EXCLUSION CLAUSES UNDER THE INDIAN CONTRACT LAW: A NEED TO ACCOUNT FOR UNREASONABLENESS

*M.P. Ram Mohan & Anmol Jain**

The Indian contract law continues to follow the classical contract law model under which parties may, in exercise of their autonomy, limit or exclude their liability for breach of contract. As long as parties have freely contracted, an exclusion clause remains effective. Because of this, parties have started drafting wide exclusion clauses, highlighting creeping unreasonableness in contracting practices. In the absence of any statutory law governing the same the only way by which a party could be relieved from the performance of an onerous contract in India is by arguing procedural unconscionability. This paper comprehensively traces the development and understanding of exclusion clauses as they have evolved under the Indian Contract law and through the adoption of common law by the courts. This being a time series study, we examine all the Indian Supreme Court and High Court decisions reported until early 2020 and find that courts have attempted to instil just-contracting by adopting ad-hoc mechanism against the unfair use of the exclusion clauses. However, uncertainty continues to prevail regarding the enforceability of unconscionable exclusion clauses. Therefore, taking a comparative approach, we argue in favour of adopting certain legislative reforms in the Indian contract law towards empowering the court to adjudicate on claims based on substantive unconscionability. A first step in this direction, specifically for consumer contracts, is the statutory recognition of 'unfair contract terms' under the new Consumer Protection Act, 2019.

Table of Contents

* M. P. Ram Mohan is an Associate Professor at the Indian Institute of Management Ahmedabad (IIMA). He directs an academic project 'Restatement of Indian Contract Law' at IIMA. Email: mprmohan@iima.ac.in.Anmol Jain is a Researcher with the 'Restatement of Indian Contract Law' project at the Indian Institute of Management Ahmedabad. Email: jainanmol23@gmail.com. We acknowledge the funding support of IIM Ahmedabad. This work benefited from the excellent insights of the Editors of NUJS Law Review, Promode Murugavelu & Gaurav Ray. Errors are authors' alone.

I. INTRODUCTION

An exclusion clause is a beneficial contractual arrangement made by either of the parties to a contract in anticipation of future contingencies that might hinder or prevent performance,[1] with a primary aim to accommodate consequences arising out of non-performance, part performance or negligent performance of a contract. Such clauses are also known as exemption, exception, exculpatory or limiting clauses.[2] Generally,they take various forms,[3] but mainly have an effect of immunising,[4] restricting,[5] or exempting a party from liability,[6] which she would have borne had it not been for the clause.[7] In other forms, an exclusion clause might contain specific procedures for making claims, allocating liabilities between the parties,[8] limiting the right to terminate the contract on breach,[9] or restricting the amount[10] and time-period[11] to claim damages on breach. Another beneficial employment of the exclusion clauses is to limit[12] the choice of fora a plaintiff might approach by excluding the jurisdiction of one or more of the multiple fora that have the capacity to hear the matter.[13] This is done in order to re-

---

1 Jack Beatson et al., Anson's Law of Contract 193 (Oxford University Press, 2010); J. W. Carter, Carter's Breach of Contract, 48 (Hart Publishing, 2018).

2 Black's Law Dictionary, 653 (12th ed., 2009).

3 *See* The Unfair Contract Terms Act,1977, §13 (United Kingdoms).

4 *Exculpatory Clause*,15 A Words and Phrases 324 (2004).

5 New India Assurance Co. Ltd. v. Yallavva, 2020 SCC OnLine Kar 1660,¶65.

6 H. K. Saharay, Dutton Contract, 37 (Eastern Law House, 2013).

7 P. S. Atiyah, An Introduction To The Law of Contract, 167 (Clarendon Press, 1981); *Exclusion Clause*, 15 A Words and Phrases, 262 (2004) citing Maimone v. Liberty Mutual Insurance Co., 695 A 2d 341: Exclusion clause in insurance policy serves purpose of delimiting and restricting coverage; *See* 9(1) Halsbury's Laws of England 552 (1998); Similarly, *See* A.W. Baker Welford, The Law Relating to Accidental Insurance, 126 (Butterworths, 1923) cited in New India Assurance Co. Ltd. v. Rajeshwar Sharma, (2019) 2 SCC 671, ¶17.

8 Beatson, *supra* note 1, at 186; Leslie Kelleher, *Exclusion Clauses in Contract*, Vol. 14(1), Manitoba L. J., 135 (1984); See Hugh Collins, *Good Faith in European Contract Law*, Vol. 14(2), Oxford J. Legal Stud., 241 (1994).

9 Smeaton Hanscomb & Co. Ltd. v. Sassoon I. Setty Son & Co., (1953) 1 WLR 1468 (Queen's Bench Division,United Kingdom); Carter, *supra* note1, 446.

10 Scruttons Ltd. v. Midland Silicones Ltd., (1962) 2 WLR 186 (House of Lords, United Kingdom); Atlantic Shipping and Trading Co. Ltd. v. Louis Dreyfus and Co., (1922) 2 AC 250 (House of Lords, United Kingdom).

11 Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co. Ltd., (1971) 2 All ER 708; Photo Production v. Securicor Transport Ltd., (1980) 1 All ER 556 (House of Lords, United Kingdom).

12 Patel Roadways Ltd. v. Prasad Trading Co., (1991) 4 SCC 270; New Moga Transport Co. v. United India Insurance Co. Ltd., (2004) 4 SCC 677, ¶¶9, 19.

13 Union of India v. Alok Kumar, (2010) 5 SCC 349, ¶43; New Moga Transport Co. v. United India Insurance Co. Ltd., (2004) 4 SCC 677, ¶19; A.V.M. Sales Corpn. v. Anuradha Chemicals (P) Ltd.,

duce hardship while defending the claims, and such a clause is particularly known as the jurisdiction clause.[14] In this article, we engage with the Indian jurisprudence on exclusion clauses that are inserted with an intention to limit or exclude liability arising out of contractual obligations.

The reasons for the emergence and widespread use of exclusion clauses are multi-fold. *First*, the exclusion of liability for breach reduces the prospective costs and risksattached to a contractual transaction and thus, enhances economies of scale of a business enterprise.[15] This, in turn, comes with the possibility of enhancing the number of contractual relations that an entity might have. This can be proved by the application of game theory.[16] While entering into a contract, the parties are always interdependent on their counter parts and they work in an atmosphere of imperfect information. Therefore, exclusion clauses function as a necessary security and risk-reduction mechanism to deal with the possibility of prospective liability. They become a strategic tool to account for the implications arising out of contractual obligations due to future uncertainties. In the words of Prof. Raymond Wacks:

> "[W]e do not always act in a rational manner in deciding, for instance, whether to enter into contractual relations. Factors such as the likelihood or otherwise of litigation or the prospects of losing face often influence what may appear to be a decision based exclusively on legal rules and principles".[17]

Second, the gradual shift in the manner of calculating damages from the principle of 'foreseeability' as laid down in *Hadley* v. *Baxendale* to the theory of 'adequate causation' has made entities prone to paymentof higher damages on breach. The 'foreseeability' principle emphasises that only such losses could be compensated on breach of contract that could be reasonably foreseen by the parties at the time of contracting.[18] As it had happened in the case, Hadley, a mill owner, had a broken engine crankshaft to be transported to W. Joyce & Co., an engineering company, to serve as a model for supplying a new one. For the same, Hadley contracted with Baxendale to deliver the broken shaft by a certain date. When delivery was not completed by the said date, Hadley sued Baxendale for damages due to loss of business. However, the court disallowed the claim noting that it was reasonably unforeseeable for Baxendale to contemplate Hadley's losses as he had failed to convey the urgency of the circumstances at the time of contracting.

(2012) 2 SCC 315; A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163, ¶16; Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32; *See* Patel Roadways Ltd. v. Prasad Trading Co., (1991) 4 SCC 270, ¶13.

14 Saharay, *supra* note 6, at 37.

15 Inter Globe Aviation Ltd. v. N. Satchidanand, (2011) 7 SCC 463, ¶21.

16 *See* Beatson, *supra* note 1,187.

17 *See* Randal C. Picker, *An Introduction to Game Theory and the Law,* Coase-Sandor Institute for Law & Economics Working Paper No. 22 (1994).

18 Raymond Wacks, Understanding Jurisprudence, 219 (2012).

Unlike this, the 'adequate causation' principle, which was developed in contrast to the principle as laid down in *Hadley,* makes provision for compensating all the losses adequately caused by breach of the contract, irrespective of the fact that certain losses were not foreseeable.[19] It obliges the party at fault to compensate consequential or indirect damages as well, such as the loss of profit and business.[20] In such a scenario, exclusion clauses have helped the contracting parties to absolve themselves from any indirect damages and check the uncertain nature of such damages.[21]

Third, exclusion clauses bring certainty in the post-breach situation and allows the parties to correctly anticipate the damages to be incurred on breach. It acts as a defence to a legal action for the breach of the contract.[22]

Fourth and last, an 'exception clause', in the terms of Prof. Brian Coote, enables a party to delimit or qualify its duties arising out of a contract, which helps them in reasonable distribution of risks by clearly marking out the conditions when a liability shall arise.[23] In other words, the exclusion clauses creates the legally secured boundaries of the primary obligations arising under a contract and thus, defines the 'standard of performance'.[24] In this manner, exception clauses can be used in the form of forward-looking contracts.[25] In 2016, the United Kingdom Supreme Court upheld the use of exemption clauses in the form of duty-delimitation clauses in *Impact Funding Solutions Limited* v. *AIG Europe Insurance Ltd.*[26] *In this case, the appellant had entered into an agreement with Barrington Support Services Ltd. ('Barrington') under which the latter was supposed to use the loan money extended from the appellant to make disbursements in the conduct of its client's litigation. Barrington misapplied the funds and failed to perform its professional duties, there by breaching a warranty of the contract. The appellant sued Barrington for the repayment of the loan amount; however, owing*

---

[19] Hadley v. Baxendale, 156 ER 145 (1854) (Court of Exchequer, Untied Kingdom) (the Indian law also _ecognizes and follows this rule. Under the Indian Contract Act, 1872, §73, it is stated that: "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of thing from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.")

[20] Jan Hellner, *Consequential Loss and Exemption Clauses*,Vol. 1(1), Oxford J. Legal Stud., 13 (1981); *See* A.T. Brij Paul Singh v. State of Gujarat, (1984) 4 SCC 59, ¶9, 11; Bharat Coking Coal Ltd. v. L.K. Ahuja, (2004) 5 SCC 109, ¶24.

[21] *See* United Nations Commission on International Trade Law, UNGA Res. 2205 (XXI), 1966, Art. 74.

[22] *See* McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, ¶116.

[23] Owners of SS Istros v. FW Dahlstroem & Co., (1931) 1 KB 247, at 252-253 (Kings Bench Divison, England); *See* Carter, *supra* note 1, at 50, 51.

[24] Brian Coote, Exception Clauses (1964).

[25] Carter, *supra* note 1, at 50; *See* Photo Production Ltd. v. Securicor Transport Ltd., (1980) 2 WLR 283 (House of Lords, United Kingdom).

[26] J.A. Weir, *Exception Clauses. By Brian Coote, LL.M.(N.Z.), PH.D. (Cantab.), Barrister of the Supreme Court of New Zealand; Senior Lecturer in Law, University of Auckland. [London: Sweet & Maxwell. 1964. xxii, 156 and (index) 7 pp. 30s. net.]*, Vol. 23(2) Cambridge L.J. 301 (1965).

to Barrington's insolvency, the appellant sued its professional indemnity insurer, the respondent. The respondent claimed that the insurance cover included only the liability of the insured arising out of performance or failure to perform legal services. It was argued that there was a clear exclusion of trading liabilities, such as trading debt, incurred by the insured and any loss arising out of guarantee, indemnity or undertaking by the insured in connection to certain benefits directly or indirectly accruing to the insured. While noting that the exclusion clause specifically restricted respondent's liabilities to the debts arising out of professional services, the court decided in favour of the respondent:

> Barrington and Impact made a commercial agreement as principals for their mutual benefit, as well as for the benefit of Barrington's clients. Impact was not a client or quasi-client of Barrington, and the promise by Barrington which led to the judgment obtained by Impact was part of the commercial bargain struck by them. It did not resemble a solicitor's professional undertaking as ordinarily understood, and it falls aptly within the description of a "trading liability" which the minimum terms were not intended to cover.[27]

The common law grants validity to the exclusion clauses based on the idea of absolute freedom of contract.[28] During the nineteenth century and large part of the twentieth century, the common law rule was to ensure freedom of contract of the parties, as they are thebest judge of their interests and positions. Prime focus, in a case of unreasonableness of clauses, was cast on procedural fairness rather than substantive fairness based on the 'will' theory and the principles of *laissez-faire* economics.[29] The courts lacked the power and showed restraint in the common law to strike down a contractual clause merely because it was unreasonable[30] and were tasked to only ensure that contracts were made with free consent.[31] Therefore, if a party seeking relief from a court failed to establish the presence of coercion, undue influence or other such vitiating elements which could have impacted the emergence of the contract, it was immaterial to argue that the substantive clauses of the contract were oppressive.

The Indian Contract Act, 1872 ('Act')[32] recognises exclusion clauses as its framework is built around the idea of freedom of contract, allowing the

---

27 Impact Funding Solutions Ltd. v. AIG Europe Insurance Ltd., 2016 UKSC 57 (Supreme Court, United Kingdom).

28 *Id*., ¶46, (*per* Lord Toulson).

29 Eike Von Hippel, *The Control of Exemption Clauses – A Comparative Study*, Vol. 16(3), Int'l & Comp. L. Q., 591 (1967).

30 Beatson, *supra* note1, 4.

31 Suisse Atlantique Societed Armament Maritime SA v. N.V. Rotterdamasche Kalen Centrale, (1966) 2 WLR 944 (House of Lords, United Kingdom).

32 H.G. Beale Chitty on Contracts, Vol. I, 11 (Sweet & Maxwell, 2008); Beatson, *supra* note 1, at 4; Atiyah, *supra* note 7, at 282; Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶77.

parties to limit their liability during contractual negotiations. This paper is a doctrinal attempt to exhaustively trace the development and understanding of the exclusion clauses in India. In Part II, we map the extended acceptance and misuse of the exclusion clauses. In Part III, we cover legal remedies developed by the courts to check its misuse. For Part IV, while taking inspiration from the Constitution of India, Law Commission Reports and the law in the United Kingdom ('UK'), we present certain mechanism to check the misuse through statutory means. Concluding remarks follow in Part V.

II. CHARACTERISING THE GROWTH OF THE EXCLUSION CLAUSES

Exclusion clauses have effects similar to any other clause of a contract and thus, possess a binding nature enforceable in a court of law. Consequent hardship is not a ground to deny the enforceability of such clauses. For instance, in the case of *Bharti Knitting Company* v. *DHL Worldwide Express Courier Division of Airfreight Ltd.*[33], the appellant had a contract of sale with a German buyer for summer season apparels. Pursuant to the agreement, the appellant consigned certain goods and documents to the buyer (consignee), but they never reached their destination. The appellant sent another package; however, by the time it reached, the season got over. Resultantly, the consignee agreed to pay only DM 35,000 instead of the invoice value of DM 56,469.63. The appellant sued the respondent, a courier delivery company for the difference amount. When the case went in appeal to the Supreme Court of India, the Court limited the liability of the respondent to USD100 considering the fact that the consignment note limited the liability of the respondent to USD100 in case of deficiency in service. The Court referred to the Anson's Law of Contract, which states that the terms normally bind a person who signs the contractual document even though she has not read them, and even if she is ignorant of their precise legal effect.[34] This isa typical exposition of the 'duty to read' doctrine developed under the classic theory of contract in the paradigm of 'individually negotiated contracts', which entails a presumption that the parties know the terms of the contract.[35]

---

[33] The Indian Contract Act, 1872.

[34] Bharti Knitting Co. v. DHL Worldwide Express Courier Division of Airfreight Ltd., (1996) 4 SCC 704.

[35] *See* L'Estrange v. F. Graucob, Ltd., (1934) 2 KB 394 (Court of Appeal, United Kingdom) ("When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.", cited in Beatson, *supra* note 1, at 188. The Court also noted that "[t]he present case is not a ticket case, and it is distinguishable from the ticket cases.…In cases in which the contract is contained in a railway ticket or other Unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed." This observation was made to differentiate the cases involving written agreement from those involving unsigned document. In the former, the signature in itself binds the signing party, wherein in the case of latter, an additional factum of knowledge of the conditions on part of the receiving party must be established.) *See* Parker v. South Eastern Rly. Co., (1877) 2 CPD 416 (Court of Appeal, United Kingdom) cited in

Such comprehensive acceptance of the exclusion clauses granted a free domain for its operation and further development, for instance, in the form of a 'Himalaya Clause'.[36] A contractual clause ordinarily binds *only* parties to the contract; however, on multiple instances, the contracting parties do not actually executive the contract themselves, but do so through their employees or agents. In such circumstances, the 'Himalaya clause' helps the parties to extend the benefits of the exclusion clause to such third parties working under the contract by explicating the extended application of the exclusion to the employees working under the contract.[37] Though the courts have taken flexible as well as stringent approach while upholding such extension.[38] Nevertheless, this depicts the wide spread acceptance and extended effects of exclusion clauses in its multi-fold manifestations.

Such widespread acceptance had brought with itself the vice of misuse as entities had started drafting exclusion clauses with the widest possible exclusion.[39] This was especially true in cases where parties shared unequal bar-

---

Beatson, *supra* note1, at 188 ("Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are."); *See* Bihar State Electricity Board v. Green Rubber Industries, (1990) 1 SCC 731, ¶23; *See also* Henderson v. Stevenson (1875) LR 2 HL (Sc) 470, at 474 (Scottish Court of Session); Hood v. Anchor Line (Henderson Brothers) Ltd., 1918 AC 837, at 845 (House of Lord, United Kingdom); Singhal Transport v. Jasaram Jamumal 1966 SCC OnLine Raj 52, ¶11.

[36] Law Commission of India, *Unfair (Procedural And Substantive) Terms In Contract*, Report No.199, 76-119 (August 2006).

[37] Adler v. Dickson, (1955) 1 QB 158 (England and Wales Court of Appeal) (here, the plaintiff was travelling through a cruise ship named 'The Himalaya'. Due to the negligence of the master and the boatswain, she was injured. The ship-owner was contractually exempted from the entire liability and thus, she sued the master and the boatswain of the ship and succeeded against them for negligence and breach of duty of care. It was noted by the Court that unless the contract between the ship-owner and the plaintiff expressly or impliedly extended the effects of exclusion to the employees working under the ship-owner, which in the present case was absent, such employees cannot take benefit of the exclusion); *See* Michael F. Sturley, *International Uniform Law in National Courts*, Vol. 27, Virginiaj. Int'l L., 729 (1987) (here, the author has highlighted the manner in which proceeding against the agents virtually nullified the inclusion of the exclusion clauses – '*The carrier ('The Himalaya'),* having indemnified its employees, ultimately paid the damages, It thus lost its contractual exemption indirectly'); Roy Goode, Goode on Commercial Law, 1175 (Penguin, 2010); Law Commission of India, Unfair Terms in Contract, Report No. 103, 2 (May, 1984).

[38] New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co.Ltd. (1974) 2 WLR 865 (Privy Council of the United Kingdom).

[39] In certain cases, the courts have extended the benefits of exclusion clause in the absence of the Himalaya clause as well: London Drugs Ltd. v. Kuehne & Nagel International Ltd., 1992 SCC OnLine Can SC 89 (Supreme Court of Canada) cited in Baf Distributors Ltd. v. George W. Bennett Brysons & Co. Ltd., Claim No.:ANUHCV2012/0680 (Eastern Caribbean Supreme Court – Antigua and Barbuda) (in this Canadian case, the matter was concerning the employees of the contracting party. Though the employees were strangers to the contracts, the Court found that they were beneficiaries of the exemption clauses because there was an identity of interest between the employees and the warehouse company. *Per contra,* in certain cases, the courts have held that Himalaya clauses in itself are not sufficient and the desired exclusion must be conveyed through a separate collateral contract between the employers and its agents). Homburg Houtimport BV v.

gaining power in the contractual negotiation, and one of the parties had no choice but to accept the terms of contract,[40] for instance, in a standard form contract.[41] Consider a situation where a business organisation (private or public) is transacting with an individual consumer having comparatively lesser bargaining power or no negotiating powers at all,[42] but to sign the contract.[43] This arrangement enables a seller to introduce favourable terms in the contract,[44] and state "if you (the other party) want these goods or services at all, these are the only terms on which they are available. Take it or leave it."[45] Given the pervasive nature of the standard form contracts,[46] instead of being a contextual necessity, some scholars have argued that the freedom of contract is becoming restricted,[47] a situation that strikes at the roots of the basic principles of the law of contract.[48] Eike von Hippel, specifically on exemption clause has gone on to state that ""freedom of contract" […] has become a fiction."[49]

Agrosin (P) Ltd., (2004) 1 AC 715 (England and Wales Court of Appeal); Saharay, *supra* note 6, at 40; G. H. Treitel, The Law of Contract, ¶14-071 (Sweet & Maxwell, 2007).

40 Atiyah, *supra* note 7, at 197; *See* Elgin Brown & Hamer (Pty) Ltd. v. Industrial Machinery Suppliers (Pty) Ltd., (1993) 3 SA 424 (Supreme Court of South Africa); Onego Shipping & Chartering BV v. JSC Arcadia Shipping M/V 'SOCOL 3', 2010 EWHC 777 (Comm) (England and Wales High Court); S. J. Leacock, *Fundamental Breach of Contract and Exemption Clauses in the Commonwealth Caribbean*, Vol. 4(2), Anglo AM. L. Rev., 188 (1975); *See also* Law Commission of India, Unfair Terms in Contract, Report No. 103, 1, 2, 5 (May, 1984).

41 Atiyah, *supra* note 7, 197.

42 Beatson, *supra* note 1, 187 (defines a standard form contract as a uniform set of printed conditions which can be used time and time again, and for a large number of persons, and at less cost than an individually negotiated contract.)

43 Law Commission of India, Unfair Terms in Contract, Report No. 103, 1 (May, 1984); *See* Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶¶84 & 91; *See* Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212, ¶21; H. B. Sales, *Standard Form Contracts*, Vol.16(3), Modern L. Rev., 318 (1953).

44 Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC156, ¶89; E. Mohan v. Madras Fertilizers Ltd., 2010 SCC OnLine Mad 2579, ¶20; *See* Tshering Diki Bhutia v. State of Sikkim, 1998 SCC OnLine Sikk 1, ¶16.

45 Law Commission of India, Unfair Terms in Contract, Report No. 103, 1-2 (May,1984); Friedrich Kessler, *Contracts of Adhesion-Some Thoughts about Freedom of Contract*, Vol. 43, Colum. L. Rev., 630 (1943).

46 A. Schroeder Music Publishing Co. Ltd. v. Macaulay, (1974) 3 All ER 616 (Judicial Functions of the House of Lords) cited in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶84; Savita Samriya v. State, 2009 SCC OnLine Raj 2651, ¶13.

47 W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, Vol. 84(3), HARV. L. REV., 529 (1971) (standard form contracts probably account for more than ninety-nine per cent of all the contracts now made.) This high percentage was reaffirmed in John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, Vol. 24, Seton Hall Legis. J., 290 (2000); See Joanne P. Braithwaite, *Standard Form Contracts as Transactional Law: Evidence from the Derivatives Markets*, Vol. 75(5), Modern L. Rev., 779 (2012).

48 Law Commission of India, Unfair (Procedural and Substantive) Terms in Contract, Report No. 199, 54-62 (August, 2006); Beatson, *supra* note 1, at 4, 7 cited in DTC v. DTC Mazdoor Congress, 1991 Supp (1) SCC 600, ¶280.

49 At this point, it is clarified that the economic benefits of standard form contracts are nowhere declined. As Friedmann puts it in Wolfgang Friedmann, Law in a Changing Society 102 (1959): 'The working out of thousands of individual contract terms for substantially similar transactions would be as uneconomical as the use of antiquated machinery.' Therefore, the pervasive acceptance of standard form contracts lies in the positive economies attached to them such as time

Here, one might argue that signing a standard contract is an individual's volition and thus, the signature shows free consent to enter into a bargain. There are three arguments to contradict such a claim. *First,* could the individual have negotiated the removal of an unreasonable exclusion clause from the contract? The Law Commission of India ('Law Commission'), in its 103rd Report,[50] raised some of the initial concerns on these lines. The Commission critically deliberated upon a number of cases involving the use of unconscionable exclusion clauses by transport carriers, which intended to limit or exclude their liability. In these cases, various High Courts in India favoured the carriers on the ground that since the conditions of the tickets were already presented to the consumers in printed form, they were deemed to know those terms irrespective of whether it was read or not.[51] However, the Law Commission raised a concern, stating: "Assuming that he knows the conditions, if he wanted to change them, could he negotiate and do so? If he cannot, what does it matter, and how are the courts to come to his rescue?".[52] This lack of negotiating power (a kind of circumstantial powerlessness) is one of the strongest factor restricting the true freedom of contract. This argument also touches upon or in many ways contradict the core of the 'duty to read' doctrine developed under the classic theory of contract and thus questions the justifiability of its continued application because:

> Free contract presupposes free bargain; and free bargain presupposes free bargaining; and that where bargaining is absent in fact, the conditions and clauses to be read into bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.[53]

Second is an argument furthered by Prof. Friedrich Kessler, that a person in need of goods and services being sold under abusive contractual terms shall not be able:

> [t]o shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clause. His contractual intention is but a subjection more or less voluntary to terms

---

saving, cost cutting, utilisation of junior employees for contract finalisation, fewer requirements to negotiate the terms on a recurring basis, constantly plugging the loop holes in contract drafting ensuring that similar mistakes are not repeated, inter alia: *See* CHESHIREETAL, LAW OF CONTRACTS 21 (1991) cited in Pawan Alloys & Casting (P) Ltd. v. U.P. SEB, (1997) 7 SCC 251, ¶46.

50 Eike Von Hippel, *The Control of Exemption Clauses – A Comparative Study*, Vol. 16(3), INT'L & COMP. L. Q., 591, 606 (1967).

51 Law Commission of India, UNFAIR TERMS IN CONTRACT, Report No.103 (May 1984).

52 Indian Airlines Corpn. v. Jothaji Maniram, 1958 SCC OnLine Mad 213; Rukmanand Ajitsaria v. Airways (India) Ltd., 1957 SCC OnLine Gau 44; Madhuri Chowdhuri v. Indian Airlines Corpn., 1962 SCC OnLine Cal 35; Singhal Transport v. Jesaram Jamumal, 1966 SCC OnLine Raj 52.

53 Law Commission of India, UNFAIR TERMS IN CONTRACT, Report No. 103, 4 (May, 1984).

> dictated by the stronger party.…Thus, standardised contracts are frequently contracts of adhesion; they are áprendreouàlaisser.[54]

Third, standard form contracts are generally used to avail necessary services such as insurance, travel, banking, employment, e-commerce services[55] etc. and the classical theory fails to check the abuse of bargaining power by the service provider. This is because such abuse does not fall within the existing vitiating elements of a contract, i.e. coercion, undue influence, fraud, misrepresentation or mistake,[56] which essentially denote procedural unfairness. On the contrary, the abuse of unequal bargaining power by the service providers as manifested through unfair contractual clauses depicts *circumstantial powerlessness* and falls under substantive unfairness. In the words of the Supreme Court of India,

> [t]he 'standard form' contract is the rule. [One] must either accept the terms of [the] contract or go without. Since, however, it is not feasible to deprive oneself of such necessary services, the individual is compelled to accept on those terms. In view of this fact, it is quite clear that freedom of contract is now largely an illusion.[57]

The situation turned worrying when the courts disallowed challenges against unreasonable exclusion clauses.[58] Owing to the lack of jurisdiction due to statutory void to entertain claims based on the '*unequal bargaining power'*,[59] *'economic dominance'* or *'circumstantial powerlessness'*,[60] the courts allowed any exclusion clause using the argument of freedom of contract,[61] without analysing whether the parties, in reality, possessed any freedom to negotiate the terms or not.[62] The contract law had no concerns with the outcomes of the contract.[63] Similarly, the courts ruled out the application of the principles of good faith in contractual arrangements:[64] "there is no general doctrine of good faith in the English law of contract. The parties are free to act as they wish, provided that they do not act in breach of a term of contract."[65]

---

54 Karl Llewellyn, *Book Review: The Standardization of Commercial Contracts in English and Continental Law, By O. Prausnitz*, Vol. 52(4), Harv. L. Rev., 700 (1939).

55 Friedrich Kessler, *Contracts of Adhesion - Some Thoughts about Freedom of Contract*, Vol. 43, Colum. L. Rev., 630 (1943).

56 See generally Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477, ¶16.

57 The Indian Contract Act, 1872, §§15-22.

58 DTC v. DTC Mazdoor Congress, 1991 Supp (1) SCC 600, ¶280.

59 *See* Law Commission of India, Unfair Terms in Contract, Report No. 103, 1-3 (May, 1984).

60 National Westminster Bank Plc. v. Morgan, (1984) 1 AC 686 (Judicial Functions of the House of Lords).

61 Consider a situation where the sole governmental railway organisation issues the travel tickets with certain exclusion clauses.

62 Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶77.

63 Atiyah, *supra* note7, at 200.

64 *Id*.,283.

65 Beale, *supra* note31, at 20.

Taking this conception of contractual autonomy further, the South African Supreme Court of Appeal, in *Afrox Health Care Pty. Ltd.* v. *Strydom,*[66] upheld a contractual clause that excluded the liability of the appellant for negligence. In vain, the respondents had argued that the exclusion clause is unenforceable for being contrary to public policy as it violated the right to health care enshrined under §27 of the Constitution of South Africa. The Court noted that the constitutional right did not prohibit the hospital from contracting certain conditions before rendering the health care services and that the right to health care needs to be balanced with the principle of freedom of contract, which was also supported by constitutional values.

The law in India has been written and interpreted on similar lines and has favoured party autonomy. §10 of the Act states that: "All agreements are contracts if they are made by the free consent of parties…"[67] and §14 defines free consent as the one that is not caused by coercion, undue influence, fraud, misrepresentation or mistake.[68] The Act does not envisage any provision prohibiting unfair contracts or substantive unconscionability. But fora public policy exception,[69] the Act is centered on the protection from procedural fairness. The Supreme Court of India has also endorsed this scheme of the Act, especially in commercial contracts. For instance, in *S.K. Jain* v. *State of Haryana*,[70] the parties inserted an additional clause in their contract, which the appellant found to be unconscionable. However, the Court denied the application of the doctrine of unequal bargaining power by reasoning that if people entered into unconscionable bargains with their knowledge and will, they cannot subsequently seek the protection of law.[71]

One could argue that such emphasis on procedural fairness while ignoring substantive fairness should be given are thought to ensure that one does not exploit circumstantial powerlessness to obtain unfair benefits out of the contract. Freedom of contract is supposed to be a reasonable social ideal,[72] which must be based on the equality of bargaining powers between the contracting parties[77] to ensure that no injury is done to their economic interests.[73] Atiyah has noted that "the fairness of the outcomes of a bargain in the market place is dependent on the

---

66 James Spencer & Co. Ltd. v. Tame Valley Pudding Co. Ltd., (Unreported) April 8, 1998, CA (Civ. Div.) (England and Wales Court of Appeal) cited in Beale, *supra* note 31, at 21; Walford v. Miles, (1992) 2 AC 128 (House of Lords, United Kingdom).

67 Afrox Healthcare BPK v. Strydom, (2002) 6 SA 21 (Supreme Court of Appeal, South Africa).

68 The Indian Contract Act, 1872, §10.

69 The Indian Contract Act, 1872, §14.

70 The Indian Contract Act, 1872, §23.

71 S. K. Jain v. State of Haryana, (2009) 4 SCC 357, ¶8.

72 Sundarambal Ammal v. Yogavanagurukkal, 1914 SCC OnLine Mad 22; Mackintosh v. Wingrove, 1878 SCC OnLine Cal 133; Satish Chunder Giri v. Hem Chunder Mookhopadhya, 1902 SCC OnLine Cal 220; *See also* Karnal Distillery Co. Ltd. v. Ladli Parsad Jaiswal, 1957 SCC OnLine Punj 156; *See also* Raghunath Altia v. Arjuno Altia, 1972 SCC OnLine Ori 102.

73 Beatson, *supra* note 1, 4; Chitty on Contracts ¶4 (A.G. Guest, ed., 1983 cited in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶79; *See* State of Kerala v. State of T. N., 2018 Indlaw SC 71, ¶¶ 111-114.

initial distribution of wealth and resources with which the parties have entered the market."[74] Given the imperfect market information and wide coverage of a business in the market, imagining an equitable distribution of wealth and resources is purely unreasonable. As Anson has noted, "in many areas of contract, freedom of contract in the classical sense is manifestly lacking … It may be objected that the general principles of contract law therefore, present an inadequate, if not distorted, picture of modern economic life."[75] Therefore, it becomes imperative to ensure that parties holding dominant bargaining position do not abuse such dominance and insert unreasonable clauses excluding their liability.

In order to provide remedies for such situations, the UK Parliament enacted the Unfair Contract Terms Act, 1977 ['UCTA'], which empowers the courts to strike down an unreasonable exclusion clause of a contract;[76] and the Consumer Rights Act, 2015, which deems unfair contractual terms as non-binding.[77] On similar lines, India has also enacted the Consumer Protection Act, 2019, which envisages remedies against unfair consumer contracts. We are yet to see courts' interpretation of unfair terms in consumer contracts and in comparison with the UK consumer law, the scope of Indian law seems restrictive.

However, a statutory void still prevails in the Indian jurisdiction with regard to contracts other than consumer contract. The courts in India will need to continue to decide, within the limited scope of interpretation, what constitutes a possible misuse of the exclusion clauses. It is desirable that statutory safeguards,[78] are structured to ensure that unequal bargaining power is not misused and unreasonable exclusion terms do not defeat one of the fundamental principles of the contract law: one must honour the promises made.[79]

III. EVOLVING REMEDIES UNDER THE CONTRACT LAW

The specific nature of the exclusion clauses, which operates in favour of one of the parties of the contract, has led to a high number of litigation over the years, which made it imperative for the courts to derive and adopt a variety of methods.[80] These methods primarily focussed on granting remedies to the plaintiffs by either undoing the effects of the unfairness attached with the exclusion clauses or by deeming such clause devoid of any legal effect. Based on the study of the case laws, the remedies can be classified under four broadheads: (A) remedies against non-fulfilment of the 'notice procedure'; (B) remedies through

74 LIC v. Consumer Education and Research Centre, (1995) 5 SCC 482, ¶¶32, 37.
75 *Id*.
76 Atiyah, *supra* note 7, 286.
77 Beatson, *supra* note1, 6.
78 The Unfair Contract Terms Act, 1977, Chapter 50 (United Kingodm); *See* Law Commission of India, Unfair Terms in Contract, Report No. 103, 7 (May 1984).
79 The Consumer Rights Act, 2015, Chapter 15 (United Kingdom), §62(1).
80 *Infra*, Part IV.

'interpretative mechanism'; (C) remedies against non-conformity with the 'statutory requirements'; and (D) remedies against 'unconscionable terms'. In the following part, elaboration is made on these remedies and their shortfalls.

A. REMEDIES FOR NON-FULFILMENT OF THE 'NOTICE PROCEDURE'

To be effective and enforceable, the drafter of the exclusion clause must endeavour to sufficiently bring its existence to the notice of the other party.[81] Once the knowledge is established and freedom of contract ensured, it is imperative for the courts to enforce it.[82] If the party inserting the exclusion clause fails to disclose the exclusion in the terms of the contract, then it is treated as foreign to the contract and thus, non-enforceable.[83] For instance, in *Modern Insulators* v. *Oriental Insurance Co. Ltd*.,[84] the insurer failed to communicate certain terms and conditions including the exclusion clause while forwarding the schedule of insurance policy to the insured. The exclusion clause intended to cease the liability of the insurer if the insured used second-hand property in a particular mechanical test. When the structure collapsed due to the use of second-hand property, the Supreme Court denied the benefits of the exclusion clause to the insurer because it was 'neither a part of the contract of insurance nor disclosed' to the insured, and held the insurer bound to bear the costs.

The law mandates that the notice of the exclusion clause must be communicated through a medium, which legally binds and obligates the other party to take cognisance. It must be extended through a contractual document so that it is obvious to a reasonable person that certain intentions are tried to be communicated[85] and the parties are restrained from making subsequent exclusions.[86] Any other kind of document not intended to have contractual effect, for instance, a receipt of payment, cannot incorporate an exclusion clause unless specific reference to the clause is made at the time of handing over of the receipt or such other document:[87] "the Court must be satisfied that the particular document relied on as containing notice of the excluding or limiting term is in truth an integral part of the contract."[88] This ensures the true presence of *consensus ad idem*, which is

---

81 Indian Contract Act, 1872, §37.

82 Atiyah, *supra* note 7, 199.

83 Road Transport Corpn. v. Kirloskar Bros. Ltd., 1980 SCC OnLine Bom 92; Singhal Transport v. Jesaram Jamumal, 1966 SCC OnLine Raj 52; Lacey's Footwear (Wholesale) Ltd. v. Bowler Insurance Ltd., (1997) 2 Lloyd's Rep 369 (Court of Appeal, United Kingdom); Parker v. South Eastern Rly. Co., (1877) 2 CPD 416 (Court of Appeal, United Kingdom).

84 United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera, (2008)10 SCC 404, ¶70.

85 Modern Insulators Ltd. v. Oriental Insurance Co. Ltd., (2000) 2 SCC 734, ¶9; Richard Lawson, Exclusion Clauses and Unfair Contract Terms 1 (Sweet & Maxwell, 2010).

86 Modern Insulators Ltd. v. Oriental Insurance Co. Ltd., (2000) 2 SCC 734, ¶ 9.

87 Nunan v. Southern Rly. Co., (1923) 2 KB 703.

88 Olley v. Marlborough Court Ltd., (1949) 1 KB 532 (Court of Appeal, United Kingdom); *See* Thornton v. Shoe Lane Parking Ltd., (1971) 1 QB 163 (Court of Appeal, United Kingdom).

required to a higher degree owing to the probable hardship that such clauses pose on the other party in the contract.[89]

The test of whether reasonable notice was given to the other party is governed by the acts of the party incorporating the clause,[90] and thus, the burden of proof to establish the applicability of the exclusion clause rests on the party which is claiming the benefit under such clause.[91] The law requires the incorporating party to merely show the reasonable steps taken to bring the fact in the knowledge of the other party,[92] and it is independent of the other party's discovery of such a fact.[93] As detailed above, once the parties have signed the Contract, it is immaterial for the opposite party to argue that it was unaware of the exclusion clause.[94]

In addressing the possible abuse in contracting, the courts have gone a step forward, particularly when the exclusion clauses are onerous in nature. It is a common practice to incorporate such unduly beneficial terms in fine print[95] and here, the test becomes 'rigorous' allowing a significant role in the *nature of the exclusion*.[96] The Andhra Pradesh High Court has noted that:

---

89 Chapelton v. Barry Urban DC, (1940) 1 KB 532 (Court of Appeal, United Kingdom); Hollingworth v. Southern Ferries Ltd., (1977) 2 Lloyd's Rep 70 (Queen's Bench Division, United Kingdom); *See* Bahamas Oil Refining Co. v. Kristiansands Tankrederie A/S, (1978) 1 Lloyd's Rep 211 (Queen's Bench Division); Road Transport Corpn. v. Kirloskar Bros. Ltd., 1980 SCC OnLine Bom 92, ¶34; Govt. of Rajasthan v. Vedakantara Venkataramana Seshaiyer, 1983 SCC OnLine AP 102, ¶¶28, 42; R. S. Deboo v. M. V. Hindlekar, 1994 SCC OnLine Bom 180, ¶ 20.

90 White v. Blackmore, (1972) 3 All ER 158, *per* Lord Denning, M. R. (Court of Appeal, United Kingdom).

91 *See* A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163, ¶21; *See* Canada Steamship Lines Ltd. v. R., (1952) All ER 305 (Privy Council, United Kingdom).

92 *See* McCutcheon v. David MacBrayne, (1964) 1 WLR 125 (House of Lords, United Kingdom) (here, the appellant, through his brother-in-law, had contracted with the respondent to ship his car. Unfortunately, the respondent's vessel sank and the appellant sued the respondent for damages. It was contended by the respondent that in its previous dealings with the appellant, they used to sign a 'risk-note', which included an exclusion clause. The absence of such a risk note in the present case, the respondent contended, should not allow the appellant to claim damages. However, the House of Lords did not agree with these contentions and ruled that in the absence of any risk-note, the appellant could not be said to be in knowledge of the exclusion clause. Moreover, the fact that there was no consistent manner of dealings among the parties as they used to sign a risk-notes only on some occasions, it was held that previous conduct could not be used as an evidence of knowledge of the exclusion clause); Hollier v. Rambler Motors (AMC) Ltd., (1972) 2 QB 71 (Court of Appeal, United Kingdom).

93 New India Assurance Co. Ltd. v. Rajeshwar Sharma, (2019) 2 SCC 671, ¶9; Peacock Plywood (P) Ltd. v Oriental Insurance Co. Ltd., (2006) 12 SCC 673, ¶73; National Insurance Co. Ltd. v Ishar Das Madan Lal, (2007) 4 SCC 105, ¶8; *See* National Insurance Co. Ltd. v. Savitri Devi, (2013) 11 SCC 554, ¶4; Mukund Dewangan v. Oriental Insurance Co. Ltd., (2017) 14 SCC 663,¶ 42; A.W. Bakerwelford, the Law Relating to Accident Al Insurance, 126 (1923) cited in New India Assurance Co. Ltd. v. Rajeshwar Sharma, (2019) 2 SCC 671, ¶14.

94 Burnett v. Westminster Bank Ltd., (1966) 1 QB 742 (Queen's Bench Division, United Kingdom).

95 Birch v. Thomas, (1972) 1 WLR 294 (Court of Appeal, United Kingdom).

96 Bharti Knitting Co. v. DHL Worldwide Express Courier Division of Airfreight Ltd., (1996) 4 SCC 704; L'Estrange v. F.Graucob, Ltd., (1934) 2 KB 394 (Court of Appeal, United Kingdom).

> The greater the rigour of the exclusion of liability, the more the need to bring such clauses to the plaintiff's knowledge, or to do all that could possibly be done in that direction. In any event, the said effort on the part of the defendant should have been made at or before the time the plaintiff entered into the contract.[97]

Though the Indian courts are silent on constituents of 'rigorousness', the English courts seem to denote something more than a mere signature on the contract. It has been held that when the terms of a contract are onerous, even a signature might not be enough to fulfil the requirements of notice. Adequate steps must be taken to bring to the knowledge of the other party the effects of the application of such clauses by making the term conspicuous,[98] in addition to taking any other special efforts.[99] This may include specifically communicating the existence and explaining its operational domain in a manner best suitable for the other party. Therefore, in the words of Treitel, "the question whether adequate notice has been given turns principally on two factors: the steps taken to give notice and the nature of the exempting conditions."[100]

B. REMEDIES THROUGH 'INTERPRETATIVE MECHANISMS'

The general rule for interpretation of a contract is that the contract must be read in its entirety in accordance with the intention of the parties derived from its intended language and nothing can be read by implication.[101] Similarly, the words of exclusion must be read in the context of the contract as a whole[102] and with due regard for its purpose,[103] otherwise "the very existence of the exclusion of the jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning."[104] Nevertheless, the nature of exclusion clauses mandates that they should be expressed *ex abundanti cautela*[105] by using

---

97 Law Commission of India, Unfair (Procedural and Substantive) Terms in Contract, Report No. 199, 54-62 (August 2006).

98 J. Spurling Ltd. v. Bradshaw, (1956) 1 WLR 461 (Court of Appeal, United Kingdom): ("I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it" per Lord Denning).

99 The Special Secretary to the Govt. of Rajasthan v. Vedakantara Venkataramana Seshaiyer, 1983 SCC OnLine AP 102, ¶ 42; *See also* Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd., 1989 QB 433 (Queen's Bench, United Kingdom).

100 Crooks v. Allen, (1880) 5 QBD 38 (Queen's Bench Division, United Kingdom).

101 Ocean Chemical Transport Inc. v. Exnor Craggs Ltd., (2000) 1 Lloyd's Rep 446 (Court of Appeal, United Kingdom).

102 Treitel, *supra* note 38, 218.

103 Beatson, *supra* note1, at183, 184; DDA v. Jitender Pal Bhardwaj, (2010) 1 SCC 146; Darlington Futures Ltd. v. Delco Australia Pty Ltd., (1986) 161 CLR 500, 510.

104 Beaumort-Thomas v. Blue Star Line Ltd., (1939) 3 All ER 127 cited in Saharay, *supra* note 6, at 37.

105 Impact Funding Solutions Ltd. v. Barrington Support Services Ltd., 2016 UKSC 57 (Supreme Court, United Kingdom) cited in New India Assurance Co. Ltd. v. Rajeshwar Sharma, (2019) 2 SCC 671, ¶15.

clear, explicit, specific, and unambiguous terms[106] to allow the courts to give it a natural meaning.

In 2016, the UK Supreme Court extensively discussed the manner of interpretation of exclusion clauses in *Impact Funding Solutions Ltd.* v. *AIG Europe Insurance Ltd.,*[107] stating:

> The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words; and that the contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed… words of exception may be simply away of delineating the scope of the primary obligation.[108]

This conveys that when the exclusion clause is clear and unambiguous to an ordinary reasonable person, is drafted in clear words or has the effect of exclusion by necessary implication or a fair reading,[109] the nit shall be accorded plain and simple meaning.[110] However, when the clause remains ambiguous about peculiar situations, it will allow the courts to invoke interpretative mechanisms to ensure reasonableness in the contract. For instance, consider a situation where a contract of vehicle servicing contains an exclusion clause stating that 'the service company shall not be liable for any damage to the car'. While the car was at the company's premises, the car was destroyed due to fire owing to company's negligence. In this situation, even if the exclusion clause seems comprehensive, it could be argued that the exclusion clause is ambiguous as it does not clarify whether the clause applies to damage incurred while performing repair works or it even extends to any other kind of damage owing to company's negligence. In such cases,

---

[106] Swatik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32, ¶37, *per* Justice Lokur.

[107] Black's Law Dictionary 641 (12th ed., 2009): out of abundant caution; to be on the safe side.

[108] Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd., (1973) 1 All ER 193 (Court of Appeal, United Kingdom); Gross v. Sweet, 49 NY (2d)102 (1979) (Court of Appeals of the State of New York); Impact Funding Solutions Ltd. v. Barrington Support Services Ltd., 2016 UKSC 57 (Supreme Court, United Kingdoms); A. W. Baker Welford, The Law Relating to Accidental Insurance 126 (Butterworths, 1923); A.B.C. Laminar (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163, ¶21; Union of India v. Alok Kumar, (2010) 5 SCC 349, ¶43; New Moga Transport Co. v. United India Insurance Co. Ltd., (2004) 4 SCC 677, ¶19.

[109] Impact Funding Solutions Ltd. v. Barrington Support Services Ltd., 2016 UKSC 57 (Supreme Court, United Kingdoms).

[110] Impact Funding Solutions Ltd. v. Barrington Support Services Ltd., 2016 UKSC 57 (Supreme Court, United Kingdoms).

the courts can invoke interpretative mechanisms to ensure reasonableness in the contract. The Indian courts have done this in twoways: (1) by employing the rule of *contra proferentem* through strict interpretation of the contract; and (2) by reading down the clause in light of the main object of the contract and intent of the parties. These two are explained below.

1. Rule of Contra Proferentem

In cases where the exclusion clause remains ambiguous, the courts have applied the rule of *verba fortius accipiuntur contra proferentem*.[111] This rule mandates the application of that interpretation which is in favour of the party other than the one who drafted the contract,[112] which is generally done by construing the exclusion narrowly.[113] For instance, when an insurer contracts with the insured on its standard terms, then "in case of real doubt, the policy ought to be construed most strongly against the insurers; [because] they frame the policy and insert the exceptions".[114] According to Anson, the reason for the evolution of this rule lies in the want to check the misuse of higher bargaining power among the parties to a contract:

> The disparity between the bargaining power of consumers and large enterprises (both private and public) means that terms have often been imposed upon consumers which are unfair in their application and which exempt the enterprise putting forward the document, either wholly or in part, from its just liability under the contract.[115]

Another reason for the emergence of this rule, in the words of Atiyah, is the want of reciprocity in a contract.

---

[111] Gillespie Bros. & Co. Ltd. v. Bowles (Roy) Transport Ltd., (1973) 1 All ER 193 (England and Wales Court of Appeal); Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd., (1983) 1 All ER 101 (House of Lords, United Kingdoms).

[112] *See* DDA v. Jitender Pal Bhardwaj, (2010) 1 SCC 146, ¶9.

[113] Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd., (2021) 7 SCC 151, ¶29; Industrial Promotion and Investment Corpn. of Orissa Ltd. v. New India Assurace Co. Ltd., (2016) 15 SCC 315, ¶10; Frans Maas (UK) Ltd. v. Samsung Electronics (UK) Ltd., 2004 EWHC 1502 (Comm) (England and Wales High Court); *See* Trans ocean Drilling UK Ltd. v. Providence Resources Plc., 2016 EWCA Civ 372 (England and Wales Appeals Court); *See* Edwin Peel, *Contra Proferentem Revisited*, Vol. 133, L. Q. REV., 7 (2017); Pushpa Agrawal v. Insurance Ombudsman U.P., 2012 SCC OnLine All 763, ¶25 cited in National Insurance Co. Ltd. v. Fehmida, 2017 SCC OnLine All 2323, ¶24.

[114] New India Assurance Co. Ltd. v. Rajeshwa Sharma, (2019) 2 SCC 671, ¶9; V. Madhumohan v. Fertilisers and Chemicals, Travancore Ltd., 2014 SCC OnLine AP 1560, ¶29; *See* Superintendence Co. of India (P) Ltd. v. Krishan Murgai, (1981) 2 SCC 246, ¶63; *See* Mills v. Dunham LR, (1891) 1 Ch 576 (Chancery Divison, England); National Insurance Co. Ltd. v. Ishar Das Madan Lal, (2007) 4 SCC 105, ¶8; Hollins v. J. Davy Ltd., (1963) 1 All ER 370 (Queens Bench, England); United India Insurance Co. Ltd. v. Pushpalaya Printers, (2004) 3 SCC 694, ¶6; General Assurancce Society Ltd. v. Chandumull Jain, AIR 1966 SC 1644, ¶11.

[115] Canara Bank v. United Indian Insurance Co. Ltd., (2020) 3 SCC 455, ¶22.

> Questions of construction and interpretation are liable to be approached by courts with a strong bias in favour of the idea that a contract should ensure some substantial reciprocity in contract.[116]

It must be clarified that this rule shall be applicable *only* to interpret ambiguous clauses and remove doubts, not to germinate any ambiguity or read new termsinto the contract.[117] The Supreme Court of India quoted the view taken by the High Court of Justice for England and Wales that a court must be sensitive to the purpose of the exclusion clause and should not automatically apply a *contra proferentem* approach when the terms are clear and unambiguous.[118] Only those cases involving genuine ambiguity in the meaning of the clause call for the application of *contra proferentem* and the courts must refrain from superficially reading ambiguity in the contract.[119] For instance, in the above illustration, if the exclusion clause had stated that 'the service company shall not be liable for any damage to the car, including any damage owing to company's negligence', it would have clarified that the exclusion even extends to any damage owing to company's negligence. Arguing that the exclusion clause fails to specifically mention 'fire' as a cause of damage and thus it does not exclude liability for damage due to a fire accident, would be to argue for an artificial ambiguity. In the words of the Supreme Court of India, "in the absence of any ambiguity, [a party] is not entitled to invoke the principle underlined in the rule of *contra proferentem* for interpreting the clauses of the policy", thereby affirming that "presence of ambiguity in the language of the policy" is a "*sine qua non* for invocation of the *contra proferentem* rule".[120]

Moreover, the UK courts have refrained from applying this rule when parties are placed with similar bargaining power, for instance:

> In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks…can be most economically borne … it is wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning.[121]

---

116 New India Assurance Co. Ltd. v. Rajeshwar Sharma, (2019) 2 SCC 671.

117 Anson, *supra* note 1, 193.

118 Atiyah, *supra* note 7, 293.

119 Cornish v. Accident Insurance Co. Ltd., (1889) 23 QBD 453 (Queens Bench, England) cited in New India Assurance Co. Ltd. v. Rajeshwar Sharma, (2019) 2 SCC 671, ¶13.

120 Crowden v. QBE Insurance (Europe) Ltd., 2017 EWHC 2597 (Comm) (England and Wales High Court), ¶65 cited in New India Assurance Co. Ltd. v. Rajeshwar Sharma, (2019) 2 SCC 671, ¶16; DDA v. Jitender Pal Bhardwaj, (2010) 1 SCC 146, ¶9.

121 Crowden v. QBE Insurance (Europe) Ltd., 2017 EWHC 2597 (Comm) (England and Wales High Court), ¶65 cited in New India Assurance Co. Ltd. v. Rajeshwar Sharma, (2019) 2 SCC 671, ¶16.

In India, a similar rule has been adopted by the Supreme Court in *Export Credit Guarantee Corpn. of India Ltd.* v. *Garg Sons International*, which involved an insurance contract.[122] In this case, the insured was contractually obligated to submit declarations regarding over due payments to the insurer within a given timeline, in the absence of which the insurer was exonerated of any liability under the contract. When the insured failed to comply with the requirements of the contract, the Court observed that:

> [t]he clauses of an insurance policy have to be read as they are. Consequently, the terms of the insurance policy, that fix the responsibility of the insurance company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonize the terms thereof, keeping in mind that the rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon.[123]

Therefore, if the parties have mutually agreed to the negotiated terms of their contract, especially in a commercial contract where it can be presumed that the parties have equal bargaining power, then the courts shall refrain from applying the rule of *contra proferentem*.

How do courts apply the rule of *contra proferentem*? Generally, exclusion clauses are drafted to cover as many liabilities as possible and therefore, strict interpretation is employed to restrict the scope of a vaguely worded clause.[124] For instance, a clause excluding liabilities for implied conditions and warranties will not exclude liabilities from expressly written conditions and warranties.[125] Similarly, a clause excluding liability for breach of a warranty shall not exclude liabilities arising from breach of a condition.[126] Moreover, it is believed that commercial contracts are drafted by taking due legal advice and thus, when a party instead of using appropriate language uses loose language to draft the clause, it cannot be read in its favour.[127] However, as a word of caution, it must be remembered that "any clause in a contract had to be construed in the context in which it was found, meaning both the immediate context of the other terms and the wider context of the transaction as a whole."[128] For instance, in *Dalmare SpA* v. *Union*

---

122 United Indian Insurance Co. Ltd. v. Orient Treasures (P) Ltd., (2016) 3 SCC 49, ¶38.

123 Photo Production Ltd. v. Securicor Transport Ltd., (1980) 2 WLR 283 (Court of Appeals, England).

124 Export Credit Guarantee Corpn. of India Ltd. v. Garg Sons International, (2014) 1 SCC 686.

125 *Id*., ¶11 (emphasis added).

126 Hollier v. Rambler Motors (A.M.C.) Ltd., (1972) 1 All ER 399 (Queens Bench, England).

127 Andrew Bros. Ltd. v. Singer & Co. Ltd., (1934) 1 KB 17 (Kings Bench, England).

128 Baldry v. Marshall, (1925) 1 KB 260 (Kings Bench, England); Wallis, Son & Wells v. Pratt & Haynes, 1911 AC 394 (Court of Appeals, England); *See* Bominflot Bunkergesellschaft fur Mineraloele mbH & Co KG v. Petroplus Marketing AG, (2011) 1 Lloyd's Rep 442 (England and Wales High Court) (the exclusion clause provided that "There are no guarantees, warranties or representations, express or implied, or [sic, of] merchant ability, fitness or suitability of the oil for any particular purpose or otherwise which extend beyond the description of the oil set forth in this

Maritime Ltd., Clause 11 of the agreement stated that "[t]he Vessel shall be delivered and taken over *as she was* at the time of inspection …". It was contended on behalf of Dalmare SpA, the seller, that the said clause excluded the warranty as to the quality. Support was sought from Clause 55 which stated that "where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may be (subject to the Unfair Contract Terms Act, 1977) be negative or varied by express agreement […]". However, the England and Wales High Court (Comm.) did not agree with the arguments and decided in favour of Union Maritime Ltd., the buyers. Itwas held that merely using the phrase 'asis' shall not have the effect of excluding the implied terms of the contract and the law.[129]

The courts have generally used the rule of strict interpretation in order to grant relief in cases of negligence when the exclusion clause is ambiguous. For instance, in *Canada Steamship Lines Ltd.* v. *R.,*[130] the exclusion clause stated that "the lessee should not have any claim against the lessor for damage to goods". When the goods were damaged owing to the negligence of the lessor's employees, adopting a strict interpretation the Privy Council held that the lessor shall be liable for negligence as the exclusion is only regarding damage to the goods and not for negligence. The Calcutta High Court used the reasoning of this Privy Council decision and allowed the benefit of an exclusion clause to the carrier when the clause expressly excluded the liability for negligence.[131] Therefore, unless expressed in clear terms, the courts presume that *it is inherently improbable that the innocent party would have agreed to the exclusion of the contract-breaker's negligence.*[132]

Analysing this dynamic use of 'interpretative mechanism', Atiyah termed the process of construction as the "most important procedure by which

agreement". The England and Wales Court of Appeal (Civil Division) referred to the decision of the House of Lords in *Wallis Sons & Wells v Pratt & Haynes,* wherein it was categorically stated that 'within the four corners of this statute applicable to this contract, we see this plain distinction between 'condition' and 'warranty'', and held that when Sale of Goods Act, 1979 (UK), §14(2) specifically envisages certain implied *conditions*, they cannot be said to be excluded by the said clause. *Similarly see* Blue Anchor Line Ltd. v. Alfred C. Toepfer International GmbH (The Union Amsterdam), (1982) 2 Lloyd's Rep 432 (Queens Bench, England) at 436 cited in CARTER, *supra* note 1, at 63; *But see* Air Transworld Ltd. v. Bombardier Inc., 2012 EWHC 243 (Comm) (here the same court upheld the exclusion of implied conditions when the exclusion clause was modified to have a wider coverage "all other warranties, obligations, representations or liabilities, express or implied, arising by law, in contract, civil liability or in tort,or otherwise …or liability on part of the seller to anyone of any nature whatsoever").

129 E. E. Caledonia Ltd. v. Orbit Valve Co. Europe, (1994) 1 WLR 221 (Court of Appeal, England); *See* Shell Chemicals UK Ltd. v. P & O Roadtanks Ltd., (1995) 1 Lloyd's Rep 297 (Court of Appeal, England).

130 K. Lewison, The Interpretation of Contracts, ¶12-03 (Sweet & Maxwell, 2011); White cap Leisure Ltd. v. John H. Rundle Ltd., (2008) 2 Lloyd's Rep 2016 (England and Wales High Court), and Stoczni Gdynia SA v. Gearbulk Holdings Ltd., (2009) 1 Lloyd's Rep 461 (Court of Appeals, England) cited in Air Transworld Ltd. v. Bombardier Inc., 2012 EWHC 243 (Comm) (England and Wales High Court).

131 Dalmare SpA v. Union Maritime Ltd., (2013) 2 All ER 870 (England and Wales High Court).

132 Carslogie Steamship Lines Ltd. v. R. 1952 AC 292 (Court of Appeal, England); *See* Smith v. South Wales Switchgear Co. Ltd., (1978) 1 WLR 165 (House of Lords, England).

the courts tend to nullify or modify the effect of exemption clauses […] judicial ingenuity was able to cut down the effects of drastic exemption clauses by strained interpretations".[133]

2. Main Object and Intent Test

Until the late twentieth century, the doctrine of fundamental breach was prevalent in the common law and it provided that a party cannot exclude the liability for breaching the fundamental terms of the contract because such terms form of the core of the contract,[134] and their breach amounts to non-performance.[135] The reason was simple: benefit scan be availed only "when he is carrying out his contract, not when he is deviating from it oris guilty of a breach which goes to the root of it".[136] An exclusion clause could not deprive a party entirely of other's contractual undertakings[137] and this understanding was universal among cases arising out of breach of fundamental term and those involving a fundamentalbreach on an aggregated level.[138] In *Karsales (Harrow) Ltd.* v. *Wallis,* Lord Denning had stated that:

> [I]t is now settled that exemption clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects … They do not avail him when he is guilty of a breach which goes to the root of the contract.[139]

Many decisions of the English Court of Appeal seemed to indicate that as a 'substantive rule', exclusions clauses cannot exempt the liabilities arising out of fundamental breach of contract.[140] However, the understanding took a slight

[133] Indian Airlines Corpn. v. Madhuri Chowdhuri, 1964 SCC OnLine Cal 38, ¶¶57-58.

[134] Gillespie v. Bowles (Roy) Transport Ltd., 1973 QB 400 (Queens Bench, England) cited in ANSON, *supra* note 1, at 195; Atiyah, *supra* note 7, at 293 ("Nobody in his senses would agree to a contract which permitted the other party to commit negligence with impunity"); *See* Owners and Parties Interested in the Vessel M.V. "Fortune Express" v. Maavar (HK) Ltd., 2004 SCC OnLine Cal 493; *See* Kandimallan Bharathi Devi v. General Insurance Corpn. of India, 1987 SCC OnLine AP 133; *See also* M. A. Sujan, Interpretation of Contract 80 (2000).

[135] Atiyah, *supra* note 7, 199.

[136] Smeaton Hanscomb & Co. Ltd. v. Sassoon ISetty, Son & Co., (1953) 1 WLR 1468 (Queens Bench Division, England).

[137] Atiyah, *supra* note 7, 199.

[138] J. Spurling Ltd. v. Bradshaw, (1956) 1 WLR 461 (Court of Appeal, England); *See* Alexander v. Railway Executive, (1951) 2 KB 882 (Kings Bench Division, England); *See* National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 cited in Mukund Dewangan v. Oriental Insurance Co. Ltd., (2017) 14 SCC 663, ¶42; Karsales (Harrow) Ltd. v. Wallis, (1956) 2 All ER 866 (Court of Appeals, England).

[139] Mendelssohn v. Normand Ltd., (1969) 2 All ER 1215 (Queens Bench Division, England); Tor Line AB v. Alltrans Group of Canada Ltd., (1984) 1 All ER 103 (House of Lords, England); See Heyman v. Darwins, 1942 AC 356 (Court of Appeals, England).

[140] Karsales (Harrow) Ltd. v. Wallis, (1956) 2 All ER 866 (*per* Parker, LJ) (England and Wales High Court) ('In my judgment, however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term.'); Yeoman Credit Ltd v. Apps, (1962) 2 QB 508

modification in later years and it was realized that the doctrine of fundamental breach operates irrespective of the intention of the parties and limits the freedom of contract.[141] It was argued that but for the freedom of contract, the contract law envisages no other social considerations to be followed.[142] Questions were raised voicing the absence of jurisdiction with the courts to address the issues regarding the harshness of the exclusion clause or the abuse of bargaining power.

This debate was directly addressed, in *U.G.S. Finance Ltd*. v. *National Mortgage Bank of Greece,*[143] by the UK Court of Appeal, which stated that it is not a rule of law but a rule of construction,[144] based on the intention of the contracting parties that an exclusion clause does not apply to a situation of fundamental breach.[145] This view was later unanimously accepted by the House of Lords in *Suisse Atlantique Societe d'Armament Maritime SA* v. *NV Rottersamsche Kolen Centrale* ('*Swiss Atlantique*'),[146] and *Photo Production Ltd*.v. *Securicor Transport Ltd*. ('*Photo Production*').[147] In the words of Lord Reid,

> If this new rule of law is to be adopted, how far does it go? In its simplest form it would be that a party is not permitted to contract out of common law liability for a fundamental breach…I do not suppose that any one has intended that this rule should go quite so far as that; but I would find it difficult to say just where the line would have to be drawn. In my view, no such rule of law ought to be adopted.[148]

The journey from *Suisse Atlantique* to *Photo Production* is worth noting. After the decision in *Suisse Atlantique*, multiple decisions of the Court of Appeal kept on furthering the pre-*Suisse Atlantique* position and held that

(*per* Holroyd, LJ) (Queens Bench, England) ("Such a … breach going to the root of the contract, as disentitles a party to take refuge behind an exception clause intended to give protection only in regard to those breaches which are not inconsistent with, and not destructive of the whole essence of the contract."); *See* Charterhouse Credit Co. Ltd. v. Tolly, (1962) 2 QB 683 (Queens Bench, England); See S. J. Leacock, *Fundamental Breach of Contract and Exemption Clauses in the Common wealth Caribbean*, Vol. 4(2), Anglo Am. L. Rev., 181 (1975).

141 Karsales (Harrow) Ltd. v. Wallis, (1956) 2 All ER 866 (England and Wales High Court).

142 *See* Charterhouse Credit Co. Ltd. v. Tolly, (1962) 2 QB 683 (Queens Bench, England); Brian Coote, *The Second Rise and Fall of Fundamental Breach*, New Zealand Legal Research Foundation Seminar Papers 6 (1980); (1980) Auckl And L. Faculty Seminar Series, Paper 1, 3.

143 Atiyah, *supra* note 7, 199.

144 Suisse Atlantique Societe d'Armament Maritime SA v. NV Rotterdamasche Kalen Centrale, (1966) 2 WLR 944 (Court of Appeals, England); Law Commission of India, Report on Unfair Terms in Contract, Report No. 103 , 6, 7 (May 1984).

145 U.G.S. Finance Ltd. v. National Mortgage Bank of Greece, (1964) 1 Lloyd's Rep 446 (Court of Appeals, England);.

146 *Also See* Photo Production Ltd. v. Securicor Transport Ltd., 1980 AC 827 (Court of Appeals, England); Darlington Futures Ltd. v. Delco Australia Pty. Ltd., (1986) 161 CLR 500, 510 (Supreme Court of Australia).

147 Saharay, *supra* note 6, at 38.

148 Suisse Atlantique Societe d'Armament Maritime SA v. NV Rotterdamsche Kolen Centrale, (1966) 2 WLR 944 (Court of Appeals, England).

exclusion of liability for fundamental breach of contract is not allowed as a substantive rule of law.[149] These decisions then came to be overruled by the House of Lords in *Photo Production*, which held that there is no substantive rule of law against excluding the liability for fundamental breach of contract and that the courts must adopt the rule of construction while dealing with exclusion clauses.[150]

This rule has been widely accepted now, including an indirect adoption in India. Though there isn't any conclusive decision by the Indian courts on this aspect, Ramaseshan has, in light of the decision in *Suisse Atlantique,* discussed the contrasting trends followed by the Indian courts.[151] It has been argued that on one hand, certain courts have invoked the doctrine of fundamental obligation to nullify the exclusion; however, on the other, some courts have followed the classical approach of giving precedence to terms of thec ontract, presumed to be entered with uncompromised freedom. However, in *Skandia Insurance Co. Ltd.* v. *Kokilaben Chandavadan* ('Skandia'),[152] where the validity of exclusion of liability for fundamental breach of contract was not the central issue, the Supreme Court had cited Carter's Breach of Contract[153] with approval, which stated that though the doctrine of fundamental breach of the contract has been rejected by the House of Lords, never the less, "wide exclusion clauses will be read down to the extent to which they are in consistent with the main purpose, or object of the contract".

As we understand from the above cases, the courts only go with a presumption of construction that an exclusion clause is not intending to exclude the liability of fundamental breach,[154] which could be rebutted by an express and clear exclusion clause manifesting an intention of the contracting parties to the opposite.[155] If the main object andthe intent of the parties speaks otherwise, the courts may limit or even reject[156] the operation of the clause and bring it in sync with the main object and intent.[157] For instance, generally in a contract for carriage

[149] Photo Production Ltd. v. Securicor Transport Ltd., (1966) 2 WLR 944 (Court of Appeals, England).

[150] Suisse Atlantique Societe d'Armament Maritime SA v. NV Rotterdamsche Kolen Centrale, (1966) 2 WLR 944 (*per* Lord Reid) (Court of Appeals, England).

[151] *See* Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co. Ltd., (1970) 1 QB 447 (Queens Bench Division, England) and Wathes (Western) Ltd. v. Austins (Menswear) Ltd., (1976) 1 Lloyd's Rep 14 (Court of Appeals, England), which relied on Charterhouse Credit Co. Ltd. v. Tolly, (1962) 2 QB 683 (Queens Bench Division, England), a pre-*Suisse Atlantique* decision of the Court of Appeal.

[152] *See* George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd., 1983 2 AC 803.

[153] V. Ramaseshan, *Fundamental Obligation and the Indian Law of Contract*, Vol. 10(2), J. INDIA L. INST. 331, (1968).

[154] Skandia Insurance Co. Ltd. v. Kokilaben Chandavadan, (1987) 2 SCC 654.

[155] J. W. Carter, Carter's Breach of Contract (Law Book Co, 1984). *See* Carter, *supra* note 1, at 451; National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297, ¶¶54, 110; Mukund Dewangan v. Oriental Insurance Co. Ltd., (2017) 14 SCC 663, ¶¶40-42.

[156] Gibaud v. Great Eastern Railway Co., (1921) All ER Rep 35 (Kings Bench Division, England); Photo Production Ltd. v. Securicor Transport Ltd., 1980 AC 827 (Court of Appeals, England).

[157] Kandimallan Bharti Devi v. General Insurance Corpn. Of India, 1987 SCC OnLine AP 133; *See* Photo Production Ltd. v. Securicor Transport Ltd., 1980 AC 827, 851 (Court of Appeals, England) ('It is, …, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations').

of goods, the courts have refrained from giving benefits of any exclusion clause because a carrier who deviates from an agreed route without any reasonable cause is deemed to have acted beyond the main object and intent or the *four corners* of the contract.[158] Similarly, in cases pertaining to insurance contracts, the courts have held that "the exclusion clause or the defence of an insurer so as to avoid liability has [to be] read down to the extent to which it is consistent to the main purpose of the contract".[159]

The determination of fundamental breach and thereby, the application of strict interpretation is also based on the consequences of the contract. If the performance or consequence of a contract is "totally different from what the contract contemplates",[160] courts could be seen as applying the strict interpretation. According to Treitel, the phrase 'totally different' has to be contextually interpreted and thus, "the rule can apply even where the breach does not make the performance totally different from that promised: it is sometimes enough if the breach causes 'serious'[161] prejudice to the injured party"[162] Therefore, applying the rule of serious prejudice, the Queen's Bench had held that the supply of a defective, unusable and unroadworthy motorcar would not excuse the supplier of his liabilities, even though the exclusion clause mentioned that "any implied warranties and conditions are also hereby expressly excluded".[163]

In cases pertaining to insurance contracts, when the breach of conditions are on part of the insured –the party against whom the exclusion clause is drafted, the courts have limited the space available to the insurance companies to exclude their liability, again by referring to the main object/purpose of the contract. For instance, in a decision handed by a full bench of the Karnataka High Court in May 2020, it was observed that

---

158 New India Assurance Co. Ltd. v. Yallavva, 2020 SCC OnLine Kar 1660, ¶118.

159 Motis Exports Ltd. v. Dampskibsselskabet, (2000) 1 Lloyd's Rep 211; *See* United India Insurance Co. Ltd v. A. Govindan, 2000 SCC OnLine Mad 58.

160 Stag Line Ltd. v. Foscolo, Mango and Co. Ltd, 1932 AC 328 (Court of Appeals, England); Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd., 1959 AC 576 (Court of Appeals, England); (Similarly, in cases of bailment, if the bailee stores the goods at a place other than the agree one, he is deemed to have acted beyond the four corners of the contract); *See* Suisse Atlantique Societe d'Armament Maritime SA v. NV Rotterdamsche Kolen Centrale, (1966) 2 WLR 944 (Court of Appeals, England); *See also* Gibaud v. Great Eastern Railway Co., (1921) All ER Rep 35 (Kings Bench Division, England) (here, the plaintiff has left his bicycle at the railway station and received a ticket which exempted the defendant from liability. The defendant failed to put the bicycle in the clock room and it was stolen from the booking hall. On a plea for damages, the Court ruled in favour of the defendant on account of the exclusion clause. The defendant was exempted from the liability as its act was within the four-corners of the contract. If the contract has obligated it to park the bicycle in the clock-room, then its act of leaving the bicycle in the booking hall would be outside the four-corners of the contract and thus, making it liable); Law Commission of India, Report on Unfair Terms in Contract, Report No. 103, 6, 7 (1984).

161 New India Assuance Co. Ltd. v. Yallavva, 2020 SCC OnLine Kar 1660, ¶117.

162 Suisse Atlantique Societed' Armement Maritime SA v. NV Rotterdamsche Kolen Centrale, (1966) 2 WLR 944 (Court of Appeals, England).

163 *See* Photo Production v. Securicor Transport, (1980) 1 All ER 556 (House of Lords, England).

> [e]ven after proving breach of a policy condition regarding a valid license by the driver or his qualification to drive during the relevant period on the part of the insured, the insurer would not be allowed to avoid his liability towards the insured unless the said breach or breaches is/are so 'fundamental' as found to have contributed to the cause of the accident. This is having regard to the 'rule of main purpose'.[164]

According to the law as it stands today, it could be concluded that if an exclusion clause is drafted in clear and unambiguous language, the courts can do nothing but enforce them because there is no rule of law that disallows a party from excluding its liability to any extent. The first step towards changing this line of thought, at least in the context of consumer contracts, has been the recent enactment of Consumer Protection Act, 2019, which came into force on July 2020, where in there is a specific statutory inclusion of 'unfair contract'. However, unlike the UK, India still lacks a general statutory supervision over unreasonable exclusion clauses and thus, the parties are virtually entitled to exclude their liability for fundamental breach as well. The limited jurisdiction vested with the courts is to employ the rule of strict interpretation in order to interpret an ambiguous clause in favour of the party against whom the exclusion clause is drafted or limit the clause in accordance to the main object and intent of the contract. In the words of Carter:

> Notwithstanding the general ability of contracting parties to agree to exclusion clauses which operate to define obligations there exists a rule, usually referred to as the 'main purpose rule', which may limit the application of wide exclusion clauses defining a promisor's contractual obligations.[165]

C. REMEDIES FOR NON-CONFORMITY WITH THE 'STATUTORY REQUIREMENTS'

The above discussion portrays a situation wherein the parties are empowered to exclude their liabilities to any extent. However, such freedom is restricted and parties cannot act in a manner to exclude the application of any law which is applicable to the facts of a particular dispute. For instance, in *Guru Govekar* v. *Filomena F. Lobo,*[166] the petitioner had given his vehicle for repairs and while test driving, the mechanic had caused an accident. When an insurance claim was filed, the insurance company denied payment based on an exclusion clause exempting it from the liability arising out of an accident during the period

[164] Treitel, *supra* note 38, 233.

[165] Yeoman Credit Ltd. v. Apps, (1962) 2 QB 508 (Queens Bench, England); Farnworth Finance Facilities Ltd.v. Attryde, (1970) 1 WLR 1053 (Court of Appeals); Carter, *supra* note 1, 448-551.

[166] New Indian Assuance Company Limited, by its New India Assurance Co. Ltd. v. Yallavva, 2020 SCC OnLine Kar 1660, ¶117. Followed in United India Insurance Co. Ltd. v. Belakerappa, (2021) 11 SCC 780.

when the vehicle was used for hire or testing. The Court rejected such contention and ordered that the insurer would be liable to pay the compensation by virtue of §94 and §95 of the Motor Vehicles Act, 1939, which mandates that an insurance policy must insure against bodily injuries caused to third party out of the use of the vehicle in a public place.[167]

Further, the courts have also employed contextual interpretation to give force to the true purpose of the law. For instance, in *Skandia,*[168] the insured gave the custody of the vehicle to his license-holding driver, who handed control of the vehicle to the cleaner who did not possess a license to drive the vehicle. The insurance policy specifically stated that the owner of the motor vehicle shall be absolutely liable for the events resulting from the driving of motor vehicle by an unlicensed driver. The Court studied §96 of the Motor Vehicles Act,1939 which bars the insurer from excluding its liability except for the grounds mentioned there in, the relevant of which, §96(2)(b)(ii), allows the insurer to absolve its liability when a breach is committed of the condition excluding driving by any person who is not fully licensed. The court provided a context to the provision and noted that it has been inserted to protect the members of the community travelling in vehicles or using the roads from the risk attendant upon the user of motor vehicles on the roads. It was held that 'breach' under this provision shall be construed as a breach committed by the insured.[169] If the insured has ensured that an unlicensed person does not drive the vehicle, the insurer can be held liable.[170] Based on this interpretation, the Court limited the operating domain of the exclusion clause, which absolved the liability of the insurer absolutely, in line with the main purpose of the contract to harmonize the freedom of contract with the purpose of the law.[171] In vain, the correctness of the *Skandia* judgment was challenged before a three judge-bench of the Court in *Sohan Lal Passi* v. *P. Sesh Reddy.*[172] The crux of the reasoning could be best summarized in the word of the Supreme Court: "the motive and philosophy of a provision should be probed, keeping in mind the goals to be achieved by enacting the same[...]".[173] Any argument based on the exclusion

---

[167] J. W. Carter, Carter's Breach of Contract, ¶251 (Law Book Co.,1984) cited in Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, (1987) 2 SCC 654, ¶14; Glynn v. Margetson & Co., 1893 AC 351.

[168] Guru Govekar v. Filomena F. Lobo, (1988) 3 SCC 1; *See* Monk v. Warbey, (1935) 1 KB 75; Vijayanagaram Narsimha Rao v. Ghanshyam Das Tapadia, 1985 SCC OnLine AP 238; Shantibai v. Govindram Sakseria Technological Institute, 1972 SCC OnLine MP 2.

[169] Guru Govekar v. Filomena F. Lobo, (1988) 3 SCC 1, ¶12.

[170] Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, (1987) 2 SCC 654.

[171] New India Assurance Co. Ltd. v. Mandar Madhav Tambe, (1996) 2 SCC 328 (a later judgment, when the insured himself was holding an expired learner's license, the insurer was allowed to enjoy the benefits of the exclusion clause as the breach was committed by the insured himself).

[172] *See* Kashiram Yadav v. Oriental Fire and General Insurance Co., (1989) 4 SCC 128; United India Insurance Co. v. Gian Chand, (1997) 7 SCC 558 (here, the Court exonerated the insurer of liability arising out of an accident by an unlicensed driver on the fact that the insurer himself allowed an unlicensed driver with due knowledge about this fact to driver the vehicle); *See also* Sohan Lal Passiv. P. Sesh Reddy, (1996) 5 SCC 21.

[173] Before the decision in Skandia Insurance Co. Ltd. v. Kokilaben Chandravada, (1987) 2 SCC 654, divergent decisions were given by the High Courts. The Andhra Pradesh High Court (Kilari

clause should flow from the true contextual intent of the particular legislation involved, otherwise, no benefits could be derived from such exclusion.[174] If the court finds that the exclusion clause and the main purpose of the legislation involved are so divergent and harmonization is an impossibility, then as we haveseen, the courts could limit the operation of the exclusion clause in light of the main purpose of the legislation.[175]

The UK Consumer Rights Act, 2015 has envisioned a similar principle but in a rigid form. For instance, §31 lists down multiple provisions of the Act and states that "(1) A term of a contract to supply goods is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under any of these provisions– [...]"[176] Therefore, certain statutory terms have to be made immune from exclusion and thus, restricting the freedom of the parties in order to protect the interests of the consumers.[177]

Based on the above discussion, the paper moots a novel mechanism to deal with the question of whether 'fundamental breach' of the contract could be excluded or not. In the previous part, it was found that an unambiguously and clearly drafted exclusion clause could validly exclude any liability arising out of fundamental breach of the contract owing to the statutory recognition of the doctrine of freedom of contract. However, an alternative way to look at such exclusion clauses is to ask whether they could be harmonised with the statutory provisions and the intent of the legislature. It is argued that the answer is in the negative. §37 of the Indian Contract Act, 1872 obliges the parties to a contract to honour their promises:

> The parties to a contract *must* either perform, or offer to perform, their respective promises, unless such performance is

---

Mammi v. Barium Chemicals Ltd., 1978 SCC OnLine AP 148) and Patna High Court (Dwarka Prasad Jhunjhunwala v. Sushila Devi, 1983 SCC OnLine Pat 35) gave their decisions in line with the reasoning of the Supreme Court in the *Skandia* Judgment. However, the Assam High Court (Sardar Nand Singh v. Abhyabala Debi, 1955 SCC OnLine Gau 41), the Madhya Pradesh High Court (Shanker Rao Prahladrao Joshi v. Babulal Fouzdar, 1980 SCC OnLine MP 42) and the Orissa High Court (Orissa State Commercial Transport Corpn. v. Dhumali Bewa 1981 SCC OnLine Ori 82) had ruled otherwise.

174 Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21, ¶13; Later, Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, (1987) 2 SCC 654, was cited with approval in B. V. Nagaraju v. Oriental Insurance Co. Ltd., (1996) 4 SCC 647.

175 Mukund Dewangan v. Oriental Insurance Co. Ltd., (2017) 14 SCC 663, ¶40.

176 *See* United India Insurance Co. Ltd. v. Lehru, (2003) 3 SCC 338, ¶20 (here, a driver produced a fake license for a job under the insured. On accident, the insurer denied payment. The Supreme Court held that if the license looks genuine and the driver knows the skills of driving, the owner is not expected to find out whether the license has in fact been issued by a competent authority or not. If any accident happens during the course of employment, the insurance company cannot excuse its liability).

177 Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, (1987) 2 SCC 654, ¶14; Glynn v. Margetson & Co., 1893 AC 351 (Court of Appeals, England).

> dispensed with or excused under the provisions of this Act, or any other law.

The intent of the legislature is clear: parties are obligated and have a duty to perform the contract.[178] In case a party fails to honour the promises, it is a breach of contract. Notwithstanding the fact that the Act allows a party to make arrangements regarding prospective liabilities, claiming a complete exemption from consequences arising out of fundamental breach of contract would render the obligation under §37 nugatory, and thus, in effect, be equivalent to the exclusion of §37. It would have an effect of vacating the sanctity of a contract and nullifying the effect of entire 'damages' jurisprudence. Therefore, construing the Indian Contract Act in a harmonious fashion, a clause excluding liability for fundamental breach must be understood as contravening §37 and thus, the courts should determine the appropriateness of such exclusion clauses in light of the main purpose of the statutory law. However, it is clarified that this argument is restricted to the situations involving fundamental breach of contract wherein a party fails to perform the core promise of the contract. It does not, in any manner, intends to argue against the inclusion of exclusion clauses for any other breach, as such clauses are supported by the idea of freedom of contract.

D. REMEDIES AGAINST 'UNCONSCIONABLE TERMS'

In the discussions we had above, the following principle of interpretation of the exclusion clauses is derived: parties can exclude their liabilities to any extent if the terms are notified to the other party, and are clear and reflective of their intent, provided that such exclusion is not contravening the main object of any statutory provision. What happens if the clause is unconscionable? If an unconscionable clause satisfies the said principle, would it been forced by the courts? Atiyah notes that "if the law is to be seriously concerned with substantive justice, there will be occasions in which it will be necessary to override the actual terms of a contract".[179]

The Indian Contract Act does not contain any provision dealing with unconscionability *per se*. Nevertheless, the courts have traced the remedy under §16, which defines undue influence, read with §19A,which makes the contract

---

[178] The UK Consumer Rights Act, 2015, §31 Clause (2) further provides that:

> (2) That also means that a term of a contract to supply good sis not binding on the consumer to the extent that it would –
>
> (a) Exclude or restrict a right or remedy in respect of a liability under a provision listed in subsection (1),
>
> (b) Make such a right or remedy or its enforcement subject to a restrictive or onerous condition,
>
> (c) Allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or
>
> (d) Exclude or restrict rules of evidence or procedure.

[179] *See also* The Consumer Rights Act, 2015 (UK), §§47, 57.

vitiated by undue influence voidable at the option of the affected party, and have allowed arguments claiming that there was undue influence which resulted in the insertion of the impugned unconscionable clause. To claim a remedy under the said provision, the alleged undue influence must have the effect of over powering the volition of the affected party,[180] exerted with an intention to obtain an unfair advantage.[181]

In the pre-UCTA era, the UK courts have also granted relief to the party affected by undue influence owing to an unequal distribution of bargaining power and set aside the contract.[182] However, it has been repeatedly clarified by the Indian courts that unless unequal bargaining power is the result of undue influence, no plea can be made to set aside the unconscionable transaction.[183] The Supreme Court of India has noted that if the parties wilfully enter into an unconscionable bargain, law cannot come to their rescue subsequently.[184]

An illustration to §16 of Act clarifies this situation beyond doubt:

> [...] (d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.[185]

---

[180] Pollock & Mulla, Indian Contract Act, 1872, 738 (2014) citing Magnum Films v. Golcha Properties (P) Ltd., 1983 SCC OnLine Del 114.

[181] Atiyah, *supra* note 7, 297.

[182] Lingo Bhimrao Naik v. Dattatraya Shripad Jamadagni, 1937 SCC OnLine Bom 150; Raja Shiba Prasad Singh v. Tincouri Banerji, 1939 SCC OnLine Pat 314; P. Saraswathi Ammal v. Lakshmi Ammal, 1977 SCC OnLine Mad 33; Alok Kumar Aich v. Asoke Kumar Aich, 1982 SCC OnLine Cal 123.

[183] Poosathurai v. Kappanna Chettiar, 1919 SCC OnLine PC 78; Sathi Sattemma v. Sathi Subbi Reddy, 1962 SCC OnLine AP 62; Ladli Parshad Jaiswal v. Karnal Distillery Co. Ltd., AIR 1963 SC 1279; Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib, AIR 1967 SC 878 (Similarly, Atiyah notes that in order to strike down unconscionable contracts based on the equitable power of the courts, 'some very serious unfairness must be shown, some real use of bargaining power to take advantage of another person'); See Boustang v. Pigott, [1993] NPC 75 (the privy council held that if it were to set aside an unconscionable contract, the defendant must be guilty of some moral culpability, impropriety, actual or constructive fraud. Merely proving the existence of unfair terms would not suffice).

[184] Lloyd's Bank Ltd v. Bundy, 1975 QB 326 (Queens Bench, England); *See* A. Schroeder Music Publishing Co. Ltd. v. Macaula, (1974) 3 All ER 616 (House of Lords, England); Clifford Davis Management Ltd. v. W.E.A. Records Ltd., (1975) 1 All ER 237 (Court of Appeals, England).

[185] Poosathurai v. Kappanna Chettiar, 1919 SCC OnLine PC 78; U. Kesavulu Naidu v. Arithulai Ammal, 1912 SCC OnLine Mad 5; See Law Commission of India, Report on The Indian Contract Act, 1872, Report No. 13, 21 (September, 1958); Lloyd's Bank Ltd. v. Bundy, 1975 QB 326; Syed Noor v. Qutbuddin, 1956 SCC OnLine Hyd 237; National Westminster Bank Plc. v. Morgan, (1985) 1 All ER 821; Chitty, *supra* note 31, at 457.

Thus, under the Indian law, procedural unconscionability attracts the prime focus and substantive unconscionability is placed on a secondary pedestal.[186]

One may also take inspiration from the Canadian legal position, that a *presumption of undue influence or procedural unconscionability* be made when ever the contractual terms are found to be substantively unconscionable. In *Harry* v. *Kreutziger,* the Court of Appeal for British Columbia summarised the standard for proving unconscionability in the following words:

> 14. From these authorities, this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.[187]

In India, however, a universal presumption of undue influence is not statutorily permitted. §16 of the Act states that such a presumption only arises when one of the parties holds a real or apparent authority over the other, stands in a fiduciary relation to the other, or makes a contract with a person whose mental capacity has been affected.[188] Therefore, the invocation of presumption of undue influence is useful only in limited cases like that of employer-employee transactions, and it fails to provide any remedy in a business or consumer transaction.

An exception to this understanding is §23 of the Act. It states that a contract shall be void, inter alia, if the court regards its consideration or object as opposed to publicpolicy.[189] The earliest recorded Indian case on the aspect of unconscionability under §23 is *Sheik Mahamad Ravuther* v. *British India Steam Navigation Co. Ltd.*,[190] decided by the Madras High Court in 1909. In this case, the defendant company inserted an exclusion clause to exempt itself from any liability arising out of the negligent conduct of its servants. Though the majority upheld the exclusion clause, the dissent of Shankaran Nair,J. stating that exclusion clause

---

[186] S. K. Jain v. State of Haryana (2009) 4 SCC 357, ¶8; *See* Sundarambal Ammal v. Yogavanagurukkal, 1914 SCC OnLine Mad 22; Mackintosh v. Wingrove, 1878 SCC OnLine Cal 133; Satish Chunder Giri v. Hem Chunder Mookhopadhya, 1902 SCC OnLine Cal 220; *See also* Karnal Distillery Co. Ltd. v. Ladli Parshad Jaiswal, 1960 SCC OnLine Punj 289; *See also* Raghunath Altia v. Arjuno Altia, 1972 SCC OnLine Ori 102.

[187] The Indian Contract Act, 1872, §16, Illustration (d).

[188] See Law Commission of India, Report on Unfair (Procedural and Substantive) Terms in Contract, Report No. 199, 16-53 (2006).

[189] Harry v. Kreutziger, (1978) 9 BCLR 166; 1978 CanLII 393 (BCCA); *See alsp* Augusto C. Lima, *When Harry Met Kreutziger: A Look Into Unconscionability from the Lenses of Culture*, CLEA 2008 Meetings Paper, April 30, 2008, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1124922 (Last visited on December 8, 2020).

[190] The Indian Contract Act, 1872, §16(2).

is opposed to public policy under §23 and thus, the defendant company is liable for negligence, is significant. In later cases, the courts have accepted this dissent and held that unconscionable contracts are against public policy.[191] For instance, in *Lilly White* v. *Mannu Swami*, the question before the Madras High Court was whether a dry-cleaner could insert a clause stating that in case the articles are lost, the customers will be 'entitled to claim only 50 per cent of the market price or value of the articles.'[192] Upholding the opinion that such a clause creates an incentive for the dry-cleaners to misappropriate the articles, the Court held that "a term which is prima facie opposed both to public policy and the fundamental principles of the law of contract, cannot be enforced by a court, merely, because it is printed on the reverse of a bill and there is a tacit acceptance of the term when the bill was received by the customer".[193] Even the Law Commission of India was assertive that §23 "comprehends the protection and promotion of public welfare. It is a principle of law under which freedom of contract or private dealings are restricted by the law for the good of the community".[194]

Be that as it may,the Indian courts have shown unusual resistance in invoking §23 in private business contracts by strictly focusing on the idea of freedom of contract.[195] Also, not all exclusion clauses would defy the principles of public policy.[196] Therefore, it can be safely concluded that the existing remedies under the Contract Act seem insufficient to deal with the unreasonableness of contractual terms. In the years to come, we will the range of possible interpretation by the courts on the tests of 'unfairness' especially under the new Consumer Protection Act, 2019.

IV. THE WAY FORWARD

Provisioning for a statutory security against economic dominance and circumstantial powerlessness could be both philosophical argument and a constitutional imperative as well. In *People's Union for Democratic Reforms* v. *Union of India,*[197] the Supreme Court of India was tasked to decide upon whether the right against forced labour under Article 23 of the Indian Constitution includes

---

[191] The Indian Contract Act, 1872, §23.

[192] S. K. Mahamad Ravuther v. British India Steam Navigation Co. Ltd., 1908 SCC OnLine Mad 151 : ILR (1909) 32 Mad 95.

[193] Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156; *See* Lilly White R. Munuswami, 1964 SCC OnLine Mad 323; International Oil Co. v. Indian Oil Corpn. Ltd, 1968 SCC OnLine Mad 247.

[194] Lilly White v. R. Munuswami, 1964 SCC OnLine Mad 323.

[195] *Id*.

[196] See Law Commission of India, Report on Unfair (Procedural and Substantive) Terms in Contract, Report No. 199, 16-53 (August, 2006).

[197] S.K. Jain v. State of Haryana, (2009) 4 SCC 357; *See* Fender v. St. John Mild May, 1938 AC 1 (12) ("The doctrine should only be invoked in clear cases in which the harm to the public is substantially in contestable, and does not depend upon the idiosyncratic inferences of a few judicial minds."); Similar approach was adopted in the Indian jurisdiction in Gherulal Parakh v. Mahadeodas Maiya, AIR 1959 SC 781:

the right to minimum wages or not. The Supreme Court, adopting a transformative approach,[198] held that 'force' does not merely mean physical force but includes "any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of actions".[199] The Court further indicated that owing to economic subjugation or circumstantial powerlessness "he [an individual] would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly forced labour[…]".

This presents a classic, though extreme, analysis of how unequal bargaining power among the parties to a contract of employment shape the contract in favour of the employer. Such situations continue to exist, mostly through the use of exclusion clauses as part of standard form contracts, but with varied degrees of dominance depending on the nature of transactions and socio-economic standing of the parties involved. Ambedkar had repeatedly stated that "Constitution existed to protect individual liberty by regulating the unequal relations of power that existed between employers and employees in the market economy".[200] We argue it is both constitutional imperative and requirement of reforms in the Indian contract law that the law makers should consider incorporating measures that aim to strike substantive fairness, which shall ensure that any contractual language reflecting economic dominance or circumstantial powerlessness is open for judicial scrutiny.[201]

One interesting step towards this end was taken recently by the Indian Parliament in the form of the Consumer Protection Act, 2019, which partially came into force from July 20, 2020.[202] It must be analysed in contrast with the UK Consumer Rights Act, 2015. The UK law envisages an entire section of the statute – Part 2 – for dealing with unfair contracts and then goes on to prescribe a

"It (public policy) has been described as an untrustworthy guide, variable equity, unruly horse, etc. … though it is permissible for the courts to expand public policy and apply them to different situations, it should be invoked in clear and in contestable cases of harm to the public

…it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days".

198 Law Commission of India, Report on Unfair Terms in Contract, Report No. 103, 5 (May, 1984): "Section 23 of the Contract Act which provides that the consideration or object of an agreement is lawful, unless the court regards it as immoral, or opposed to public policy, is not of much use in meeting the present situation (regarding unfair contracts), because courts have held that the heads of public policy cannot be extended to a new ground in general, which certain exceptions, and that *the term of a contract exempting one party from all liability is not opposed to public policy*".

199 People's Union for Democratic Reforms v. Union of India, (1982) 3 SCC 235.

200 Gautam Bhatia,The Transformative Constitution, 169-212 (2019) (The task of constitutional law was to regulate the shape and form of economic structure of society in order to protect the individual liberty).

201 People's Union for Democratic Reforms v. Union of India, (1982) 3 SCC 235, ¶14.

202 Bhatia, *supra* note 204, 196.

non-exhaustive list of illustrations of unfair terms in Part1 of Schedule 2. The first two illustrations specifically deal with exclusion clauses.[203]

When it comes to the Indian law, the 2019 Act statutorily addresses unfair contracts for the first time and grants discretionary powers to the judges to deem an exclusionary clause asunfair.[204] It is upon the Indian courts now to interpret the law and lay down its operative domain. It is hoped they shall earnestly take into account the learnings from other jurisdictions and develop the law providing for all the challenges discussed above.

Though the Indian law has introduced the idea of statutory protection against substantive unconscionability and has progressed towards investing statutory power in the judiciary through the Consumer Protection Act, 2019 to scrutinise consumer contracts, the inadequacy of addressing unfairness and unconscionability in general principles of contract law remains. We argue in favour of reforms by adopting any of the following mechanisms. *First,* an amendment be made in the Indian Contract Act in accordance to the Law Commission's suggestions intending to grant discretion to the courts to deem a contract as unenforceable based on *substantive unconscionability.* In its 103rd Report, the Commission had recommended for the insertion of draft §67A in the Contract Act that would read as follow:

(1) Where the Court, on the terms of the contract or on the evidence adduced by the parties, comes to the conclusion that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that it holds to be unconscionable.

(2) Without prejudice to the generality of the provisions of this Section, a contract or part of it is deemed to be unconscionable if it exempts any party thereto from – (a) the liability for wilful breach of the contract, or (b) the consequence of negligence.[205]

---

[203] B. Shiva Rao, The Framing of India's Constitution, Vol. 2, 100-101 (Universal Law Publishing, 2015). ('The useful remedy adopted by democratic countries is to limit the power of Government to impose arbitrary restraints in political domain and to invoke the ordinary power of the legislature to restrain the more powerful individual from imposing arbitrary restraints on the less powerful in the economic field.').

[204] Ministry of Consumer Affairs, Food and Public Distribution, S.O. 2351(E), (Notified on July 15, 2020).

[205] Consumer Rights Act, 2015 (UK), Schedule 2: Consumer contract terms which may be regarded as unfair, Part1:"List of terms:

1. A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader.
2. A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader."

This shall invest the court with the power to scrutinise unconscionable clauses independent of the argument on 'freedom of contract' or 'undue influence'. This provision is drafted in a similar fashion as has been envisioned under §2-302 of the United States Uniform Commercial Code:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.[206]

These provisions can be made further dynamic and equitable by inserting another level of inquiry on the lines of the Canadian law. In *Tercon Contractors Ltd*. v. *R*., the Supreme Court of Canada laid down a three-part test that courts must apply while adjudicating on the enforceability of exclusion clauses:

> [121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effects of an exclusion clause or other contractual terms to which it had previously agreed.
>
> [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. […] If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made , "as might arise from situations of unequal bargaining power between the parties"…

[206] Consumer Protection Act, 2019, §2(46):

"unfair contract" means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely:-

(i) Requiring manifestly excessive security deposits to be given by consumer for the performance of contractual obligation; or
(ii) Imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party or to the contract; or
(iii) Refusing to accept early repayment of debts on payment of applicable penalty; or
(iv) Entitling a party to the contract to terminate such contracts unilaterally, without reasonable cause; or
(v) Permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or
(vi) Imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage.

[123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that overweighs the very strong public interest in the enforcement of contracts.[207]

The three-part test, thus, requires a court to first determine the applicability of the exclusion clause, then reach a finding on unconscionable nature of the clause employing the test as stated earlier in this paper, and lastly, if the exclusion clause is not found as unconscionable, then determining whether the clause if barred by the overarching public policy. The third part – testing the exclusion clause against public policy – is a novel addition to the US law and Law Commission's suggestion, and has the power to bring in significant changes in the current understanding of 'public policy' as a vitiating element for private contracts. Recall that §23 of the Indian Contract Act already deems contracts based on those objects and consideration that are opposed to public policy as unenforceable. However, the application of §23 is majorly restricted to government contracts and the courts refrain frominvoking it in disputes arising out of private contracts. The inclusion of the third-leg of the Canadian standard can help courts extend the application of 'public policy'[208] arguments to private contracts as well.

Second, a law in India be enacted on the lines of the Unfair Contract Terms Act,1977. The preamble of the UCTA provides us a necessary sense of the scope of the law:

> An Act to impose *further limits* on the extent to which … civil liability for breach of contract, or for negligence or other breach of duty, can be avoided by means of contract terms and otherwise.[209]

§2(3), the crown jewel of the UCTA, acknowledges that an individual's signature or awareness of an exclusion clause *does not* necessarily indicate her *voluntary acceptance* of the clause.[210] This indicates that signature on contractual documents would not debar the courts from still accepting evidence for undue influence, thereby giving preference to the idea of substantive fairness over the enforceability of any contract merely on the basis of one's signature. Three relevant provisions dealing with exclusion clauses provide as follows:

---

[207] Law Commission of India, Report on Unfair Terms in Contract, Report No. 103, 9 (May 1984).
[208] The Uniform Commercial Code-Sales (2002), §§2-302 (United States).
[209] Tercon Contractors Ltd. v. R., 2010 SCC OnLine Can SC 4.
[210] For an elaboration on the phrase '*public policy*', *see* Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶92.

i. §2 of the Act absolutely restricts the freedom of the parties to exclude liability for death, personal injury. Further, liability for loss or damage owing to negligence can be avoided only by giving necessary notice of the same and such notice satisfies the requirement of reasonableness.[211]

ii. §3 of the Act pertains to liability arising out of standard form contracts and restricts the power of the drafter to exclude its liability for breach unless such exclusion satisfies the requirements of reasonableness.

iii. §11 elaborates on the 'reasonableness test' and provides that 'the term shall have been 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.' In effect, §11 grants statutory sanction to the requirements of notice and situates discretion with the judiciary to strike a contractual term for unreasonableness.[212]

The Law Commission of India, in its 199th Report, has already annexed a mutated form of the UCTA, named as the Unfair (Procedural and Substantive) Terms in Contract Bill, 2006.[213] The Bill attempts to implement a law on the lines of Unfair ContractTerms Act, 1977 intending to invest jurisdiction with the courts to 'grant certain reliefs to relieve the parties from the effect of unfairness in contracts.'[214]

V. CONCLUSION

One of the prime features of a modern state is free contracting, the mannerism of which must be determined by the industry. Indian contract law adopts a similar approach in allowing the insertion of any exclusion clause if it has been clearly drafted; inserted in the contract after giving proper notice to the other party; and is not vitiated by procedural unconscionability. Unfair and unconscionable contract terms test this fundamental idea of freedom of contract. General principles of Indian contract law are currently inadequate to handle remedies for substantive unconscionability. Entities with higher bargaining power are free to incorporate unreasonable exclusions in the contract by merely abiding by certain procedural requirements while benefitting from the *circumstantial powerlessness* of the other party. The law thus creates separate compartments for procedural and substantive fairness, even when they both are balanced against each other, largely.[215] A law cannot function in a just manner if it merely focuses on procedural

[211] The Unfair Contract Terms Act, 1977, Preamble (UK).

[212] The Unfair Contract Terms Act, 1977, §2(3) (UK) ('Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk').

[213] The Unfair Contract Terms Act, 1977, §2(2).

[214] Anson, *supra* note 1, 208.

[215] See Law Commission of India, Report on Unfair (Procedural and Substantive) Terms in Contract, Report No. 199, 228-240 (August, 2006).

fairness and ignores to ensure substantive fairness. It is not a surprise that courts have also followed this understanding while developing the '*ad-hoc* 'solutions. In light of the discussion above, and similar to the Consumer Protection Act 2019, we call for reforms to the Indian Contract Act, 1872 envisaging judicial discretion to rule on unreasonable and unfair terms.