'Safe' in 'Safe Deposit Locker Services' of Class-A Banks vis-à-vis the International Jurisprudence on Contracts and Consumerism.

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Abstract

The service of safe deposit lockers, as provided by the Banks, is sought for the purpose of safekeeping of the articles deposited. Such service creates a risk on the part of the Banks regarding any loss or damage of the articles stored. Therefore, for the purpose of risk aversion, the Banks themselves classify the nature of the Locker Service Agreements (LSAs) and include clauses therein which limit the Bank's liabilities in violation of the jurisprudence on law of contracts and consumerism. The article therefore analyses the contractual relationship arising from the LSAs and the usage of the clauses therein by taking into account consumer welfare. For the ease of understanding, the article, based on the Bank's own classification, classifies the LSAs drafted by all twenty Nepalese Class-A Banks into four types: (a) contract of lease; (b) contract of license; (c) LSAs that do not expressly classify themselves; and (d) contract of bailment. The article deals with the concept of lease, license, and bailment, and determines the valid nature of the LSAs. The article also criticizes the loopholes and contradictory clauses used by the Banks in their LSAs. Considering the burden of proof on the customer plaintiff during an event of loss or damage to the deposited article, the article also suggests important changes with regards to the service of locker services. The article makes large reference to the jurisprudence developed in India, the U.K., and the U.S.A.

Keywords: *Banks, Locker Service, Bailment, Contracts, Consumerism.*

I. Introduction

Banking and Financial Institutions (hereinafter "BFIs") provide various services to their customers. One of such services is the service of safe deposit lockers, wherein the BFIs charge certain fee/rent to allow a customer to avail the safe deposit locker facility by entering into a locker service agreement (hereinafter, "LSA"). However, BFIs, for the purpose of risk-aversion, classify the contractual relationship arising from such LSAs in a manner that favor the BFIs.[1] Additionally, BFIs include 'one-sided provisions' in their LSAs which again favor the BFIs. The LSAs include provisions that defeat the fundamental purpose to avail such service i.e. for safe-keeping of the articles deposited in the lockers.[2] The article analyses the LSAs drafted by all

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1 *Amitabha Dasgupta v. United Bank of India*, Supreme Court of India, 2021, AIR 1193, para. 10.

2 Ibid; *Unified Directive Issued for Class-A, B and C Banks 2080*, Nepal Rastra Bank, Directive no. 21, Clause 16 (which suggests that the services require safe-keeping by the Banks); Subedi, Bibek, 'Banks may

twenty Class-A Banks of Nepal and criticizes its classification (as done by the Banks) and the usage of the clauses therein vis-à-vis the jurisprudence developed internationally with regards to contracts and consumerism.

For the purpose of efficient analysis of the LSAs, the author has divided the LSAs drafted by all the Class-A Banks of Nepal into four categories (detail attached below with Annexure-I):

a. List I includes LSAs that classify themselves as a Contract of Lease.
b. List II includes LSAs that classify themselves as a Contract of License.
c. List III includes LSAs that do not classify themselves and include conflicting clauses.
d. List IV includes LSAs that classify themselves as a Contract of Bailment.

The article, based on the Banks' categorization of the contractual relationship and the clauses included therein, analyses the validity of the LSAs vis-à-vis a consumer's concerns.

II. Analyzing the classification of locker service agreements and the clauses therein

A. Analyzing the Validity of List-I Agreements (Contracts of Lease)

1. Introduction to Contract of Lease

The National Civil Code, 2074 (hereinafter "the Code") provides that a contract of lease is created when a person provides certain goods or properties over which the person has a right and ownership, to another person for its use (along with a creation of an interest over the leased good or property on the part of the lessee) in exchange for a consideration of rent/fee being received.[3] Therefore, a lease is simply a grant of interest or right over good or property.[4]

The only obligation that the Code has envisioned against the lessor is with regards to maintenance of the good or property leased (subject to the terms of the contract).[5] Therefore, the lessor is not burdened by the obligation of safe keeping of the leased property in a contract of lease.

2. Analysis

a. Right to Property/Interest in the Locker

List-I includes seven Class-A Banks (see, Annexure-I) which have categorized the relationship arising from the LSAs as that of a lessor-lessee. A contract of lease creates an interest/right in favor of the lessee on the property/good leased. The Supreme Court of Nepal has decided that a contract of lease creates a temporary interest on the property in favor of the lessee such that the lessor's interest on the property itself is eclipsed.[6] If

check objects put in safe deposit boxes', *The Kathmandu Post,* Kathmandu, 30 August 2023; Giri, Sanjeev, 'Demand for lockers at banks swells', *The Kathmandu Post,* Kathmandu, 15 May 2015.

3 *Muluki Dewani Sangita 2074* (National Civil Code 2017), Nepal, s. 610.

4 *B.M. Lall (Dead) By L. Rs v. Dunlop Rubber & Co. Ltd. & Ors.*, Supreme Court of India, 1968, AIR 175, 1968 SCR (1) 23.

5 National Civil Code (n 3), s. 613.

6 *United Builders and Engineers Pvt. Ltd. v. Office of the Kathmandu Metropolitan*, NKP 2077 (2019), volume 6, Decision no. 10515, para. 6.

the exclusive possession over the property is parted with by the lessor, its *prima facie* means that the contract is a contract of lease, unless there are circumstances which negative such intention.[7]

However, despite the classification of the LSAs as contracts of lease by the List-I Banks, two of the seven List-I Banks have expressly included a clause that provides that the locker holders shall not have a right to property over the lockers, which violates the fundamental principle of a contract of lease. Further, while the other five List-I Banks do not include such a clause, it can be implied from the general practice that the locker holders do not have a right to property over the lockers and only have a right to use the lockers. This can be implied from the fact that the locker holders cannot access the lockers at their will and that the lockers always remain in the ownership and possession of the Banks.[8] The right to property of the locker holders is limited to the materials deposited within the lockers but does not extend to the entirety of the lockers.

b. Test of Exclusive Possession and the Intent of the Parties

When exclusive possession of a property is parted with *vide* a contract, it *prima facie* leads to the conclusion that such a contract is a contract of lease.[9] If such possession is not parties with, and merely a right to use is provided, it would *prima facie* lead to a conclusion that the contract is a contract of license. However, there is no litmus test to differentiate between lease and license, which are often differentiated by thin or even blurred lines, and therefore, the determining factor is the intent of the parties.[10] The context, purpose, and character of the agreement must be considered as well.[11] Further, mere nomenclature of the agreement does not determine the nature of the agreement.[12] The test is one of fact, and not one of form.[13] Therefore, since the Banks do not provide the customers with a right to property over the lockers, it can be conclusively held that the intent of the parties is not to create a contract of lease, despite the nomenclature and classification of List-I agreements as contracts of lease.

c. Restriction on the Right to Sub-Lease

Amongst the List-I Banks, four Banks have expressly restricted the locker holders' right to sub-lease the lockers. However, since the locker holders are not provided with a right of

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7 *Associated Hotels of India Ltd v. R.N. Kapoor,* Supreme Court of India, 1959, AIR 1262, 1960 SCR (1) 368; See also, *Errington v. Errington,* Court of Appeal, England, 1952, 1 KB 290.

8 Soe, Myint, 'The Legal Position of Safe Deposit Boxes in Banks', *Malaya Law Review*, volume 16:2, 1974, p. 290.

9 *Associated Hotels of India Ltd.* (n 7); See also, *Errington* (n 7); *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit,* Supreme Court of India, 1971, AIR Online 29; *Mrs. M.N. Clubwala and Anr v. Fida Hussain Saheb and Ors.,* Supreme Court of India, 1965, AIR 610, 1964 SCR (6) 642.

10 *Ashok Harry Pothen v. Premlal*, Kerala High Court, 2023, O.P. (RC) No. 119; *Smt. Rajbir Kaur and Anr. v. S. Chokesiri & Co.,* Supreme Court of India, 1988, AIR 1845, 1988 SCR SUPL. (2) 310; *Qudrat Ullah v. Municipal Board, Bareilly*, Supreme Court of India, 1974, AIR 396, 1974 SCR (2) 530; *Delta International Ltd. v. Shyam Sunder Ganeriwalla and Anr.*, Supreme Court of India, 1999, SC 2607; *Cobb v. Lane*, Court of Appeal, England, 1952, All E.R. 1199.

11 *M.N. Clubwala* (n 9); *Delta International* (n 10); *BM Lall* (n 4); *Chandu Lal v. Municipal Corporation of Delhi*, Delhi High Court, 1978, AIR 174.

12 *Madhu Behal and Anr. v. Rishi Kumar and Anr.,* Punjab & Haryana High Court, 2008, Civil Revision No. 571, para.3; *Shell-Mex and B.P. Ltd. v. Manchester Garages Ltd.,* Court of Appeal (Civil Division), United Kingdom, 1971, 1 ALL ER 841.

13 Soe (n 8), p. 291.

property/interest over the lockers, such a clause itself becomes redundant.

While it is true that the clause restricting the right to sub-lease are primarily only observed in contracts of lease, a mere inclusion of such a clause cannot lead to mean that the contract is a lease contract. Since the LSAs restrict locker holders from enjoying a right to property over the lockers, the LSAs cannot be considered as contracts of lease, despite the inclusion of any such clause that might suggest otherwise.

d. Is there a Waiver of the Right to Property?

The Supreme Court of Nepal has accepted the principle of waiver as an "intentional relinquishment of a known right."[14] Therefore, where a party to a contract is aware of their contractual right, the person can waive such a right. However, such a waiver cannot alter the fundamental feature of the contract itself. For example, in a contract of lease, the lessee's waiver of the right to property and limitation of their right to mere 'right to use' would alter the nature of the contract itself from that of a lease to that of a license. Thus, waiver of the right to property and a lease contract cannot exist at the same time. Therefore, the doctrine of waiver cannot help in establishing that the List-I Agreements would be a contract of lease despite the agreement curtailing the locker holder's right to property. It must be noted that the doctrine of waiver cannot be used to waive an illegality.[15] Therefore, the doctrine of waiver cannot be used to enforce a lease contract that does not create a right to property, which is an illegality since it violates the fundamental principle of a lease contract.

3. Observation as to List-I LSAs

From the discussion above, it can be concluded that LSAs cannot be classified as contracts of lease. Further, the purpose of seeking locker service is for safe-keeping of the deposited articles which is not ensured by a contract of lease since the lessor does not have a responsibility of safe-keeping. It is for such reasons as well that LSAs cannot be classified as contracts of lease since it defeats the fundamental purpose of the locker service. Therefore, List-I LSAs should be classified as contracts of bailment (discussed later in Chapter II (D)).

[At this juncture, since the article later relies on the jurisprudence developed in India, it must be noted that the Reserve Bank of India (hereinafter 'RBI') in 2017 clarified (albiet wrongly) that the locker service agreement is a contract of lease.[16] Such a classification is not legally valid, as discussed above. The article, however, as under Chapter II (D) cites some Indian judgements which have made some valid observations regarding LSAs.]

B. Analyzing the Validity of List-II Agreements (Contracts of License)

1. Introduction to Contract of License

There remains a fundamental difference between a lease and a license. While lease creates a right over the property in favor of the lessee, no such right is created in favor of the licensee

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14 *Pushpa Kamal Dahal (Prachanda) v. The Constitutional Council and Ors.*, NKP 2067 (2010), volume 7, Decision No. 8406, para 14.

15 *Waman Shriniwas Kini v. Ratilal Bhagwandas & Co.,* Supreme Court of India, 1959, AIR 689.

16 Aasavri Rai, 'Banks Not Liable for Theft in Lockers, Reveals RBI in RTI Query', *LiveLaw,* 2017, available at https://www.livelaw.in/banks-not-liable-theft-lockers-reveals-rbi-rti-query, accessed on 16 December 2024.

in cases of contract of license.[17] In simple words, while lease amounts to a transfer of interest in the property, license is personal or contractual in nature[18] which merely provides a right to use. It is for such a reason that under a lease contract, sub-leasing is possible since the lessee has an interest in the property (subject to the contract restricting sub-lease), while as under a contract of license, sub-licensing is not possible, since the licensee does not have any interest in the property. Therefore, the features of a contract of license can be ascertained by differentiating it with a lease contract. However, a common feature of lease and license is that a licensor (like a lessor) also does not have an obligation of safe keeping.

2. Analysis

a. Right to Property

List-II includes five Class-A Banks which have expressly categorized the contractual relationship arising from the LSAs as that of a licensor-licensee. A contract of license, unlike a contract of lease, does not create any right/interest over the property in favor of the licensee.[19] Accordingly, four of the List-II Banks have expressly provided that the locker holders do not have a right to property over the lockers. Further, as already discussed above, it can be understood from the practice of the Banks itself that the locker holders do not have any interest/right over the lockers but only have a right to use the lockers. Therefore, the limitation on the locker holders' right to property/exclusive possession is in compliance with the licensor-licensee classification.

b. Right of Renewal Issue

Since a license merely creates a contractual right rather than a right to property, the right of renewal inherently remains with the licensor. However, all of the List-II Banks include a clause which provides that the LSA shall be renewed automatically and that the locker holder is required to provide a notice to terminate the agreement. Therefore, this implies that the right of renewal lies with the locker holders (licensee). The Supreme Court of India in the case of *Captain D'Souza v. Antony Fernandes*[20] decided that since the right of renewal lies with the 'licensee', the contract cannot be said to be a contract of license, and thus decided the contract in question to be a contract of lease. However, the conclusion reached by the Court is erroneous, as the doctrine of waiver allows a licensor to waive their right of renewal in favor of the licensee, without changing the nature of the contract.

c. The Doctrine of Waiver

Waiver is simply an "intentional relinquishment of a known right".[21] Therefore, any party to a contract, who has the required knowledge of their contractual right can easily waive such a right. In a contract of license, the right of renewal lies with the licensor. However, such a right can be waived by the licensor, in favor of the licensee. The decision in *Captain D'Souza*[22] is erroneous as the Licensor's (Bank's) waiver of its right of renewal, does not

17 *BM Lall* (n 4).

18 *Madhu Behal* (n 12); *Shell-Mex* (n 12); *Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr.*, Supreme Court of India, 2011, SC 1869, para.13.

19 *Associated Hotels* (n 7).

20 *Capt. B.V.D. Souza v. Antony Fausto Fernandes*, Supreme Court of India, 1989, AIR 1816, para. 4.

21 *Pushpa Kamal Dahal* (n 14).

22 *Captain D'Souza* (n 20).

alter the nature of the contract i.e. license. Therefore, merely because the locker holder has a right of renewal, the contract cannot be said to be a contract of lease.

A fundamental difference between a contract of lease and a contract of license is that the former creates an interest in the property in favor of the lessee while as the latter does not create such an interest in favor of the licensee.[23] When a contract of license has expressly/impliedly restricted the licensee's right in the property, a mere inclusion of a clause that provides the licensee with a right of renewal of the contract, cannot be interpreted to mean that the nature of the agreement is that of a lease which entirely defeats the purpose of the licensing contract. Further, the Judiciary also cannot interpret such contracts of license to be that of a lease, in cases of List-II agreements, since (a) the (*prima facie)* intent of the parties (to create a contract of license) is clear from contract itself;[24] (b) the power of the Courts are circumscribed by the terms of the contract;[25] and (c) the Courts cannot make the clause/contract restricting the right of property redundant or ineffective.[26]

d. Right to Sub-Let Issue

All of the five Banks enlisted under List-II expressly include a clause that restricts the locker holders from sub-letting the lockers. However, an inclusion of such a clause is redundant in a contract of license since the licensee does not have any right/interest over the property and therefore cannot sub-let the property anyways. The right to sub-let a property is restricted by the (*prime facie)* nature of the contract itself (i.e. contract of license) and therefore does not require any specific clause to do so. Such clauses are only useful when it comes to contracts of lease, where the lessee has an interest/right over the property/good leased and can therefore lease the property if there is no restriction on their right To sub-lease.

Again, in *Captain D'Souza v. Antony Fernandes*[27] since the contract of license concluded between the parties included a clause that prevented sub-letting, the Court concluded that such a clause led to a presumption that an interest was created on the property in favor of the 'licensee' and therefore, the contract was said to be a contract of lease. However, later in the case of *Vayallakath Muhammodkutty v. Illikkal Moosakutty*[28] it was decided that an inclusion of such a sub-clause cannot automatically mean that the agreement is an agreement of lease. Therefore, the inclusion of a clause preventing the right to sub-lease does not automatically defeat the existence of a contract of license. Instead, the nature of the contract should be decided according to the pith and substance of the document.

As discussed above, a substantial difference between a contract of lease and a contract of license is that of creation of interest in the property. Therefore, where a contract of license expressly/impliedly provides that there shall not be any creation of interest in the property, a mere inclusion of a clause that restricts sub-letting cannot be interpreted to mean that the contract should be considered as a contract of lease. Where a right to property is not created

23 *Associated Hotels* (n 7).

24 *Himalayan Bank Ltd. v. Durgadevi Dhungel and Ors.*, NKP 2065 (2008), volume 2, Decision No. 7935, para 7; *See also, Bangalore Electricity Supply Co. Ltd. (BESCOM) v. E.S. Solar Power Pvt. Ltd.*, Supreme Court of India, 2021, AIR 3418, para. 16.

25 *Krishi Samagri Sangsthan v. Milimili Enterprises,* NKP 2066 (2009), volume 4, Decision No. 8128, para. 9.

26 *Umakant Jha on behalf of Mahakali Sinchai Pariyojana v. Appellate Court Patan*, NKP 2066 (2009), volume 5, Decision No. 8156.

27 *Captain D'Souza* (n 20).

28 *Vayallakath Muhammodkutty v. Illikkal Moosakutty*, Supreme Court of India, 1996, AIR 3288; See also, *M.N. Clubwala* (n 9).

via the contract, an inclusion of a clause that prevents sub-letting (despite its redundancy in a licensing contract) should be interpreted as a clause that expressly clarifies the nature of the contract as a license, where sub-letting (or rather 'sub-licensing') is not possible. Therefore, the clause restricting sub-lease provides clarification of the licensing contract rather than defeating it.

3. Observation as to List-II LSAs

List-II LSAs validly fulfil the grounds of a contract of license despite the inclusion of seemingly conflicting clauses. However, while the requirements for a valid license have been fulfilled, which creates a right to use, the use of the locker itself is for the primary purpose of safe-keeping and should therefore be classified as a contract of bailment (as has been established below in Chapter II (D)). Therefore, while the classification of List-III LSAs by the Banks as contracts of license might seem legal since it fulfills the requirement of a (*prima facie)* license, such practice is still not legally sound as the intent of seeking such service is for the purpose of safe keeping rather than for mere use or for storage purpose.

C. Analyzing the Validity of List-III Agreements

1. Analysis

List-III enlists seven Class-A Banks which do not expressly clarify the nature of the contractual relationship arising from the agreement. Further, the agreements contain a mixture of clauses which are typically only observed in either lease contracts or licensing contracts, thus adding to the confusion regarding the nature of the contractual relationship.

Three of the List-III agreements include a clause which expressly restricts the locker holders' right to property/interest over the lockers. Since all of the Banks enlisted in List-III either expressly or impliedly restrict the locker holder's right to property/interest in the locker, the agreements enlisted in List-III cannot be said to be contracts of lease (as has been discussed above in Chapter II (A)). Further, six of the List-III Banks include a clause restricting sub-lease and all of the List-III Banks include a clause which provides the locker holders with a right to renewal. While these clauses are typically only observed in lease contracts, it does not defeat the fact that the agreement would (*prima facie)* be a contract of license (as has been discussed above in Chapter II (B)).

Therefore, since the locker holders do not have any right to property/interest in the locker, the agreement must (*prima facie)* be considered as a contract of license, despite the inclusion of clauses which are typically seen in lease contracts. However, despite fulfilling the requirements of a licensing contract, the observation in Chapter II (B) (3) with regards to List-II agreements applies *mutatis mutandis* to List-III agreements as well. Therefore, List-III agreements should also be classified as contracts of bailment instead.

D. Analyzing the Validity of List-IV Agreements (Contracts of Bailment)

1. Introduction to Contract of Bailment

The National Civil Code provides that a contract of bailment is created when a person delivers goods to another person and such goods are later returned to him or handed over

or sold to a third person.[29] Delivery of the good is a important pre-condition that must be fulfilled for a valid bailment.[30] Further, the Civil Code requires the bailor to disclose any fault in the goods bailed.[31] Therefore, a valid delivery of the goods and disclosure regarding the goods and their quality are the only obligations of the bailor as provided by the Code. Such disclosure is required so as to enable a bailee to perform its obligation of safe keeping, based on a reasonable man standard.[32] If the bailee knows about the quality and the characteristics of the good, only then can the bailee be expected to take a reasonable care of the bailed good.

Most of the Class-A Banks do not classify their LSA as a contract of bailment, despite such classification being legally sound, as it creates an obligation of safe-keeping. Only one of the twenty Class-A Banks has expressly included a clause that provides that the LSA would create a bailor-bailee relationship (see, Annexure-I).

2. Analysis

a. Issue of Exclusive Possession

Change in possession is a *sine-qua-non* for a valid bailment.[33] Delivery of 'possession' from one person to another must take place[34] rather than a mere change in 'custody'. For instance, a car-parking service does not operate as a service of bailment[35] since the possession is not changed without the owner handing over the key to the vehicle. According to the older jurisprudence on bailment, the bailee must have 'exclusive possession'[36] over the article for a valid bailment to exist, as can also be observed in the case of *Kaliaperumal Pillai v. Visalakshmi*,[37] wherein it was decided that a goldsmith only had mere 'custody' of a box containing jewelry instead of 'exclusive possession' itself, since the key to the box was still with the owner of the jewelry. Therefore, the goldsmith was determined not to be a bailee and was not liable for the theft of the box from his residence, despite having effective possession of the stolen box. Based on such observation, it has been decided that hiring a Bank's locker would not constitute bailment[38] since the 'double key lock system' of the lockers (wherein the Banker and the Customer have one key each and both the keys are required to access the locker) defeats the exclusive possession requirement.[39] Such requirement largely favors the Banks

29 National Civil Code (n 3), s. 575.

30 Ibid., s. 576.

31 Ibid., s. 577.

32 Ibid., s. 578.

33 *Trustees of Port of Bombay v. The Premier Automobiles Ltd.,* Supreme Court of India, 1981, AIR 1982; See also, *State of Bombay (Now Gujrat) v. Memom Mohomed Haji Hasam*, Supreme Court of India,1967, AIR 1885.

34 *The New India Assurance Co. Ltd. v. The Delhi Development Authority,* Delhi High Court, 1991, AIR 298.

35 *Lord v. Oklahoma State Fair Association,* Oklahoma Supreme Court, 1923, 219 P. 713; *Thompson v. Mobile Light and R. Co.*, Alabama Court of Appeals, 1924, 101 So. 177; *Suits v. Electric Park Amusement,* Kansas City Court of Appeals, 1923, 249 S.W. 656; *Panhandle South Plains Fair Assoc. v. Chappell,* 1940, 142 S.W. 2d 934 ; *Porter v. Los Angeles Turf Club Inc.,* California Court of Appeal, 1940, 105 P. 2d 956; *Ashby v. Tolhurst*, Court of Appeal, England, 1937, 2 K.B. 242.

36 *Atul Mehra v. Bank of Maharashtra*, Punjab and Haryana High Court, 2003, AIR 11; *Halbauer v. Brighton Corporation,* Court of Appeal, United Kingdom, 1954, 1 WLR 1161.

37 *Kaliaperumal Pillai v. Visalakshmi Achi*, Madras High Court, 1938, AIR 32, para.1.

38 *Atul Mehra* (n 36).

39 *Mahesh Minz v. State of Jharkhand*, Jharkhand High Court, 2009, Cr.M.P. No. 1519; See also, *National Bank of Lahore Ltd. v. Sohanlal Sehgal And Others,* Supreme Court of India, 1965, AIR 1663 (where liability was established only after it was proven that the Bank had independent access to the articles deposited in

who can easily escape from the responsibilities as a bailee.[40]

b. Issue of Knowledge of the Deposited Articles

A bailee is required to take care of the bailed articles based on a reasonable man standard.[41] The standard of a 'reasonable man' depends on the circumstances of the case, based on the nature of the article that is bailed.[42] For instance, the reasonable man standard would be high for a valuable article and low for an article which is less valuable. Therefore, a bailee is required to have the knowledge of the article bailed so as to enable them to take care of the article based on a reasonable man standard. Such lack of knowledge on the part of the Banks with regards to the deposited article has been taken as a ground to deny the claim that the LSAs are contracts of bailment.[43]

[However, see Chapter II (D) (2) (f), wherein the NRB directives have implied that the Banks used to be aware of the article deposited.]

c. Locker Service Agreement as a Contract of Bailment

The discussion above in Chapter II (A) and II (B) has clearly established that LSAs do not fulfil the requirements of a valid lease, but (*prima facie*) fulfil the requirements of a valid license, which only provides for a right to use. However, it is a well-known fact that locker services are sought for the purpose of safe keeping rather than for the want of storage space.[44] Therefore, when the use of the locker itself is for the primary purpose of safety,[45] the agreement must qualify to mean that it is a contract of bailment instead of a contract of license.

It has been discussed above while differentiating between a contract of lease and a contract of license that the factor differentiating between the two is the intent of the parties and the real purpose of the agreement.[46] The same logic can be applied in case of LSAs to classify them as contracts of bailment, since the real purpose of the agreement and the intent of the parties is safe-keeping of the articles instead of mere storage. Such argument has been noted by the National Consumer Disputes Redressal Commission, India (NCDRC) while coming to the conclusion that LSAs are in the nature of bailment.[47] Additionally, in this regard, noting the nomenclature of the service, an author has pertinently questioned if the

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the locker. No decision was made with regards to the question of bailment).

40 See, *Mahendra Singh Siwach and Anr. v. Punjab and Sind Bank and Anr.*, National Consumer Dispute Redressal Commission, 2006, SCC OnLine NCDRC 62.

41 *Houghland v. R.R. Low (Luxury Coaches) Ltd.,* Court of Appeal, England & Wales, 1962, EWCA Civ J0313-5; *Giblin v. McMullen*, Supreme Court of the Colony of Victoria, 1868, L.R. 2 P.C. 317; *Webber v. Bank of Tracy,* Court of Appeal of California, 1924, 66 Cal.App.29; *Morris v. CW Martin & Sons Ltd.,* Court of Appeal of England and Wales, 1966, 1 QB 716.

42 *Shanti Lal v. Tara Chand Madan Gopal,* Allahbad High Court, 1993, AIR 158; *Shiv Nath Rai Ram Dhari and Ors. v. Union of India*, Supreme Court of India, 1965, AIR 1666.

43 *Mohinder Singh Nanda v. Bank of Maharashtra,* Punjab & Haryana High Court, 1998, ISJ (Banking) 673; *Jagdish Chandra Trikha v. Punjab National Bank and Ors.,* Delhi High Court, 1998, AIR 266 , para. 70, (where bailment was established only due to knowledge on the part of the Bank).

44 *Amitabha* (n 1); Unified Directive (n 2); Subedi (n 2); Giri (n 2).

45 *Oriental Bank of Commerce v. State of UP (Through its Commissioner)* Allahabad High Court, 2008 (2) TMI 350.

46 *Ashok Harry Pothen* (n 10); *Rajbir Kaur* (n 10); *Qudrat Ullah* (n 10); *Delta International* (n 10); *Cobb v. Lane* (n 10).

47 *Mahendra Singh* (n 40); *Punjab National Bank v. KB Shetty,* National Consumer Disputes Redressal Commission, 1991 SCC OnLine NCDRC 6.

service of the Banks is a 'safety deposit vault' or a mere 'leased metal box'.[48] Therefore, the purpose of the LSAs can be determined from the name of the service itself. Despite the classification of the agreement as lease or license, the term "safety lockers" itself, and the advertisements concerning the safe-keeping service further corroborates the bailment nature of the agreement.[49]

Historically, courts have held a consistent view that locker services are based on a contract of bailment.[50] Such jurisprudence has dominantly existed in the United States.[51] Strict interpretation of the requirement of knowledge and exclusive possession on the part of the Banks so as to establish bailment should be done away with. Since the Banks are aware that the locker service is sought for the purpose of safe-keeping, and thus valuable items are stored in the lockers, Banks should not be afforded the defense of lack of knowledge of the articles deposited. Further, since the Banks have effective possession of the lockers, they must not be afforded the defense of lack of exclusive possession. In the case of *National Safe Deposit v. Stead*,[52] it was decided that the company's lack of knowledge regarding the articles deposited would not bar a case for bailment. Similarly, despite noting the dual-key nature of lockers (thus defeating the exclusivity in possession requirement), a court observed that it would still be a contract of bailment.[53] Lack of control over the articles on the part of the depositor and their dependence on the Banks for any access to the articles has been a ground to establish a contract of bailment, despite the Bank lacking exclusive possession.[54]

While the current Indian jurisprudence requires strict fulfilment of the conditions for a bailment, some jurisprudence has developed in favor of the customer. In the case of *Amitabha Dasgupta v. United Bank of India and Ors*[55] it was decided that Banks cannot trouble the customer by claiming ignorance of the content of the lockers. Similarly, some High Courts in India have also decided that despite the (strict) requirements for a bailment not being fulfilled, the locker is undoubtedly in custody and possession of the Banks.[56] The

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48 A.L. Stein (Q.C.), 'The Safety Deposit Vault or Leased Metal Box: The Responsibility of a Bank to its Customer', *McGill Law Journal*, volume 18, 1972, p. 45.

49 Ibid.

50 *U.S. and France v. Dollfus Mieg et Cie. and Bank of England*, House of Lords, 1952, UKHL J0225-4.

51 *Roberts v. Stuyvesant Safe Deposit Co.,* New York Court of Appeals, 1890, 25 N.E. 294,123 N.Y. 57; *Lockwood v. Manhattan Storage & Warehouse Co.*, Appellate Division of Supreme Court of New York, 50 N.Y.S. 974; *Cussen v. Southern Cal. Savings Bank*, Supreme Court of California, Department One, 1901, 133 Cal. 534 (Cal. 1901); *National Safe Deposit Co. v. Stead,* United States Supreme Court, 1914, 232 U.S. 58; *Schaefer v. Washington Safety Deposit Co.*, Supreme Court Of The State Of Illinois, 1917, 281 Ill. 43, 117 N.E. 781; *Re Ackerman's Estate*, Surrogate's Court of the City of New York, 1918, 169 N.Y.S. 1073*; West Cache Sugar Co. v. Hendrickson,* Supreme Court of Utah, 1920, 190 P. 946; *Young v. First National Bank of Oneida,* Tennessee Supreme Court, 1924, 265 SW 681; *Trainer v. Saunders*, Pennsylvania Supreme Court, 1921, 113 A. 681; *Webber v. Bank of Tracy*, Court of Appeal of California, First District, Division One, 1924, 225 P. 41; *Security Storage & Trust Co. v. Martin*, Court of Appeals of Maryland, 1924, 125 A. 449; *Morgan v. Citizens' Bank of Spring Hope*, North Carolina Supreme Court, 1925, 129 S.E. 585; *McDonald v. Perkings,* Washington Supreme Court, 1925, 234 P. 456; *Moon v. First National Bank of Benson*, Supreme Court of Pennsylvania, 1926, 135 A. 114; *Rosendahl v. Lemhi Valley Bank*, Idaho Supreme Court, 1926, 251 P. 293; *Kramer v. Grand National Bank of St. Louis*, Missouri Supreme Court, 1935, 81 S.W.2d 961; *People v. Mercantile Safe Deposit Co.,* Appellate Division of the Supreme Court of New York, First Department, 1913, 143 NYS 849.

52 *National Safe Deposit* (n 51).

53 *Young* (n 51).

54 *Lockwood* (n 51); *Blair v. Riley*, Court of Appeals of Ohio, 1930, 175 N.E. 210.

55 *Amitabha* (n 1)(However, it was still decided that the locker service agreement would not be a contract of bailment).

56 *Mahesh Minz* (n 39); *Atul Mehra* (n 36) (However, it was still decided that the locker service agreement

Supreme Court of India opined that the High Courts had provided such judgements based on 'substantial degree of access' by the Banks of their lockers.[57] While the judgements did not classify the concerned LSA as a contract of bailment, some NCDRC judgements have expressly accepted that the LSAs would be contracts of bailment.[58]

Therefore, there exists substantial jurisprudence which supports the claim that LSAs should be classified as contracts of bailment and that the strict requirements of bailment must be relaxed in favor of consumer welfare.

d. Can there be a Duty of Care Independent of the Nature of the Contract?

While various judgements (particularly in the USA) consider LSAs as contracts of bailment despite the non-fulfilment of the requirements of 'exclusive possession' and 'knowledge regarding the bailed articles', there are also some judgements (particularly in India) which require a strict fulfilment of such pre-conditions for a valid bailment to exist.[59] Therefore, some courts have taken a different (however, jurisprudentially controversial) approach to secure a customer's interest of safe-keeping by deciding that the Bank's duty of care is independent from the nature of the LSAs.

In the case of *Security Storage and Trust Co. v. Martin*, [60] it was decided that *"whether the relation was that of bailor and bailee or lessor and lessee its duty and liability were the same."* Despite a precise bailment not being created in compliance with the strict jurisprudence concerning the pre-conditions of a bailment, it has been decided that the duty to safeguard any goods presumed to be valuable would be identical to the duties of a bailee.[61] Similarly, the Supreme Court of India has also recently affirmed that Banks, as a service provider, owe a separate duty of care to exercise due diligence in their service of safety lockers irrespective of whether the law of bailment is applicable or not.[62] Therefore, some courts, having regards to consumerism, have imposed a duty of care on the Banks independent from the nature of the contract, when it comes to locker services, considering that the locker-holders are the customers and the Banks are the service providers.

However, an indirect creation of a duty of care even with regards to contract of lease or a contract of license would be in violation of the fundamental jurisprudence concerning such types of contracts, wherein the lessor and the licensor do not have a duty of care towards the lessee and the licensee, respectively (subject to the terms of the contract). Creation of a duty of care on behalf of a licensor and a lessor can lead to jurisprudential inconsistency. Indirect creation of duty of care on behalf of a licensor or lessor would also be in violation of the principle *'quando aliquid prohibetur ex directo, prohibetur et per obliquum'* which means that things that cannot be done directly, cannot be done indirectly either. A duty of care and a contract of license or lease cannot exist together (unless a duty of care is expressly agreed by the licensor or the lessor).

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would not be a contract of bailment).

57 *Amitabha* (n 1).

58 *Mahendra Singh* (n 40); *Punjab National Bank* (n 47).

59 *Atul Mehra* (n 36).

60 *Security Storage* (n 51); *Carples v. Cumberland Coal & Iron Co.*, Court of Appeals, New York, 1925, 148 N.E. 185; *People* (n 51); *Jones v. Morgan*, Court of Appeals of the State of New York, 1882, 90 N.Y.4.

61 *Young* (n 51); *Schmidt v. Twin City State Bank*, Supreme Court of Kansas, 1940, 100 P. 2d 652; *Bohmont v. Moore,* Nebraska Supreme Court, 1940, 295 N.W. 559.

62 *Amitabha* (n 1).

A duty of care cannot be established merely on the basis of a client-customer relationship, when the relationship itself is said to be based on a contract of lease or license. A service provider is well within their rights to provide a service as a lessor or a licensor without assuming any duty of care. However, when it comes to LSAs, the classification of such agreements as contracts of lease or as contracts of license itself is wrong. Therefore, the courts should have created a duty of care by validly classifying the LSAs as contracts of bailment, rather than creating a duty of care independent of the nature of the contract i.e. lease or license. Therefore, so as to validly create a duty of care on the Banks, the contracts must be classified as contracts of bailment by the courts (by correcting any misclassification of the LSAs by the Banks as contracts of lease or license).

e. The Burden of Proof Issue

Even if a duty of care is established on the part of the Banks, it would still be difficult for the customer to dispose of their burden of proof under the current practice. In case of any loss or harm to the articles deposited, the customer-plaintiff would first have to provide proof of the articles deposited in the lockers and if such proof is not provided, the court is barred from looking into further issues.[63] The burden of proof regarding discharge of duties as a reasonable man lies on the Banks after the delivery and identity of the bailed goods is ascertained by the customer-plaintiff.[64] Therefore, the burden of proof first lies on the plaintiff, and since a depository list of the articles deposited is not created while availing the service (so as to defeat the 'knowledge requirement' for a valid bailment), it would be difficult to dispose the burden of proof as a customer.

For instance, a detail of the locker's contents in an FIR corroborated by an affidavit, a valuation report, and wedding photographs wearing the jewelry deposited has been accepted as evidence due to a lack of a depository list.[65] Similarly, affidavits of receipts of the jewelry deposited along with the source of income has been accepted as evidence.[66] Further, courts have accepted that documentary evidence is not always possible.[67] Nevertheless, a complete lack of depository list would anyway create difficulty in disposing the burden of proof as a customer-plaintiff in case of loss of the deposited articles.

Despite classifying the LSAs as contracts of bailment and despite a creation of a duty of care on the Banks, it would still not help the customer-plaintiff to dispose their burden of proof as Banks intentionally do not create a list of the articles deposited. Therefore, the best approach to ensure consumer protection would be to classify the LSAs as contracts of bailment along with a mandate to create a regular depository list during the time of the deposit and subsequent access of the locker by the customer.

f. NRB's Unified Directives for Class- A, B, C Banks

The Chapter immediately above has suggested that a depository list should be created with

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63 Ibid.

64 *Claflin v. Meyer*, Court of Appeals of the State of New York, 75 N.Y. 260 (1878); *Isham v. Post*, Court of Appeals, New York, 1894, 141 N.Y. 100; *Merchants Nat. Bank v. Carhart*, Supreme Court of Georgia, 1895, 95 Ga. 394; *Cumins v. Wood,* Illinois Supreme Court,1867, 44 Ill. 416; *Schaefer* (n 51); *Hendrick v. Uptown Safe Deposit Co.,* Appellate Court of Illinois, 1959, 159 N.E. 2d 58.

65 *Mahendra Singh Siwach* (n 40).

66 *Pune Zilla Madyawarti Sahakari Bank Ltd v. Ashok Bayaji Ghogare*, National Consumer Dispute Redressal Commission, India, 2015 SCC OnLine NCDRC 2832 (NC).

67 Ibid.

regards to the articles deposited in the locker. An interesting observation can be made in this regard under the Unified Directives of the Nepal Rashtra Bank till the year 2074 B.S. wherein the Banks were required to insure the lockers.[68] The concept of insurance is fundamentally based on the principle of utmost good faith, wherein the insured (Bank) is required to disclose all the facts of the lockers before an insurance is sought.[69] Therefore, legally, this would imply that the Banks were required to be aware about the articles deposited since the articles deposited would impact the value of the lockers, without the information of which, an insurer does not provide its insurance services. The insurance requirement however has been removed by the Unified Directives from the year 2075 B.S.,[70] and currently, some LSAs expressly provide that the duty of insurance shall be of the customer themselves. Therefore, what can be observed is that the older directives existing till the year 2074 B.S. had required the Banks to be aware of the articles deposited and provide a detail disclosure to the insurer. Such a disclosure would have been a substantial evidence which would have helped the customer-plaintiff to dispose of their burden of proof. Such insurance obligation on the part of the Banks would also have defeated the 'lack of knowledge defense'.

3. Observation as to List-IV LSAs

The fundamental nature of the agreement would not be altered merely by the inclusion of some minor clauses which can suggest that the agreement is not of such nature.[71] Therefore, since the locker service is sought for the purpose of safe-keeping, LSAs should be classified as contracts of bailment, despite the Banks' lack of knowledge of the articles deposited and despite the Banks lacking exclusive possession in its strict sense. Therefore, nullifying the misclassification of the LSAs as contracts of lease or license, all of the List-I, II, and III banks should also be classified as contracts of bailment.

There is only one Class-A Bank (List-IV) that classifies the LSA as a contract of bailment. However, the LSA still includes unconscionable terms like limitation of liability as a bailee, which defeats the purpose of the bailment agreement itself. For such bailment contracts (LSAs) to serve their purpose, the unconscionable terms as discussed below in Chapter III and IV must be excluded from the agreements as well. Further, the Banks should be required to maintain a depository list so that the actual loss can be determined in case of loss or harm to the articles deposited.

III. Illegal exclusion of banker-customer relationship

It can be observed from Annexure-I that amongst the Class-A Banks, five Banks expressly state that the LSAs do not give rise to a Banker-Customer relationship. By inserting such a clause, the Banks seek to escape the provisions of the Consumer Protection Act, 2018 which is not legal.[72] LSAs cannot be said to be mere contracts of lease or license and are contracts done for the purpose of security of the deposited article for which the Banks provide banking services

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68 Unified Directive Issued for Class-A, B and C Banks 2074, Nepal Rastra Bank, Directive no. 23, Clause 19.

69 *United India Insurance Co. Ltd. v. M.K.J. Corporation*, Supreme Court of India, 1997, AIR 408; *Branch Manager, Bajaj Allianz Life Insurance Co. Ltd. And Others v. Dalbir Kaur*, Supreme Court of India, 2020, AIR 5210.

70 Unified Directive Issued for Class-A, B and C Banks 2075, Nepal Rastra Bank, Directive no. 22, Clause 19.

71 *Foley v. Hill and Others*, House of Lords, 1848, 9 E.R. 1002.

72 National Civil Code (n 3), ss. 505 (1) (d), 517 (2) (e).

covered under the Consumer Protection Act, 2018.[73] Further, since the NRB issues directives regarding such service,[74] it further corroborates the fact that locker services are banking services. Further, banking services have been expressly included within the meaning of the term 'service' as under the Consumer Protection Act, 2018.[75] Therefore, by receiving the service of safety lockers a Banker-Customer relationship gets established and therefore, the laws concerning consumer protection gets attracted (which includes right against unfair trade practices, and right to compensation for damages caused by the use of the service),[76] which the Banks cannot contract out of.[77]

1. Income Tax Treatment

A potential way to ascertain a banker-customer relationship can be to ascertain the nature of tax applicable to the profit generated *via* locker services. In the case of *Oriental Bank of Commerce v. U.P.*,[78] it was decided that the locker service includes service of security (primary purpose) and cannot be considered as a service provided merely for storage, and therefore, the locker service would fall under the category of banking service and the profit generated from such service would be taxed under the head of 'banking service' instead of 'rent'. Therefore, the judgement established that a banker-customer relationship gets established in cases of locker service instead of a mere landlord-tenant relationship.

In case of Nepal, banking services are subjected to 30% tax[79] while as non-banking service (like lease) is subjected to 25% tax.[80] Therefore, a misclassification of the nature of the service as mere lease by the Banks can also invite tax evasion concerns upon the Banks.[81] Therefore, it is in the Banks' own interest to recognize the LSA as a contract that establishes banker-customer relationship.

IV. Unfair contractual clauses in locker service agreements

1. Limitation of Liability Clauses

It is well accepted that the true intent of the contractual parties is determined from the express terms of the contract itself.[82] Further, contracts are known as 'instrument of insurance against calculated economic risks' and therefore, the clauses included in the contract are enforced as it is,[83] without even the judiciary having the requisite authority to

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73 *Upabhokta Sangrakchand Ain, 2075* (Consumer Protection Act 2018), Nepal, s. 2 (r).

74 Unified Directive (n 2).

75 Consumer Protection Act (n 73), s. 2 (r).

76 Consumer Protection Act (n 73), s. 3 (2)(f) and (g).

77 National Civil Code (n 3), s. 505 (1) (d).

78 *Oriental Bank of Commerce* (n 45); See also, *National Leasing Ltd. and Ors. v. The Assistant Commissioner of Income*, Bombay High Court, 2007, Income Tax Appeal no. 685 "*what must be borne in mind for the Court is to consider the main objective of the assessee as contained in the Memorandum of Association, and that the deciding factor, is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them*".

79 *Aayakar Ain 2058* (Income Tax Act 2002), Nepal, s.59 and schedule 1, s. 2(2).

80 Ibid, schedule 1, s. 2(1).

81 Sharad Prasad Koirala, *Aayakar Kanoon*, p. 46.

82 *Himalayan Bank* (n 24); *BESCOM* (n 24).

83 *Pawan Raj Bhandari v. Ram Shrestha,* NKP 2078 (2021), volume 8, Decision No. 10724, para. 13.

intervene.[84] However, such contractual autonomy is not without its limits, for instance, when the contract intersects with concerns of consumerism.[85] It has been noted that standard form of contracts can impact consumer welfare and therefore, such contracts should be interpreted by taking such facts into account.[86] It has further been established that despite the law of contracts being private in nature, it does not permit the parties to transgress the express provisions of the law or include unconscionable terms in the contract.[87]

Banks usually draft LSAs to favor them and to the effect that the lockers are operated at the customers' own risk.[88] It is in this regard that the limitation of liability clause used in LSAs are questionable and should be tested on the grounds of reasonableness.[89] While the origin of exclusion clauses (or limitation of liability clauses) were based on reasonable developments of the law,[90] the vice of misuse of the clause extended in cases where the parties shared unequal bargaining power in the contract, or had no choice but to accept the contract (take it or leave it situation), for instance, when it comes to standard form contracts.[91] The Court in *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.*[92] emphasized the requirement of 'reasonableness' with regards to contractual clauses and discussed the doctrine of 'unconscionability' where unequal bargaining power is a major factor in the imposition of unfair terms in the contract. With regards to banker-customer relationship, Bankers have superior bargaining power and therefore can impose unconscionable terms (in concert) within their contracts. An arrangement amongst service providers (Banks) to include favorable clauses for themselves in uniformity gives rise to a situation where the service providers can state "if you (the service recipient) want these goods or services at all, these are the only terms on which they are available (anywhere). Take it or leave it",[93] which violates the principle of reasonableness. Therefore, LSAs that include limitation of liability clauses by exploiting the inequality in bargaining power are unconscionable. Further, such clauses defeat the very purpose of safety for which the service is sought.

It has been discussed above under Chapter II (D) that the LSAs should be classified as contracts of bailment, which invites statutory obligations of a bailee as under the Civil Code. It should be noted that even where a person (Banker) has been absolved as under a clause in the bailment agreement, they will be liable as a bailee.[94] This can also be understood

84 *Krishi Samagri* (n 25); *Mahakali Sinchai Pariyojana* (n 26).

85 *Pawan Raj Bhandari* (n 83).

86 Ibid.

87 *Shayara Banu v. Aadhar Traders*, NKP 2064 (2008), volume 12, Decision No. 7907, para.10.; *Ericsson AB v. Nepal Telecom,* Supreme Court, 2072 (2016), Writ no. 69-WO-0298; *Lumbini Bank Ltd. v. Sangita Tripathi*, NKP 2073 (2015), volume 8, Decision No. 9646.

88 *Amitabha* (n 1).

89 *Pawan Raj Bhandari* (n 83); See also, Kush Kalra, 'Should Banks be Held Responsible for Loss of Valuables Kept In Lockers?' *LiveLaw*, 2017, available at https://www.livelaw.in/banks-held-responsible-loss-valuables-kept-lockers/, accessed on 16 December 2024.

90 MP Ram Mohan & Anmol Jain, 'Exclusion Clauses Under the Indian Contract Law: A Need to Account for Unreasonableness' *NUJS Law Review*, volume 13:4, 2020, p. 2.

91 Ibid*,* p. 7.

92 *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.*, Supreme Court of India, 1986, AIR 1571.

93 MP Ram Mohan (n 90), p. 7; Kalra (n 89).

94 *Mahendra Kumar Chandulal v. C.B.I.,* Gujarat High Court, 1984, 1 GLR 237, para. 34; *Punjab National Bank* (n 47).

from the fact that a person cannot contract out of the law,[95] since the law itself has enlisted the duties of the bailee. There are two judicial pronouncements in India as to whether a Bank can reduce its obligation arising from the Contract Act, as a bailee. According to the first pronouncement, a bailee can only undertake a liability greater than that provided by the statue but cannot reduce its responsibility towards the bailor.[96] However, the second pronouncement allows the bailee to reduce liability *via* a contract even to the extent that wholly relives the bailee.[97] However, the latter jurisprudence would validate unconscionable terms which can defeat consumer welfare. Such jurisprudence would defeat the very purpose for which bailment is sought. Where the duties and liabilities of a bailee has been determined by the statue itself, it would be unreasonable for the Banks to use their superior bargaining power *via* standard form of contracts (which are drafted uniformly by the Banks, with a uniform objective of risk aversion) to escape their statutory liabilities, thus defeating the test of reasonableness.[98] Therefore, Banks, under its LSAs, should be restrained from using unconscionable limitation of liability clauses that help them from escaping the statutory duty as a bailee.

2. Right of Lien

Most Class-A Banks have provided themselves (*via* the LSA) with a right of lien over the articles deposited in case of non-payment of the service fee (as can be observed in Annexure-I). Lien is a right to retain the possession (not ownership) of the material deposited until the demand for the fee has been fulfilled.[99] Under the Indian Contract Act, 1872 it can be observed that the Bank is provided with a right of general lien only when it acts a bailee.[100] Therefore, a court decided that to use such a statutory right, the Bank must provide in its LSA that the Bank is a bailee and not a lessor or a licensor.[101]

In the case of Nepal as well, right to lien has only been mentioned under Chapter-8 (Provisions Relating to Contracts of Bailment) of the National Civil Code.[102] However, the right to lien has only been provided for bailees who were provided the possession of the good for the purpose of repair or maintenance.[103] Therefore, where the legislature has expressly restricted such right to a special kind of bailee (i.e. bailee who were provided the good for repair or maintenance), lien cannot be exercised by Banks who are not provided with the goods for the purpose of repair or maintenance.

Prohibition of right to lien would however not impact the possibility of recovery of the unpaid fees from the customer as the Unified Directives issued by the NRB allows the Banks to collect a security deposit (since 2077 B.S.)[104] to avail the locker service. Further,

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95 National Civil Code (n 3), s. 505 (1) (d).

96 *J. Sheikh Mohamed v. The British India Steam Navigation Co. Ltd.,* Madras High Court, 1908, 1 IND. CAS.977, para. 37.

97 *Jellicoe and Ors. v. British Indian Steam Navigation Company*, Small Cause Court, India, 1884, ILR 10 CAL 489.

98 *Shayara Banu* (n 87); *Lumbini Bank Ltd.* (n 87); *Ericsson AB* (n 87).

99 *City Union Bank Ltd. v. C. Thangarajan*, Madras High Court, 2003, 46 SCL 237 (Mad.).

100 Indian Contract Act*,* 1872, s. 171.

101 *Union Bank of India v. K.V. Vennugopalan and Ors.,* Kerela High Court, 1990, AIR 223.

102 National Civil Code (n 3), ch. 8.

103 National Civil Code (n 3), s. 581(2).

104 Unified Directive Issued for Class-A, B and C Banks 2077, Nepal Rastra Bank, Directive no. 21, Clause 19.

since only the clients who have an account with the Bank are allowed to avail the locker service,[105] it assures an option for recovery of the locker service fees from the account. Therefore, while Banks have a number of ways to recover the unpaid locker service fees, some LSAs still include banker's right to lien which violates the National Civil Code.

3. Observation as to Unfair Contractual Terms

There is a uniform practice by Banks wherein the Banks seek to escape their duties and liabilities by undertaking unlawful classification of the LSAs and by including unfair contractual clauses.[106] Herein, it is suggested that, given the development of jurisprudence in Nepal that prohibits the use of unconscionable terms,[107] Banks should themselves be aware regarding their LSAs since, despite the inclusion of unconscionable clauses, a potential liability can arise on the Bank in case of any loss of the articles deposited, if any such case is brought before the judiciary.

V. Conclusion

With regards to classification of the LSAs, it can be concluded that LSAs cannot be classified as contracts of lease, since there is no creation of right to property in favor of the locker holders. Therefore, List-I LSAs, which classify themselves as contracts of lease, are not legally valid. Further, while LSAs fulfil the (*prima facie*) requirement of a license, it is particularly a contract of bailment since the purpose of the LSAs is for safe keeping of the articles deposited. Therefore, List-II and List-III LSAs, which expressly or impliedly classify the LSAs as contracts of license, are not legally valid either. For an LSA to be legally valid, it must be classified as a contract of bailment, despite not strictly fulfilling the requirements of 'exclusive possession' and 'knowledge of the deposited article' on the part of the Bank, since such flexibility is in compliance with the concerns of consumerism.

Additionally, noting the difficulty in disposing of the burden of proof on the part of the customers, creation of a regular depository list of the articles stored should be mandated. Further, Banks cannot be allowed to escape the responsibilities and liabilities under the Consumer Protection Act, 2075 by stating that the LSAs would not give rise to a banker-customer relationship, which would be an anathema to the concept of consumerism. Further, noting the high bargaining power of the Banks exercised *via* standard forms of LSAs, the unconscionable terms included within the LSAs (for instance, limitation of liability clause) loses its legal validity.

Therefore, Banks, as a bailee, must not be allowed to easily escape their liability by exploiting their bargaining power and loopholes as under the law. It is suggested, noting the jurisprudence developed internationally, that Banks themselves should reconsider their (mis)classification of the contractual relationship and usage of unconscionable clauses as the said relationship can be correctly re-classified and the unconscionable clauses can easily be nullified by the Judiciary which can invite liability on the Banks themselves.

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105 Unified Directive (n 2).

106 Kalra (n 89).

107 *Shayara Banu* (n 87); *Lumbini Bank Ltd.* (n 87); *Ericsson AB* (n 87).

ANNEX-I

This annexure differentiates all the twenty Class-A Banks into four lists according to their categorization of the contractual relationship arising from their locker service agreements.

List-I Agreements: Banks Classifying the Locker Service Agreement as a Contract of Lease:

Name of the Bank	Other Clauses (in summary)	
Machhapuchchhre Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	Yes
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
	*Includes a clause which provides that the insurance obligation would be of the customer.	
NMB Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	Yes
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
Sanima Bank Ltd	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	Yes
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
	*Includes a clause which provides that the insurance obligation would be of the customer.	
Kumari Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	No
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Depends on the Bank's Policy

Nabil Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	No
	Clause Providing that the Bank is unaware of the Substance in the Locker	Yes
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	No
Prabhu Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	Yes
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
Prime Commercial Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	Yes
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	No
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	No
	Clause Providing Right of Lien to the Bank	Yes

List-II Agreements: Banks Classifying the Locker Service Agreement as a Contract of License:

Name of the Bank	Other Clauses (in summary)	
Everest Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	Yes
	Clause Excluding Banker-Customer Relationship	Yes
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
Nepal-SBI Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	Yes
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	No

Rastriya Banijya Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	Yes
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
NIC Asia Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
Citizens Bank International Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes

List-III Agreements: Banks Without Express Classification of the Relationship Arising from their Locker Service Agreement.

Name of the Bank	Other Clauses (in summary)	
Global IME Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
Laxmi-Sunrise Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	No
	Clause Providing that the Bank is unaware of the Substance in the Locker	Yes
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes

	Clauses	Inclusion
Siddhartha Bank Ltd.	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination/ Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
Nepal Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	No
Agriculture Development Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	No
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	No
Himalayan Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes
Nepal Investment Mega Bank (NIMB) Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	Yes
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes

List-IV Agreements: Banks Classifying the Locker Service Agreement as a Contract of Bailment

Name of the Bank	Other Clauses (in summary)	
Global IME Bank Ltd.	Clauses	Inclusion
	Clause Excluding Bailor-Bailee Relationship	No
	Clause Excluding Banker-Customer Relationship	No
	Notice Requirement for Termination / Automatic Renewal	Yes
	No Right to Property Clause	Yes
	Clause Excluding the Right to Sub-Lease	Yes
	Clause Providing that the Bank is unaware of the Substance in the Locker	No
	Clause Excluding the Deposit of Illegal/Other Substances	Yes
	Clause Providing Right of Lien to the Bank	Yes

*** Most of the Banks listed above, either expressly or impliedly, included a Limitation of Liability Clause which limits the banks' liability in case of loss/damage to the stored articles.

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