

LAW COMMISSION OF INDIA

199<sup>TH</sup> REPORT

ON

UNFAIR (PROCEDURAL & SUBSTANTIVE)

TERMS IN CONTRACT

AUGUST 2006

JUSTICE M. JAGANNADHA RAO  
CHAIRMAN

**LAW COMMISSION OF INDIA**

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Dear Shri Bhardwaj Ji,

Sub: Report No.199 of the Law Commission on ‘Unfair (Procedural and Substantive) Terms in Contracts’.

The subject of ‘Unfair Terms In Contract’ has attained grave importance in recent times not only in relation to consumer contracts but also in regard to other contracts. In 1984, the 103<sup>rd</sup> Report of the Law Commission was submitted and it was suggested that a single section (sec. 67A) be incorporated in the Indian Contract Act, 1872 with two subsections invalidating exclusion of liability for negligence and for breach of contract. That section, however, did not contain any general provision to deal with unfairness.

Recent Developments:

But, since 1984, there have been significant developments in other countries and detailed statutes have been enacted or proposed and there are voluminous Reports of the Law Commissions such as the Report of the Law Commission of England and Scotland (2004), the Report of the South African Law Commission, 1998, the Interim Report of the British Columbia Law Institute, 2005, the Discussion Paper of the Standing Committee of

Officers of Consumer Affairs, Victoria (Australia), 2004, Report of the New Zealand Law Commission, 1990 and Ontario Law Reform Commission, 1987, etc.

In view of these developments in other countries, the Law Commission has taken up a detailed study of the subject suo motu. The Commission has referred to the statutes and Law Commission Reports of various countries in relation to unfair terms.

Unfair terms of contract law will not affect foreign investment:

At the outset, we would like to refer to an argument that introduction of a law on 'unfair terms' may prejudicially affect foreign investment in India. In this context, we may point out that the South African Law Commission 1998 has strongly refuted such an argument and stated that when such 'unfair terms' laws exist in several countries including UK, USA, Australia, New Zealand, Canada etc., a situation will be reached when South Africa would suffer a great disadvantage if it did not have one such law. We are of the same opinion so far as India is concerned (see our introductory chapter). Our business and commerce will be put to serious disadvantage if we do not have a law regulating unfair terms of contract.

Need for additional provisions apart from provisions of Indian Contract Act, 1872 and Specific Relief Act, 1963:

We have discussed in detail the existing provisions as regards voidable and void contracts under the Indian Contract Act, 1872, as well as non-enforcement of contracts where there is unfairness or hardship, as contained in the Specific Relief Act, 1963. We have proposed that the provisions of these two statutes need not be disturbed. We, however, propose, in addition, separate set of general provisions to deal with unfair terms of contracts. In view of the need to protect consumers and particularly to grant protection from the disadvantages of extensive introduction of standard terms of contracts which are one-sided, it has become necessary to evolve general principles regulating unfairness in contracts. It is in this area that there are new legislations in other countries. These new laws on unfairness elsewhere contain several important provisions intended to protect the weaker party against the stronger. Further, those statutes also contain a long list of guidelines to adjudge unfairness. The UK Bill of 2004 annexed to the Report of the Law

Commission of UK and Scotland (2004) is perhaps the longest of any such statutes and it divides the discussion of unfairness in relation to consumer contracts, small businesses and other big businesses. That Bill contains a large number of schedules which deal with ‘do’s’ and ‘don’ts’.

Therefore, it has become necessary to provide additional provisions in India for redressal against unfair terms of contracts, apart from the existing provisions contained in the Indian Contract Act and Specific Relief Act.

‘Procedural’ and ‘substantive’ unfairness in contracts:

While a law to deal with unfairness in contracts is necessary, the more important aspect is the division of unfairness into ‘procedural’ and ‘substantive’ unfairness. Such a division has not been done in any country so far, but there are several articles by jurists that such a division is necessary. They point out that the laws in several countries have created a lot of confusion because they are a ‘mish-mash’ of procedural and substantive unfairness. We agree that such a division is absolutely necessary. With that in view, we have examined the statutes of various countries and for our convenience and for purposes of our research, we have segregated the provisions in those countries into ‘procedural’ and ‘substantive’ ones with a view to have separate focus on those two aspects.

In this Report and the Bill annexed to this Report, we have, therefore, defined ‘procedural unfairness’ and ‘substantive unfairness’ separately and have also provided separate guidelines for each of them. We shall briefly refer to these proposals.

General ‘procedural’ unfairness and guidelines thereto:

A contract or a term thereof is procedurally unfair if it has resulted in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party or the manner in which or the circumstances under which the contract has been entered into or the term thereof has been arrived at by the parties (see sec. 5 of the Bill).

We have provided separate statutory guidelines in sec. 6 to enable the Court to decide on procedural unfairness.

General ‘substantive’ unfairness and guidelines thereto:

We have likewise introduced a provision in sec. 12 relating to ‘general substantive unfairness’ which says that a contract or a term thereof shall be treated as unfair if the contract or terms thereof are by themselves harsh, oppressive or unconscionable.

Sec. 13 contains guidelines to adjudge substantive unfairness.

In addition, we have referred to three specific situations in sections 9, 10, 11 of the proposed Bill where “substantive” unfairness has to be presumed. (i) Sec. 9 of the Bill corresponds to sec. 67A as proposed in the 103<sup>rd</sup> Report of the Law Commission of India (1984) and it invalidates (a) exclusion or restriction of liability for negligence; and (b) exclusion or restriction of liability for breach of contract. So far as exclusion of liability for breach of contract is concerned, we have added the words “without adequate justification” in the light of similar provisions abroad. (ii) Then we have proposed sec. 10 in the Bill and that section deals with the exclusion or restriction of the rights, duties or liabilities referred to in sec. 62 of the Sale of Goods Act, 1930 without adequate justification; and (iii) We have also proposed sec. 11 in the Bill and it deals with the unfair practice of incorporating choice of law clauses in contracts needlessly requiring the application of a foreign law, despite the fact that the contract has no foreign element at all. These three sections 9, 10 and 11 deal with specific types of “substantive” unfairness, in addition to the general provision of ‘substantive’ unfairness in sec. 12.

Burden of proof:

We have also proposed a provision in sec. 14 as regards burden of proof in the case of ‘general substantive’ unfairness falling within clause (b) of sec. 9 (exclusion of liability for breach of contract) and sec. 10 (exclusion of liabilities etc. as are referred to in sec. 62 of Sale of Goods Act, 1930) and the burden will be on the person relying on such exclusions or restrictions referred to in those sections to prove that there is adequate justification for exclusion of liability.

Provisions to apply to executed contracts:

Another provision of considerable importance, which is found in other countries is that the provisions of the proposed Act will apply also to 'executed contracts'. But, unlike similar provisions elsewhere, we have stated that for that purpose, the Court will have to consider whether and to what extent restitution is possible and where such restitution is not possible, either wholly or partly, whether compensation can be granted.

Court to suo motu raise issues of unfairness of contract or terms: (sec. 16)

Yet another provision which is similar to the one abroad is the one relating to the Court's power to raise an issue of unfairness or a term thereof on its own, even if the parties have not raised such a plea.

Reliefs to be granted by Court: (sec. 17)

We have proposed that the Court can grant various reliefs if there is procedural or substantive unfairness. The reliefs include non-enforcement of contract or its terms, declaring the terms as not enforceable or void, varying the terms so as to remove unfairness, refund of consideration or price paid, compensation or damages and permanent injunction and mandatory injunction etc.

Act not to apply to some contracts:

The proposed Act will not apply to service contracts between employer and workmen under the labour laws in force; nor to public employment under the Central Government or State Governments or their instrumentalities or employment under local authorities, or under public sector undertakings of the Central or State Governments, or to employment under corporations or bodies established by or under any statutes made by Parliament or State Legislatures, or to international treaties or agreements.

We have also listed the existing 'procedural' provisions of the Contract Act, 1872 and Specific Relief Act, 1963 which are procedural in

nature in sections 3 and 4 and the existing 'substantive' provisions of those Acts in sections 7 and 8. Of course, those Acts are not disturbed.

Act to apply to matters in civil courts, consumer fora and arbitral tribunals:

It is proposed that the new provisions of the Act will be applicable to civil courts, consumer fora under the Consumer Protection Act, 1986 and to the arbitral tribunals under the Arbitration and Conciliation Act, 1996.

The proposal also is to make the Act applicable to contracts entered into after the commencement of the proposed Act.

We hope that this Report and Bill which for the first time divides unfair terms into 'procedural' and 'substantive' terms, will meet an urgent need of persons who are parties to contracts in the markets today as well as to other contractual transactions.

Yours sincerely,

(M. Jagannadha Rao)

Shri H.R. Bhardwaj  
Union Minister for Law and Justice  
Government of India  
Shastri Bhawan

**NEW DELHI.**

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## **CHAPTER-I**

### **INTRODUCTORY**

The subject of ‘Unfair (Procedural and Substantive) Terms of Contract’ has assumed great importance currently in the context of tremendous expansion in trade and business and consumer rights. In the last two decades, several countries have gone in for new laws on the subject in order to protect consumers and even smaller businessmen from bigger commercial entities. Several Law Commissions across the world have taken up the subject for study and recommended new legislation. The British and Scottish Law Commission has prepared its latest Report in 2004 on ‘Unfair Terms in Contracts’ (Law Com No. 292, Scot Law Com No. 199) with a new draft Bill annexed to the Report after reviewing its earlier laws. The South African Law Commission, in its Report in 1998 on ‘Unreasonable Stipulations in Contracts and the Rectification of Contracts’ has reviewed the comparative law in several countries and has come forward with a draft Bill. The Discussion Paper of 2004 from Victoria (Australia) proposed by the Standing Committee of Officials of Consumer Affairs, the Interim Report of 2005 from Canada (British Columbia) prepared by British Columbia Law Institute and the Reports of the New Zealand Law Commission and Ontario Law Commission, etc. have added new dimensions to the subject.

The Law Commission of India in its 103<sup>rd</sup> Report (1984) on “Unfair Terms of Contract”, had dealt with the subject and proposed insertion of section 67A into the Contract Act. In as much as new concepts have been built into the subject in the last two decades, the Law Commission of India has taken up the subject afresh for further study.

The main highlight of this Report is the consideration of Unfair Terms of Contract by separating the ‘procedural unfairness’ and the ‘substantive unfairness’ in the matter of contracts or their terms. In the statutes in force or Bills prepared by other Law Commissions, while it is recognized that contracts or their terms may be unfair either on account of ‘procedural unfairness’ or on account of ‘substantive unfairness’, the discussion as well as the provisions of the statutes/Bills does not treat these aspects separately. In fact, in some countries, while the distinction is realized, there is no consideration of the concepts separately and the result is that several sections combine ‘procedural unfairness’ and ‘substantive unfairness’. The specialty of our Report is that not only have we tried to segregate the procedural and substantive unfair provisions of other countries in separate chapters, we have also kept the concepts separately in the Bill annexed to this Report.

What we mean by ‘procedural unfairness’ is whether there is unfairness in the manner in which the terms of the contract are arrived at or are actually entered into by the parties, or in the circumstances relating to the events immediately before the entering into the contract, or in the conduct of the parties, their relative position, or literary knowledge, or

whether one party had imposed standard terms on the other or whether the terms were not negotiated. These and other circumstances relate to procedural unfairness.

What we mean by ‘substantive unfairness’ is that a term by itself may be either one-sided, harsh or oppressive or unconscionable and therefore unfair. One party may have excluded liability for negligence or for breach of contract or might have imposed terms on the other which are strictly not necessary or might have given to himself power to vary the terms of the contract unilaterally etc. Such terms could be unfair by themselves.

The Indian Contract Act, 1862 has several provisions relating to ‘voidable contracts’. These provisions deal with undue influence, coercion, fraud, mistake, misrepresentation etc. These are indeed ‘procedural’ provisions already contained in the Act. Likewise, the Contract Act deals with ‘void’ contracts or ‘void’ terms. These are ‘substantive’ provisions already contained in the Act. Similarly, the Specific Relief Act, 1963 contains provisions for granting relief where there is procedural or substantive unfairness.

But, what is now proposed in this Report and the Bill is to provide additional provisions of ‘procedural unfairness’ and ‘substantive unfairness’ and remedies for removing such types of unfairness.

These new remedies can be granted by the Civil Courts, arbitral tribunals and the consumer fora under the Consumer Protection Act, 1986.

The British and Scottish Law Commissions have indeed stated in their joint Report of 2004 referred to above that ‘both substantive unfairness’ (the substance and effect of the term) and ‘procedural unfairness’ (the circumstances existing at that time) must be taken into account.

Goldring and others have complained that the Australian Unfair Terms statutes have failed to distinguish between procedural and substantive unconscionability. The Discussion Paper, 2004 from Victoria (Australia) refers to the above statutes and states that ‘the current regimes in Australia have created some confusion in practice because of their failure to distinguish between procedural and substantive unfairness’. The Paper states that in the Australian statutes such as the (NSW) Trade Practices Act, Uniform Consumer Credit Code, “the list of factors to which the court is required to have regard, in determining whether a contract is unjust, is a mish mash of process-oriented and outcome-oriented considerations”.

The above Discussion Paper also states that whilst it has been argued that there is probably sufficient coverage of the procedural aspect of unfair contract terms, still the criticism noted earlier by Goldring et al, that current Australian legislation is problematic in that it does not distinguish between procedural and substantive issues, is considered to be valid. In order to create clarity, the opportunity might be undertaken, whilst addressing the issue of unfairness of contract terms, to rectify this situation. The Discussion Paper also stated:

“There would be better Court outcomes for aggrieved individuals due to the differentiation between procedural and substantive matters.”

Indeed, the earliest source for distinguishing between ‘procedural’ and ‘substantive’ unfairness is a paper of 1967 by Arthur Allen Leff, Asstt. Prof. Washington University Law School, on ‘Unconscionability and the Code – The Emperor’s New Clause’, published in (1967), University of Pennsylvania Law Review, p 485.

Arthur Leff comments on Section 2-302 of the Uniform Commercial Code (ESA) as follows:

“If reading this section makes anything clear, it is that reading his section alone makes nothing clear about the meaning of ‘unconscionable’ except perhaps that it is pejorative. More particularly, one cannot tell from the statute whether the key concept is something to be predicated on the bargaining process or on the bargain or on some combination of the two, that is, to use our terminology, whether it is procedural or substantive.... The draftsman failed fully to appreciate the significance of the unconscionability concepts necessary “procedure – substantive” dichotomy and that such failure is one of the primary reasons for section 2-302’s final amorphous unintelligibility and its accompanying comment’s final irrelevance.”

Unfair Terms legislation not an obstacle to foreign investment:

Our proposals for introducing unfair or unconscionable terms in India would not isolate the contracting parties nor inhibit foreign investment and trade. Such a concern was raised by number of respondents but was rejected in the Report given by South African Law Commission on ‘Unreasonable Stipulations In Contracts And The Rectification of Contracts (1998)’ on the ground that when several countries have made laws to curb unreasonable contracts, South Africa would stand at a disadvantage if it did not have such laws. The Report stated:

“The Commission notes the concern in respect of the possibility that foreign investors and contracting parties might be discouraged from concluding contracts in South Africa should the law enable the courts to review contracts in order to determine whether they comply with principles of contractual fairness. The Commission notes that apart from there being local calls for the recognition of fairness in contracts, measures have lately been adopted and existing ones extended in foreign jurisdictions who have recognized the need to regulate unfair contracts. In view of this factual situation it seems to the Commission that the argument raised by some respondents that the introduction of measures against unfair or unconscionable terms would isolate South African contracting parties and inhibit foreign investment and trade, should be critically evaluated. It seems to the Commission that South Africa would rather become the exception and its law of contract would be deficient in comparison with those countries which recognize and require compliance with the principle of good faith in contracts.”

It is in the light of the above criticism in several countries that, we have felt that it is necessary

- (1) to segregate the existing provisions of the Indian Contract Act, 1872 and the provisions of the Specific Relief Act, 1963 in so far as they relate to voidable contracts and void contracts, respectively into ‘procedural provisions’ and ‘substantive provisions’, and
- (2) to add to these
  - (a) a specific definition of ‘procedural unfairness’ and provide specific guidelines for judging if there is procedural unfairness, and
  - (b) a specific definition of ‘substantive unfairness’ and provide specific guidelines for judging if there is substantive unfairness.
- (3) to list remedies which can be granted to relieve parties from procedural and substantive unfairness.

The proposed Bill is a detailed one, which perhaps for the first time in any country is dealing separately with ‘procedural’ and ‘substantive’ unfairness. That is why we have named this Report as “Unfair (Procedural and Substantive) Terms in Contracts Report”. The proposed Bill is named “Unfair Terms (Procedural and Substantive) of Contracts Bill, 2006”.

## **CHAPTER-II**

### **THE PRESENT STATE OF LAW IN INDIA AND NEED FOR IMPROVEMENT:**

At present, contracts could be declared void or voidable in a court of law only if it falls under one or other of the provisions of the Indian Contract Act, 1872 which make such terms void or voidable. There is, as of today, no general statutory provision in the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 whereby the courts can give relief to the consumer/weaker party by holding such terms in contracts as void on the ground of their being unreasonable, or unconscionable or unfair.

#### **'Unconscionable' Contract Under Section 16 of the Indian Contract Act, 1872:**

One of the relevant provisions of the Indian Contract Act, 1872 which refers to the inequality of bargaining power between parties and of unfair advantage of one party over the other, is contained in section 16 dealing with 'undue influence'. The situation is a mix up of procedural and substantive unfairness and subsection (3) only raises a presumption. We shall presently refer to that section.

Section 16 has three subsections. The first and second subsections deal with procedural unfairness and reads as follows:



“Section 16 ‘Undue influence’ defined: (1) A contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and use that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing ..., a person is deemed to be in a position to dominate the will of another –

- (a) when he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or
- (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.”

(ii) Subsection (3) of sec 16:

The other relevant provision is sub-section (3) of section 16 which refers to the aspect of burden of proof in ‘unconscionable transactions’ induced by ‘undue influence’. Sub section (3) of section 16 and illustration (c) are reproduced as under:-

"16(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be **unconscionable**, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in sub section shall affect the provisions of section 111 of the Indian Evidence Act, 1872."

"Illustration (c): A being in debt to B, the money lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence."

Thus, it will be seen that even sub-section (3) of section 16, deals with unconscionability which is an aspect of 'substantive' unfairness but links it up with 'procedural' unfairness of domination of will. Sub-section (3) of section 16, it must be noted, does not enable the Court, to strike down the unconscionable terms, but only enables raising a presumption.

What does the term "unconscionable" mean? We may look at the Legal Glossary (Government of India 2001 P.351). It defines the word "unconscionable" as 'irreconcilable with what is right or reasonable'. Unconscionability, in relation to contracts, has generally been recognized to include absence of a meaningful choice on the part of one of the parties to avoid the contractual terms which unreasonably favour one party against the other party. Whether a meaningful choice is present in a particular case can

only be determined by consideration of all the circumstances surrounding the transaction.

Regarding this aspect of burden of proof, reference may be made to the 103<sup>rd</sup> Report of the Law Commission on Unfair Terms in Contract (1984), where the Commission pointed out that sub-section (3) of section 16 has been interpreted by the Privy Council (Poosathurai v. Kannappa Chettair (1919) ILR 43 Mad 546 (PC)) as meaning that both the elements of dominant position and the unconscionable nature of the contract will have to be established, before the contract can be said to be brought about by undue influence. This decision, though old, has not been departed from. However, the Law Commission of India in the 13<sup>th</sup> Report on Contract Act, 1872 (at p 21) stated that there are some cases in which, on principles of equity, relief has been given against hard and unconscionable bargains even though there is no question of undue influence. In an early Madras case, in U. Kesavulu Naidu v. Arithulai Ammal (1912) ILR 36 Mad 533 it was, in fact, held that unless undue influence was specifically proved, no relief should be granted on the ground of unconscionable nature of a contract. Can such a situation be allowed to continue?

### **Section 23 of the Indian Contract Act, 1872: Illegality and public policy**

One other relevant provision which needs to be discussed is Section 23 of the Contract Act: This deals with ‘substantive’ matters which invalidate a contract but does not refer to ‘unconscionability’ specifically.

Section 23: What considerations and objects are lawful and what not:

The consideration or object of an agreement is lawful, unless –

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another,

or

the Court regards it as immoral or opposed to public policy.

The section does not speak of ‘unconscionability’ as one of the grounds. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Section 23 provides that the consideration or object of an agreement is lawful, unless it is forbidden by law or unless they are such a nature that if permitted, they would defeat the provision of any law; or are fraudulent; or involve or imply, injury to the person or property of another; or the court regards it as immoral or opposed to public policy. The last clause in section 23 thus declares that no man can lawfully do that which is opposed to public policy. It 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.

The Indian Contract Act does not define the expression ‘public policy’ or what is meant by being ‘opposed to public policy’. From the very nature of things, the expressions “public policy”, “opposed to public policy”, or “contrary to public policy” are incapable of precise definitions.

Unlike, in cases falling under section 16 which permits a party to avoid a contract, section 23 enables a Court to hold clauses opposed to law or public policy, to be void ab initio.

### **Section 23 and Public Policy**

The circumstances in which a contract is likely to be struck down as one opposed to public policy are fairly well established in England. Lord Halsbury refers to certain contracts such as “... contract of marriage brokerage, the creation of perpetuity, a contract in restraint of trade, a gaming or wagering contract, or what is relevant here, the assisting of the King’s enemies, are all undoubtedly unlawful things”, and that these are grounds of public policy (Earl of Halsbury L.C. in Janson vs. Drienfontein Consolidated Mines Ltd. [1902] A.C. 484 at 491-92).

The ordinary function of the court is to rely on the well-settled heads of public policy and to apply them to varying situations. If the contract in question fits into one or the other of these pigeons-holes, it may be declared void (Asquith J., Mank L and v. Jack Barclay Ltd. [1951] All ER 714 at 723). The courts may, however, mould the well-settled categories of public policy to suit new situations in a changing world. But may a court invent a new head of public policy? This question is still under debate.

According to Lord Halsbury the categories of public policy are closed. “I deny”, he said that any court can invent a new head of public policy”. But, public policy is a vague and unsatisfactory term”. Even so, “From time to time judges have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field. Lord Atkin in Fender V. St. John Mild May 1938 AC 1 (p 12) further said that “the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds”.

In the same strain, about hundred eighty years ago in Richardson vs. Mellish (1824) All ER 258, Burrough, J., protesting against public policy, said that “it is a very unruly horse, and when once you get astride it, you never know where it will carry you”.

The orthodox view on public policy in India was explained nearly fifty years ago, by Subba Rao, J. (as he then was) in Gherulal v. Mahadeodas (AIR 1959 SC 781). The Supreme Court cautioned against expansion of grounds in practice though in theory, they could be expanded. It said:-

“Public policy or the policy of law is an elusive concept. It has been described as an “untrustworthy guide”, “variable quality”, “unruly horse”, etc; the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which forms the basis of society; but in certain cases the court may

relieve them of their duty on a rule founded on what is called the public policy..... though it is permissible for the courts to expand public policy and apply them to different situations, it should be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.”

However, a more flexible and liberal approach was advocated by the Apex Court in the recent case in Central Inland Water Transport Corporation case: AIR (1986) 1571 (at 1612). The Supreme Court held that:

“public policy is not the policy of a particular Government, it connotes some matter which concerns the public good and public interest. The concept of what is for the public good or in the public interest or what would be injurious or lawful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. It is thus clear that the principles governing public policy must be and are capable on proper occasions of expansion or modification. If there is no head of public policy

which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy.”

The meaning of ‘public policy’ has been referred to recently by the Supreme Court in Zoroastrian Corp. Housing Society Ltd. vs. DC Registrar of Cooperative Societies 2005(4) SCALE, page 156, and it was stated that when the statute referred to public policy, it meant ‘public policy’ of the particular Act which dealt with membership of cooperative society.

#### Whether public policy covers unconscionability?

The Law Commission of India, in its 103<sup>rd</sup> Report (1984) (p 5), had considered the question, whether there was a possibility of striking down an “unconscionable bargain” by resorting to ‘public policy’ under Section 23 of the Indian Contract Act, 1872. The Commission was, however, of the view that section 23 was not of help in meeting the situation. It also observed that courts have held (as the law in 1984 was) that the heads of public policy cannot be extended to a new ground in general, with certain exceptions, and that the terms of a contract exempting one party from all liability was not opposed to public policy.

#### **Section 27 of the Indian Contract Act: Restraint in Trade:**

Section 27 of the Indian Contract Act, concerns a special category of contracts which the law treats as void, namely, an agreement by which any



one is restrained from exercising a lawful profession, trade or business of any kind and is to that extent, the agreement is void. However in India (unlike UK), an agreement not to carry on, within the specified local limits, a business similar to the business of which goodwill is sold, can be enforced, provided the limits of the restraints are reasonable. This special provision is contained in section 27.

Section 27 reads as follows:

“Section 27: Agreement in restraint of trade void: Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1:

Saving of agreement not to carry on business of which goodwill is sold:

One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carrying on a like business therefrom, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

An agreement which unnecessarily curtails the freedom of a person to carry on a trade is against public policy. Restraining a person from carrying on a trade generally aims at avoiding competition and has a monopolistic tendency and this is both against an individual's interest as well as the

interest of the society and thus such restraints are discouraged by law. The agreement is void whether it imposes total restraint or partial restraint. However in UK, all agreements in restraint of trade are void unless there is some justification for the restraint which could make it reasonable. If the restriction was reasonable in the interest of the contracting parties and also in the interest of public, the agreement would be valid. The Indian law, however, is stricter. The agreement would be valid if it fell within any of the statutory or judicially created exceptions. Any agreement which is not covered by any one of the recognized exceptions would be void.

The Apex Court in the case of Gujarat Bottling Co. Ltd. V. Coca Cola (1995) (5) SCC 545 has pointed out the difference in the position of law in regard to restraint of trade in India and that in England. The rule now in England is that the restraints of trade whether general or partial, may be good if they are “reasonable and necessary” for the purpose of freedom of trade. In India, the question of reasonableness of restraint is outside the purview of section 27 of the Indian Contract Act. The courts have only to consider the question whether the “contract” itself is or is not in restraint of trade. The facts in the above were as follows:

The agreement in question here was for the grant of franchise by Coca Cola to GBC to manufacture, bottle, sell and distribute various beverages for which the trade marks were acquired by Coca Cola. It was thus a commercial agreement whereunder both the parties had undertaken obligations for promoting the trade in beverages for their mutual benefit. The purpose of the negative stipulation contained in the agreement was that GBC will work vigorously and diligently to promote and solicit the sale of

the products/beverages produced under the trade marks of Coca Cola. This would not be possible if GBC were to manufacture, bottle, sell, deal or otherwise be concerned with the products, beverages or any other brands or trade marks/trade names. Thus, the purpose of the said agreement was to promote the trade and the negative stipulation sought to achieve the said purpose by requiring GBC to wholeheartedly apply itself to promoting the sale of the products of Coca Cola. Moreover, since the negative stipulation was confined in its application to the period of subsistence of the agreement and the restriction imposed therein was operative only during the period the agreement was subsisting, the said stipulation, it was held, could not be treated as being in restraint of trade so as to attract the bar of section 27 of the Indian Contract Act.

**Section 28 of the Indian Contract Act: Ouster of Jurisdiction of Courts to adjudicate.**

Section 28 of the Contract Act states that agreements absolutely in restraint of legal proceedings are void. It is in two clauses and contains two exceptions and reads as follows:

“Every agreement

- (a) by which any party thereto is restricted absolutely from enforcing his rights or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
- (b) Which extinguishes the rights of any thereto, or discharges any party thereto from any liability, under or in respect of

any contract on the expiry or a specified period so as to restrict any party from enforcing his rights.”

Section 28 saves two types of contracts under the exceptions:

- (1) It does not render void a contract by which two or more persons agree that any dispute which may arise between them shall be referred to arbitration and that only the amount awarded in the arbitration shall be recoverable.
- (2) It does not also render void a contract to refer to arbitration questions that have already arisen.

Section 28 will come into play when the restriction imposed upon the right to sue is ‘absolute’ in the sense that the parties are wholly precluded from pursuing their legal remedies in the ordinary tribunals. A partial restriction will be valid as observed by Supreme Court in **Hakam Singh v. Gammon (India) Ltd.** (AIR 1971 SC 740). In this case a clause in the agreement between the parties provided that “the court of law in the city of Bombay alone shall have jurisdiction to adjudicate thereupon.” The plaintiff filed a suit at Varanasi, but the same was dismissed in view of the abovestated agreement. The court held that agreement was not opposed to public policy and it did not contravene section 28, and therefore, the suit filed at Varanasi was rightly dismissed.

Under section 28 of Indian Contract Act, 1872, the citizen has the right to have his legal position determined by the ordinary tribunals, except, in the case of contracts to refer to arbitration disputes which may arise or

which have already arisen. Section 28 affirms the common law and its provisions appear to embody a general rule recognized in the English courts which prohibits all agreement purporting to oust jurisdiction of the courts. Section 28 was amended by Indian Contract (Amendment) Act, 1996 which came into effect in 1997. The amendment gave effect to the suggestions made in the 97<sup>th</sup> Report of the Law Commission of India on “Section 28, Indian Contract Act, 1872: Perspective Clauses in Contract” (1984).

The Supreme Court laid down as follows:

“It is not open to the parties by agreement to confer jurisdiction on a court which it does not possess under the Code. But where two courts or more have this Code of Civil Procedure jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. Such agreement does not contravene section 28 of the Contract Act.”

A recent judgment of the Supreme Court requires mention in this context:

In Shiv Satellite Public Co. v. M/s Jain Studios Ltd., 2006(2) SCALE p.53, the arbitration clause stated that the Arbitrator’s determinations will be ‘final and binding between the parties’ and it declared that the parties have waived the right of appeal or objection ‘in any Jurisdiction’. It was argued that this objectionable clause was not severable from the clause which

enables disputes to be referred to arbitration and that the entire clause was void. The Supreme Court held that that part of the arbitration clause which speaks of reference of disputes to arbitration is severable and was not void.

The Court noticed the concern of the opposite party that the portion of the arbitration clause which stated that the ‘arbitration decision shall be final and binding between the parties and the parties waive all rights of appeal or objection in any Jurisdiction’ was unenforceable because of section 28 of the Act. It was argued to the respondent that the ensuing part of the clause which requires disputes to be referred to arbitration was valid and this contention was accepted. The Court, however, referred to Coring Oil Co. v. Koegles (1870) ILR 1 Cal 466 where a clause giving finality to an arbitration award was held not enforceable but the rest of the clause was held valid. The position in Union Contribution Co. (P) Ltd. v. Chief Engineer, Eastern Command, Lucknow & Anr., AIR 1960 All 72 was the same when it was held that the clause giving finality to the award was held to be unenforceable but separable from the arbitration clause.

#### Sale of Goods Act, 1930:

The Sale of Goods Act, 1930 creates a large number of rights, duties and liabilities. These include the warranties and guarantees implied by the law, i.e. the Sale of Goods Act.

But sec. 62 of that Act permits exclusion of these rights, duties or liabilities by express clause or on account of the course of dealings between the parties, or by usage, if the usage is such as to bind both parties to the contract.

In our view, it becomes necessary to examine sec. 62 and consider whether, in the present context of substantive unfairness, such exclusion should be deemed to be unfair.

**Judicial Review of contracts entered by an authority which is a 'State' within Article 12 of the Constitution and application of Art 14.**

We have referred to this aspect in Chapter III. Apart from sections 16, 23, 27 and 28 of the Indian Contract Act, the High Courts and the Apex Court have invoked Article 14 to strike down certain unreasonable terms of contract entered into by the Government or Public Sector Undertakings or Statutory bodies which fall within the meaning of the word a 'State' in Article 12 of the Constitution of India. Here these Courts are exercising power of judicial review under articles 226 and 32 of the Constitution of India. The courts have confined the exercise of such power to strike down clauses in public service employment contracts. However, the courts have declared that they would not extend this principle to strike down clauses in commercial contracts. (See Inland Land Water case: AIR 1986 SC 1571 and DTC case: AIR 1991 SC 101)

It has to be noted that the abovesaid method of invoking article 14 in the last two decades by the Supreme Court was not available when the 103<sup>rd</sup> Law Commission Report was submitted in 1984. The question naturally arises as to why a similar wider beneficial statutory provision should not be treated as necessary to protect parties those who enter into commercial contracts with “non-State” entities though Art. 14 is not applicable.

We may, however, point out that there are certain legislations, apart from the Indian Contract Act, 1872, which prevent one party to a contract from taking undue or unfair advantage of the other.

Instances of this type of legislation are the Usurious Loans Act, 1918, Industrial Disputes Act, 1947, the Monopolies and Restrictive Trade Practices Act, 1969, the Consumer (Protection) Act, 1986, the Competition Act, 2002 and the Specific Relief Act, 1963, but as explained latter in this chapter, they deal with specific situation or special types of contracts whereas, in this Report, we are considering the need for general provisions covering all types of contracts relating to unfairness.

### **Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act)**

The MRTP Act was enacted in 1969 and became effective from 1<sup>st</sup> June, 1970. The aims and objects of the Act as stated in the preamble was “an Act to provide that the operation of the economic system does not result



in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto”, which is identical with the preamble of the draft MRTP Bill 1965 prepared by the MRTP Commission. However, the MRTP Act, 1969 delinked restrictive trade practices from the concept of dominant undertaking. The Act has also elaborated the definition of monopolistic and restrictive trade practices in more comprehensive terms.

The application and operation of the provisions of the MRTP Act, are related to: (a) control and regulation of concentration of economic power which was to the common detriment and (b) prohibition or regulation of monopolistic or restrictive trade practices, actually emanating out of the Directive Principles of State Policy, particularly articles 39(b) and (c) and the Act enjoys the umbrella of Article 31 specially after it has been put under the IX Schedule of the Constitution. There are certain provisions in MRTP Act, 1969 dealing with specific types of contract.

Section 2(o) has laid down the principles and basis of determining what is a ‘restrictive trade practice’ as under:

“(o) “restrictive trade practice” means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular, --

- (i) which tends to obstruct the flow of capital or resources into the stream of production, or

- (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.”

The MRTP Act was amended in 1984 by introducing the concept of ‘unfair trade practices’ based on the recommendation of the high-powered Sachar Committee, and these are intended largely to protect consumer interest, public interest and to prevent, lessen or eliminate competition. Under the MRTP (Amendment) Act, 1984, section 33 was amended to provide that every agreement falling within one or more of the categories specified therein shall be deemed to be an agreement relating to restrictive trade practices and further, two new categories were added vide sub-clause (ja) (jb) under the said section. Restrictive trade practices are not banned or prohibited per se. Section 33 of the Act lays down in specific terms various ‘restrictive trade practices’, which are deemed to be restrictive (but not necessarily against public interest) which are as follows:

- (a) any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from, whom goods are bought;
- (b) any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

- (c) any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (d) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers;
- (d) any agreement to grant or allow concessions or benefits, including allowances, discount, rebates or credit in connection with, or by reason of dealings;
- (e) any agreement to sell goods, on condition that the prices to be charged on re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;
- (f) any agreement to limit, restrict or withhold the output or supply of any goods or

allocate any area or market for the disposal of the goods;

- (g) any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods;
- (h) any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;
- (i) any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;
- (ja) any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be bought;
- (jb) any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to

abstain from bidding at any auction for the sale of goods;

- (j) any agreement not hereinbefore referred to in this section which the Central Government may, by notification, specify for the time being as being one relating to a restrictive trade practice within the meaning of this sub-section pursuant to any recommendation made by the Commission in this behalf;
- (k) any agreement to enforce the carrying out of any such agreement as is referred to in this sub-section.”

The MRTP Act, 1969 was directed against restrictive or monopolistic trade practices and had no provision for the protection of consumers against false or misleading advertisement or other similar unfair trade practices till the year 1984. Thus by way of an amendment, section 36A was introduced defining “unfair trade practices” which are of immediate concern to the consumer.

A complaint relating to any unfair trade practice and restrictive trade practice can be made by a consumer or trade association before MRTP Commission under section 36B(a) or under section 10(a) of MRTP Act .The Commission during the inquiry may grant a temporary injunction restraining

such person from carrying on any trade or unfair trade practice until further orders.

### **Consumer Protection Act, 1986**

In early years when welfare legislations like the Consumer Protection Act, 1986 did not exist, the maxim caveat emptor (let the buyer beware) governed the market. Now with the opening of global markets, economies and progressive removal of restrictions on international trade, there is increasing competition among manufacturers which has benefited consumers in the form of improvement in quality of goods and services. Now the maxim caveat emptor has been replaced by (let the seller beware). In spite of various provisions providing protection to the consumer in different enactments like CPC 1908, Indian Contract Act 1872, Sale of Goods Act 1930, etc. very little could be achieved in the area of consumer protection. Though the MRTP Act, 1969 has provided relief to the consumers, yet it became necessary to protect consumers from exploitation and to save them from adulterated and substandard goods and deficient services and unfair business practices. The Consumer Protection Act, 1986 (CPA) was thus framed to protect consumers from unfair and undesirable practices of business community. The Act came into force in 1987 and was further amended from time to time.

The preamble of the Act shows that it is “an Act to provide for better protection of the interest of consumers and for that purpose, to make

provision for establishment of consumer councils and other authorities for the settlement of consumer disputes and for matters connected therewith.”

When Act was enacted in 1986, it did not originally contain the definition of ‘unfair trade practice’. The concept of unfair trade practice was, however, interpreted according to definition of unfair trade practice, given in the MRTP Act of 1969. However, in 1993, section 2(1)(r) incorporated an exhaustive definition of ‘unfair trade practice’ as given under section 36A of MRTP Act, as amended in 1984 with a view to making Consumer (Protection) Act, 1986 a self-contained Code and is reproduced as under:

(r) “unfair trade practice” means a trade practice which, for the purpose of promoting the sale, use or supply of goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:

(1) the practice of making any statement, whether orally or in writing or by visible representation which,--

- (i) **falsely** represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
- (ii) **falsely** represents that the services are of a particular standard, quality or grade;

- (iii) **falsely** represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
- (iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services **do not** have;
- (v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier **does not** have;
- (vi) makes a **false** or **misleading** representation concerning the need for, or the usefulness of, any goods or services;
- (vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is **not based on** an adequate or proper test thereof;

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the **burden of proof** of



such defence shall lie on the person raising such defence;

(viii) makes to the public a **representation** in a form that purports to be-

(i) a warranty or guarantee of a product or of any goods or services; or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) materially **misleads** the public concerning the price at which a product or like products or goods or services, have been, or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly

specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the presentation is made;

- (x) gives **false or misleading** facts disparaging the goods, services or trade of another person.

Explanation – For the purposes of clause (1), a statement that is –

- (a) expressed on an article offered or displayed for sale, or on its wrapper or container; or
- (b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or
- (c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public; shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

(2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business and the nature of the advertisement.

Explanation – For the purpose of clause (2), ‘bargain price’ means –

- (a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise; or
  - (b) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;
- (3) permits –
- (a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating the impression that something is being

given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;

- (b) the conduct of any contest, lottery, game of chance of skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;
- (4) permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, construction, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;
- (5) permits the hoarding or destruction of goods or refuses to sell the goods or to make them available for sale, or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.

(2) Any reference in this Act to any other Act or provision thereof which is not in force in any area to which this Act applies shall be construed to have a reference to the corresponding Act or provision thereof in force in such area.”

Under the above Act of 1986, there is a three tier set up to enquire into the allegation of unfair trade practice with each of three Authorities having its own original pecuniary jurisdiction.

The complaint lies before the District Forum where the value of goods or services and for compensation claimed does not exceed rupees five lakhs. The District Forum after the proceedings are conducted under section 13, is satisfied that the goods complained against suffer from any of the defects specified in the complaint about the services are proved, it shall issue an order to the opposite party directing him to either remove the defect pointed out to replace the goods with new ones, to remove the defects or deficiencies in services in question, to return to the complainant the price, to pay such amount as compensation for any loss suffered, to discontinue the unfair trade practice or the restrictive trade practice, or not to repeat them, etc.

Section 14 deals with the reliefs which the District Forum is authorized to give to the aggrieved consumer. The District Forum has to record its satisfaction as regards the defects in goods, deficiency in service, etc. It is only after recording such satisfaction that the District Forum can

give direction in respect of the reliefs which it grants to consumers. The District Forum shall issue orders to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them.

### **Competition Act , 2002**

There was substantial overlap in the provisions of MRTP Act, 1969 and Consumer (Protection) Act, 1986, though each has several distinctive features with regard to composition of adjudication machinery, jurisdiction, type of persons who may seek relief, nature and scope of relief and administrative procedure. An aggrieved consumer can thus approach both bodies for relief. It appears that the present provisions of the MRTP Act 1969 and Consumer (Protection) Act, 1986 are not sufficient to deal with anti-competitive practices.

Thus, a need has arose for a separate competition act. The Report of the Raghavan Committee on Competition Law, 2000 categorically mentioned that the right to free and fair competition could not be denied by any other consideration. The ultimate reason d'etre of competition will continue to be “consumer interest”. It is no longer the era of caveat emptor.

The Competition Act, 2002 received the assent of the President on 13<sup>th</sup> January, 2003. The preamble of the Act shows that “it is an Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse

effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto”.

The scope and ambit of Competition Act, is fairly wide. Section 3(1) of the Act, prohibits anti-competitive agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on the competition within India. Any agreement entered into in contravention of the provisions contained in sub-section (1) of section 3 shall be void. The said Act repeals the Monopolistic and Restrictive Trade Practices Act, 1969.

Under the Act, it is the duty of the Competition Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants in markets in India. The Commission has the power to grant a temporary injunction, restraining any party from carrying on such act in certain circumstances. The Commission may also order for award of compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of chapter II having been committed by such enterprise. The person has to pay a penalty for failure to comply with orders/directions of the Commission.

**Specific Relief Act, 1963 merely grants discretion to Courts to refuse specific performance:**

Section 20 deals with discretion as to decreeing specific performance. The court is not bound to grant relief merely because it is lawful to do so but it is discretionary and the discretion of the court is not arbitrary but sound and reasonable guided by judicial principles.

One of the cases in which the court may properly exercise discretion not to decree specific performance has been enumerated in sub-section 20 (2)(a) to (c) if the agreement gives an unfair advantage to one party, or involves hardship as it is inequitable to grant specific performance.

**Usurious Loans Act, 1918: Reopening of transactions:**

The Usurious Loans Act, 1918 is an Act to give additional powers to courts to deal in certain cases with usurious loans of money or in kind. Section 3 of the Act provides for reopening of transactions if the court has reasons to believe –

- (a) that the interest is excessive; and
- (c) that the transaction was, as between the parties thereto, substantially unfair, the Court may



exercise all or any of the following powers,  
namely, may, --

- (i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;
- (ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed on account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;
- (iii) Set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just:

Provided that, in the exercise of these powers, the Court shall not –

- (i) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than [twelve] years from the date of the transaction;
- (ii) do anything which affects any decree of a Court.

### **Industrial Disputes Act, 1947**

Section 2 (ra) defines 'unfair labour practices' as any of the practices specified in the Fifth Schedule such as discharging or dismissing a workman for taking part in any strike (not being a strike which it deems to be an illegal); to discharge or dismiss workmen not in good faith, but in colourable exercise of the employer's rights; to refuse bargain collectively, in good faith with the recognized trade unions.

Section 25U inserted by Industrial Disputes (Amendment) Act, 1982 deals with penalty for committing unfair labour practices. Any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine, which may extend to one thousand ruppees, or with both.

**Provisions of Indian Contract Act, 1872 and other existing laws referred to above are not sufficient to meet the problems of today**

The Commission in its 103<sup>rd</sup> Report opined that the existing sections of the Indian Contract Act, do not seem to be capable of meeting the mischief caused by unfair terms incorporated in contracts. It was stated that “the Indian Contract Act” as it stands today cannot come to the protection of a consumer who is clearly with big business. Further, the ad hoc solutions given by courts in response to their innate sense of justice without reference to a proper yardstick in the form of a specific provision of statute law or known legal principle of law only produce uncertainty and ambiguity.’

The recommendations given by the Law Commission in its 103<sup>rd</sup> Report is for the incorporation of the following provision in Chapter IVA. That section reads as follows:-

**“Section 67A : (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 willful breach of the contract, or (b) the consequences of negligence.”

While section 67(A)(1) is general in nature, dealing with ‘unconscionability’, section 67(2) refers to two particular situations in which the law deems the provisions to be unconscionable. Section 67(1) is not restricted to the cases referred to in section 67(2). It does not deal with unfair contracts except those that are unconscionable. It does not provide any guidelines which a Court has to consider to judge unconscionability. Several States in other countries list a number of guidelines to judge ‘unfairness’.

Although the recommendation made by the Law Commission in the Report on Unfair Terms in Contract in the 103<sup>rd</sup> Report (1984), was concerned with standard form contracts imposing unfair and unreasonable terms upon unwilling consumers or persons who had no bargaining power, the recommendation was wide, and did not restrict itself to any particular type of contract. The Commission recommended the addition of a new chapter IV-A with a single section into the Indian Contract Act, 1872. Before making the recommendations, the Commission had invited public comments on its proposal to insert a new section 67A into the Indian Contract Act, 1872. The Commission received replies from the Registrar, Judges of High Courts, Law Departments, etc. The Commission felt that it was better to go step by step and the only step that could be taken in our country to remedy the evils of unfair terms in standard form of contracts was to enact a provisions into the Indian Contract Act, 1872 which would combine the advantages of English Law of Unfair Contract Terms Act and section 2.302 of Uniform Commercial Code of USA. The Commission did not think it proper to enact a separate law as in U.K.

We agree with the 103<sup>rd</sup> Report that the provisions of the Indian Contract Act, 1872 and other laws are not sufficient to meet the problems of today. Not only that, we feel further that we have to introduce more provisions than were contemplated in the 103<sup>rd</sup> Report.

### **CHAPTER-III**

#### **STANDARD FORM CONTRACTS AND THEIR NATURE**

The device of a new type of contract i.e. standard form contract, is common in today's complex structure of giant corporations with vast infrastructural organization. The use of standard terms and conditions is confined not only to contracts in commercial transactions, but contracts with public authorities, multinational corporations, or in banking and insurance business etc. Standard form contracts have become common place in the trade practices of the 20<sup>th</sup> and 21<sup>st</sup> century. They are found in almost every branch of industry and commerce, consumer contracts, employment, hire-purchase, insurance, administration, any form of travel, or the courier services, or while downloading software contracts from the internet, etc.

But there are also dangers inherent in standard form contracts. First, the bargain before parties contract, is not on equal terms and one party invariably has to sign on the dotted line, with no opportunity for that party to negotiate over the terms at all. Second, one party may be completely or relatively unfamiliar with the terms or language employed by the other. This may be compounded by the use of fine print and exclusionary clauses. Thus the characteristics, usually and traditionally associated with a contract, such as freedom of contract and *consensus ad idem* are significantly absent in these so-called standard form contracts.

The standard form contracts have varied names, the French call them “Contracts d’adhesion”, and the Americans call them “adhesion contracts” or “contracts of adhesion”. In Black’s Law Dictionary (7<sup>th</sup> Ed. p.38), ‘Adhesion contracts’ are defined as follows:

“A standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms. Also termed Contract of adhesion; adhesory contract; adhesionsary contract; take it or leave it contract; leonire contract.

Some sets of trade and professional forms are extremely one-sided, grossly favouring one interest group against others, and are commonly referred to as contracts of adhesion. From weakness in bargaining position, ignorance or indifference, unfavoured parties are willing to enter transactions controlled by these lopsided legal documents” Quinlin Johnstone and Dan Hopson, Ir, *Lawyers and Their Work*, 329-30 (196).

Standard form contracts are usually pre-printed contracts that are only “contracts” in name. The standard terms and conditions unilaterally prepared by one party are offered to the other on a take it or leave it basis, rather, the terms are forced on the other party. The individual participation consists of a mere adherence to the document drafted unilaterally and insisted upon by the powerful enterprises who could abuse their position under the garb of free will. The conditions imposed by one party on the other are never put into discussion. One has to just fill the blanks and sign

on the dotted line. Clever suppliers of goods and services-providers seek to exclude or limit their possible legal liability by the insertion of exclusionary clauses in the standard form contract offered by them.

In the case of a person who takes a mediclaim policy, if one looks at its standard form, there is, for example, a restricting clause in the contract which says that any pre-existing illness that the policy holder suffers from will not be covered. It is uncommon to find an individual aged above 65 years who does not suffer from some medical problem or other. The policy contains another clause in fine print that in case of any life threatening situations that require immediate treatment the company “could” pay insurance cover, which means that they may or may not pay. Then, there are contracts where one party is authorized unilaterally either to enforce or not to enforce the contract or to alter its terms wholly or within certain limits at its free will. Employment contracts contain certain clauses enabling the employer to terminate the contract without assigning any reason whatsoever. Some contracts permit one party to nominate its own employee, consultant or lawyer to act as arbitrator. Such terms could never be part of a contract, if parties were to negotiate the terms on an equal footing.

The standard form contract can be beneficial to both the parties if the terms constitute a fair balance between them. For example, use of such standard terms can enable the parties to make complex contracts with minimum expense of time and trouble in negotiating the terms to standardize the risks they face. Further, it takes advantage of lessons of



experience and enables a uniform interpretation of all similar contracts. It is believed that simplified planning and administration, makes the skill of the draftsman available to all personnel and it makes risks calculable and increases real security which is the necessary basis of initiative and the assumption of foreseeable risks.

In Chitty on Contracts 'General Principles' (27<sup>th</sup> Ed) (vol. I, 1994), the following passage in connection with the standard form contracts (paragraph No. 12.097) is referred to:

“Contracts in standard form. -- A different problem may arise in proving the terms of the agreement where it is sought to show that they are contained in a contract in standard form, i.e. in some ticket, receipt, or standard form document. The other party may have signed the document, in which case he is bound by its terms. More often, however, it is simply handed to him at the time of making the contract, and the question will then arise whether the printed conditions which it contains have become terms of the contract. The party receiving the document will probably not trouble to read it, and may even be ignorant that it contains any conditions at all. Yet standard form contracts very frequently embody clauses which purport to impose obligations on him or to exclude or restrict the liability of the person supplying the document. Thus it becomes important to determine whether these clauses should be given contractual effect.”<sup>1</sup>

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<sup>1</sup> Quoted in Pawan Alloys and Casting Pvt. Ltd Meerut etc. v. U.P. State Electricity Board, AIR 1997 SC 3910 at 3930 with approval.

**The Standard form contracts: original purpose disclosed:**

In Cheshire's Law of Contract, 14<sup>th</sup> Edn. "Use of standard form contracts' is dealt with at page 21 in the following terms:

"The process of mass production and distribution, which has largely supplemented if it has not supplanted individual effort, has introduced the mass contract -- uniform documents which must be accepted by all who deal with large-scale organizations. Such documents are not in themselves novelties: the classical lawyer of the mid- Victorian years found himself struggling to adjust his simple conceptions of contract to the demands of such powerful bodies as the railway companies. But in the present century, many corporations, both public and private, have found it useful to adopt, as the basis of their transactions, a series of standard forms with which their customers can do little but comply."

Lord Diplock has pointed out in Schroeder Music Publishing Co V. Macaulay (1974) 1 WLR 1308) that standard form of contracts are of two kinds. The first which are of very ancient origin are those which set out the terms on which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charter parties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved, and have been widely adopted because experience has shown that they facilitate the conduct of

trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as, buyers or sellers, charterers or ship-owners, insurers or bankers. He then proceeded to state that if fairness or reasonableness were relevant to their enforceability, the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable. Lord Diplock observed:

“The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kind of business in relatively few hands. The ticket cases in the 19<sup>th</sup> century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organization representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: ‘If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it’. (see also Cheshire, Fifoot, & Furmston’s, Law of Contract, 14<sup>th</sup> Edn. 2001 pp.21-22)

**Interpretational issues in standard form contracts:**

In this context, it is to be noted that in Anson’s Law of Contracts, 26<sup>th</sup> Edn. (page 136), the learned author has dealt with the question pertaining

to construction of terms in a written contract which can create hurdles. The author states:

“An agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. The proper mode of construction is to take the instrument as a whole, to collect the meaning of words and phrases from their general context, and to try and give effect to every part of it. However, if the words of a particular clause are clear and unambiguous, they cannot be modified by reference to the other clauses in the agreement.”

If this principle is to be applied to standard-form contracts, it will be seen that even if the party having greater bargaining position has introduced exemption clauses unilaterally in its own favour, the court's job is to give full effect to those clauses which have been agreed upon, even if they are unreasonable or unconscionable. The freedom of equal bargaining power, in such cases, is thus largely an illusion. The contracts in the standard forms do generally contain terms and conditions which are unreasonable and unfair resulting from inequality of bargaining power or no bargaining power at all. The question arises as to the remedy against such unconscionable clauses in contracts.

**Supreme Court on Contracts by Government and Public Institutions and Art 14: Judicial Review under Art 226 of the Constitution:**

Yet another angle to these contracts arises not only from the traditional aspect of consent or unconscionability, but also from the point of arbitrariness, where the contract is entered into by a department of Government, or a public sector undertaking or other public body. Here, in as much as the party so stipulating is a Government or public sector undertaking, the question can arise if the aggrieved party can resort to Article 14 of the Constitution of India and the 'arbitrariness' doctrine laid down in Royappa's case (AIR 1974 SC 555). But, here parties could go to the High Court under Art 226 of the Constitution or under Art 32 to the Supreme Court. While views have been expressed, particularly in the Central Inland Water Transport Corporation case (AIR 1986 SC 1571), and in Delhi Transportation case (AIR 1991 SC 101), that such unreasonable clauses in contracts of employment could be struck down by the courts, it has, however, been stated in these very cases by the Supreme Court that the Court is not prepared to extend the principle of 'arbitrariness' to 'commercial contracts' in the same manner as it has extended the principle to terms imposed unilaterally by a statutory employer on its employee.

**Other Contracts:**

Apart from contracts in standard form, there may be individual contracts of an ad hoc nature, entered into between individual parties, which

are not like multi-national companies or big commercial houses within India, where one-sided or unreasonable conditions may be imposed in situations where the bargaining power is unequal. Even in such cases, some power must be given to the courts to remedy the situation.

Therefore, the 'unfairness', if any, in such standard form contracts, falls for consideration in this Report.

## **CHAPTER-IV**

### **JUDICIAL PRONCEMENTS IN INDIA ON UNFAIR TERMS**

We see from the preceding discussion in Chapters II and III that though every standard form contract may not be an unconscionable one, there are reasonable chances of some standard form contracts being tainted with unfairness as there is very little scope for negotiations. Further, the existing provisions of the Indian Contract Act, 1872 show that the legal control under the said provisions is also not quite adequate to come to the rescue of the weaker party against harsh contracts. The judiciary in India has, in several cases, indeed come to the rescue of parties from the menace of unreasonable terms in standard form contracts. The experience has shown however that in the majority of cases where the weaker party, under pressure of circumstances (generally economic or due to ignorance) arising out of inequality of bargaining power, enters into such contracts, the courts may not be able to help because all such cases do not fall within the four corners of Sections 16, 23 or 27 of the Indian Contract Act, 1872.

#### **The Central Inland Water Transport Corporation Limited Case (AIR 1986 SC 1571)**

The unfairness of contractual terms by 'authorities' which fall within the meaning of the word 'State' in article 12 of the Constitution of India figured in several service matters before the Supreme Court. The

irrationality or arbitrariness of clauses in such contracts was considered in the context of article 14. The apex court for the first time in 1986 in **Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly** (AIR 1986 SC 1571) made an attempt to broaden the applicability of unconscionability outside the boundaries laid down by section 16 of the Indian Contract Act. We have referred to this briefly in the earlier chapters. Here, we propose to go into the facts of the case also.

The appellant in this case was a Government company. Since another company was carrying on the same business as the Central Inland Water Transport Corporation (CIWTC), a scheme of arrangement was entered into between the said Corporation and that company, with the approval of the High Court. Under the scheme, an officer of the company could accept the job in the corporation or in the alternative, leave the job and receive a meagre amount by way of compensation. Rule 9 (i) of the relevant Rules of the Corporation provided that the services of officers could be terminated by giving three months notice. The petitioner's service was terminated in this manner. He challenged this rule as arbitrary under article 14 of the Constitution and alleged that a term in a contract of employment of this kind entered into by a private employer, which was unfair, unreasonable and unconscionable was bad in law. This rule formed part of the contract of employment and its validity fell to be tested by the principles of the law of contracts. The Court read the principles of unconscionable bargain outside the four corners of section 16 of the Indian Contract Act and held that such a contract was void under section 23 of that Act. The Court emphasized on the requirement of 'reasonableness' in the terms of the contract by discussing three principles namely- 'unconscionability', 'distributive justice



and unreasonableness' and 'inequality of bargaining power' and considered the issue under three headings:

(1) Unconscionability: To explain the meaning of 'unconscionability', the apex Court relied upon the "Restatement of the Law (Second)" as promulgated and adopted by the American Law Institute (Volume II) (dealing with the law of contracts, in Section 208 at page 107)., as follows:

**Section 208.** Unconscionable Contracts Term:

"If a contract or term thereof is unconscionable at the time the contract is made, a Court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term, as to avoid any unconscionable result."

The Supreme Court referred to the comments given under that section, where it is stated "Like the obligation of good faith and fair dealing (S.205), the policy against unconscionable contracts or terms applies to a wide variety of types of conduct. The determination that a term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud and other invalidating clauses; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy.

Policing against unconscionable contracts or terms has sometimes been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.

The Supreme Court also referred to the comment under Uniform Commercial Code Section 2-302 which makes nice distinctions. It says:

"A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favourable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms"

The Court also referred to the Reporter's note to section 208, where it is asserted that a contract of adhesion is not unconscionable per-se and that all unconscionable contracts are not contracts of adhesion. Nonetheless, the more standardized the agreement and the less a party may bargain meaningfully, the more susceptible, the contract or a term will be to a claim of unconscionability.

(2) Distributive justice: The Court explained the concept of 'distributive justice' when it relied on its previous decision in the case of Lingappa Ponchanna Appelwar v. State of Maharashtra.<sup>2</sup> In that case, while upholding the constitutionality of Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 the Apex court said:

“The present legislation is a typical illustration of the concept of distributive justice, as modern jurisprudence knows it. Legislators, judges and administrators are now familiar with the concept of distributive justice. Our Constitution permits and even directs the State to administer what may be termed ‘distributive justice’. The concept of distributive justice in the sphere of law making connotes, inter-alia, the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequals in society. Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon the principle: ‘From each according to his capacity, to each according to his needs’. Distributive justice comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or distribution of property owned by one to many who have none by imposing ceiling on holdings, both agricultural and urban, or by direct regulation of contractual transactions by forbidding certain transactions and perhaps, by requiring others. It also means that those who have been deprived of their properties by unconscionable bargains should be restored their property. All such

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<sup>2</sup> (1985) 1 SCC, 499

laws may take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of society or there may be legislative control of unfair agreements.” (emphasis supplied)

(3) Inequality of bargaining power: The Court explained the concept of 'unreasonableness and inequality of bargaining power' with the help of several English decisions (Gillespie Brothers and Co Ltd v. Roy Bowles Transport Ltd (1973) Q.B.400; Llyods Bank Ltd. v. Bundy (1974) 3 ALL. ER 757; Schroeder Music Publishing Co Ltd. v. Macaulay (1974) 3 ALL ER 616 etc.). After discussing various judgments of English courts, and the law in U.K., USA and Germany, the court observed that there might be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances. The above principle would apply, the court reiterated, “where the in-equality of bargaining power is the result of the great disparity in the economic strength of the contracting parties or where the inequality is the result of circumstances, whether of the creation of the parties or not, or where the weaker party is in a position in which he could obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them or where a man had no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in prescribed or standard form or to accept a set of rules as part of the contract, however, unfair,

unreasonable and unconscionable a clause in that contract or form or rules might be. The court, however, reiterated that this principle would not apply where the bargaining power of the contracting parties is equal or almost equal. The contracts of this type to which the principle formulated above applied were not just contracts which were tainted with illegality, but were so unfair and unreasonable that they shock the conscience of the Court. According to the court, this principle may not apply where both parties are businessman and the contract is a commercial transaction.

A question also arose here as to under which head would an unconscionable bargain fall under the Contract law? If it fell under the head of undue influence, it would be voidable, but if it fell under the head of being opposed to public policy, it would be void. The Court answered that such contracts would rarely be induced by undue influence, even though at times they were between parties one of whom held a real or apparent authority over the other. Very often in vast majority of cases such contracts were entered into by the weaker party under pressure of circumstances, generally economic, resulting in inequality of bargaining power. Such contracts did not fall within the four corners of the definition of 'undue influence' given in section 16 (1) of the Indian Contract Act, and ought not to be held voidable, because it would compel each person with whom the party with superior bargaining power had contracted, to go to the court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no court should encourage. Such a contract or such a clause in the contract ought, therefore to be adjudged void as being opposed to public policy under section 23.

In the above case, Justice Madon considered the development of law and held that an instrumentality of the State cannot impose unconstitutional conditions in service rules vis-à-vis its employer to terminate the services of a permanent employee without reasons merely on a three months notice and found the clause to be unconscionable, unfair unreasonable and against public policy and public interest and thus violative of article 14.

**Uptron's case:** (AIR 1998 SC 1681)

In Uptron India Ltd v. Shanni Bhan, the conferment of permanent status on an employee guaranteed security of tenure was in issue. It was stated that it is now well settled that the services of a permanent employee, whether employed by the Government or Government company or Government instrumentality or statutory corporation or any other 'Authority' within the meaning of article 12 of the Constitution, cannot be terminated abruptly and arbitrarily either by giving him a months or three months notice or pay in lieu thereof or even without notice, notwithstanding that there may be a stipulation to that effect either in the contract of service or in the certified standing orders.

**Delhi Transport Corporation's case:** (AIR 1991 SC 101):

The ratio of Central Inland Water case, above referred to, was upheld per majority in Delhi Transport Corporation v. D.T.C. Mazdoor Corporation. The central question involved in the group of cases was

whether the clauses permitting the employers or the authorities concerned to terminate the employment of the regular or permanent employees by giving reasonable notice or pay in lieu of notice but without holding any enquiry are constitutionally valid? If not, what would be the consequences of termination by virtue of such clauses or powers, and further whether such powers and clauses could be so read down with such implied conditions which would make such powers constitutionally and legally valid.

In that case, the respondents who were permanent employees, allegedly became inefficient in their works and started inciting other staff members not to perform their duties. They were served with termination notices under Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952. In the writ petition, the constitutional validity of the Regulation was challenged. The Constitution Bench held that Regulation 9 (b) whereby service of a permanent employee could be terminated by issuing a month's notice without assigning any reasons was arbitrary, unfair, unjust and unreasonable. It was also opposed to public policy and thereby void under Section 23 of the Indian Contract Act, 1872.

Reliance was placed by the court on the decision in **West Bengal State Electricity Board v. Desh Bandhu Ghosh** 1985 (3) SCC 116, where the court was concerned with Regulations of the West Bengal State Electricity Board which said that in the case of a permanent employee, his services may be terminated by serving 3 month's notice or on payment of salary for the corresponding period in lieu thereof. The court was of the

view that it was naked “hire and fire” rule, and thus struck down Regulation 34.

However, the Court was cautious to let the question of unreasonableness, inequality of bargaining power and public policy remain flexible and observed that the meaning and scope of these may change by passage of time.

**LIC v. Consumer Education & Research Center: 1995 (5) SCC 482**

We next come to a case not involving service conditions. A case of unequal bargaining power arose in the context of a life insurance policy in **LIC India v. Consumer Education & Research Center**. The Supreme Court interpreted an insurance policy issued by Life Insurance Corporation of India by bringing in certain elements of public purpose. The court declared a term in the policy, pertaining to restricting the benefit of the policy only to those people employed in the Government, quasi-Government or reputed commercial firms as void under article 14 of the Constitution.

It was stated that it is settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain as to assume to have equal bargaining power. He has either to accept or leave the service or



goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service for ever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract. An unfair and untenable or irrational contract executed by a public authority is unjust and amenable to judicial review. LIC being a State within the meaning of article 12 of the Constitution, the court invoked article 14 of the Constitution and, in para 27, it further stated:

“In the sphere of contractual relations the state its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or be arbitrary in its decision. Duty to act fairly is part of fair procedure envisages under Articles 14 and 21. Every activity of public authority or those under public duty or obligation must be informed by reason and guided by the public interest.”

**Pawan Alloys Case, AIR 1997 SC 3910:**

We shall next refer to a business transaction where section 23 of the Contract Act was applied. In **M/s Pawan Alloys & Casting Pvt. Ltd. Meerut v. U.P.S.E.B.**, the three notifications of Electricity Board giving

incentive development rebate to new industries in the State of UP in exercise of its statutory powers under section 49 of the Electricity (Supply) Act, 1948 read with section 78A were challenged. The appellant industries established on basis of said promise in the notification by signing standard agreement for supply of electricity. The Board then arbitrarily and prematurely withdrew this rebate. The court held that incentive to new industries by way of tax holiday or tax exemption could validly form the subject matter of promissory estoppel as it would not be against public policy but in so far as any representation seeks to enable the promisee to get refund of the collected sales tax it would remain unconstitutional being violative of the taxation scheme and would be contrary to public policy and thus void under section 23 of Contract Act.

**Conclusion:**

It will be seen that the Apex Court either applied Article 14 in cases where unreasonable term were imposed by an entity which was a 'State' within Article 12, or applied section 23 of the Indian Contract Act, 1872. The only substantive development was that the Court was not confined to existing heads of public policy. Though in certain cases, it was observed that Article 14 could not be applied to commercial contracts entered by entities which were a 'State' within Article 12 of the Constitution, in some cases section 23 was invoked against such entities to grant relief. The various decisions rendered by the Court would reveal that the above procedures were adopted because the court was otherwise handicapped in

giving relief because of the absence of a general power given by a statute to strike down 'unreasonable clauses'.

## **CHAPTER-V**

### **UNFAIR TERMS IN CONTRACT - A COMPARATIVE STUDY**

The law relating to unfairness, arising from inequality of bargaining power was developed around the globe, as a separate ground on which contracts can be set aside. Classical legal theory viewed standard form contracts no differently than individually negotiated contracts, and enforced them according to their terms, no matter how harsh or unjust the terms were. Under the classical theory, courts created a conclusive presumption that the signing party understood the terms. This result was based on the “duty to read” doctrine, which was also developed out of the paradigm of individually negotiated contracts. However, legal scholars and courts recognized the fundamental differences between standard form contracts and the classical models of individually negotiated contracts. Professor Karl Llewellyn [Book Review, 52 Harvard Law Review 700, 704 (1939)] noted the importance of protecting the weaker party’s reasonable expectations when interpreting standard form contracts:

“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.”

**Position in U.S.A. : American Restatement (Second Edition) and UCC: Unconscionability:**

The notion of unconscionability in contracts is by no means new in U.S.A. As stated in Chapter III, it has taken a new life since it was embodied as a test of enforceability in the Uniform Commercial Code, 1977, (hereinafter called UCC). The general doctrine of unconscionability was developed in that country largely through judicial decisions. We have already referred to the position under the American Law as stated in Restatement of Law (second edition) in Section 208 as referred to by the Supreme Court in Inland Waters case, AIR 1998 SC 151. It stated:

“If a contract or terms thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result”.

The doctrine of unconscionability has also been included in the UCC, though it was applicable only to contracts relating to sales of goods. It has been applied by analogy or as a general doctrine to other kinds of contract. Section 2 - 302 of the UCC provides:-

“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”.

The comment to this section, extracted below, to the extent relevant describes the purpose of this section, as follows:

“This section is intended to enable the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract....”

Since Section 2-302 referred to above is addressed to the Court in as much as the unconscionability must be determined by the court as the matter of law. Under this provision 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 the effect in order to aid the court in making the determination. The relief granted by the courts could be refusal to enforce the entire contract or the particular clauses found to be unconscionable.

The comment to section 2-302 further states as follows:

"A bargain is not unconscionable merely because the parties to it are unequal in bargaining power, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favourable to the stronger party may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact, assent or appear to assent to the unfair terms".

Thus, though the mere inequality of bargaining power does not suffice and the courts 'recognize that the parties are often required to make their contracts quickly even if their bargaining power may rarely be equal still the court has power to interfere in cases falling within the provisions. It is quite clear that in U.S., there is a statutory bar on unconscionable contracts and the interest of the parties prejudiced by inequality of bargaining power. The UCC does not define unconscionability but indicates in the comment the basic test, whether in the light of general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. The principle is one of oppression and unfair surprise (**Campbell Soup Co. v. Wentz**) (referred to hereinafter) and not of disturbance of allocation of risks because of superior bargaining power, Prof. M.A. Eisenbergs "The Bargain Principle and its Limits" (1982) 95 Harv. LR. p.741.

### **Wentz's Case**

The case of **Campbell Soup Co. v. Wentz**, 172 F. 2d 80, 3d cir, (1948) (as cited in Fansworth – Contracts, p. 419), is cited in comment 1 to UCC 2-302. The case concerned a standard form-carrot-grower contract. The defendant had committed his entire crop of carrots to Campbell for a price of not more than \$ 30 a ton. At the time of delivery, a scarcity had developed and such goods were virtually unobtainable and their price had also risen to at least \$ 90 a ton. Campbell’s supplier began to sell some of their crops to others and Campbell brought an action to enjoin further sales elsewhere by the defendant and for specific performance. The Court of Appeals found several provisions of the contract to be objectionable and refused to grant equitable relief. It said that the contract was obviously “drawn by skilful draftsmen with the buyer’s interests in mind”, and that it was too hard a bargain to entitle the plaintiff to relief in a court of conscience.

**New Principles of procedural and Substantive Unconscionability (USA):**

The definition of ‘unconscionability’ as stated in **Williams v. Walker Thomas Furniture Co.** (350 F.2d. 445C D.C. Cir 965) has been generally accepted in absence of definition in the UCC. That case defines: “Unconscionability” to include the absence of “meaningful choice” on the part of one of the parties together with contract terms which are unreasonably favourable to the other party. Whether a meaningful choice is present in a particular case or not can only be determined by consideration of all the circumstances surrounding the transaction. In many cases, the



meaningful choice is negated by gross inequality of bargaining power. A contract or a clause in a contract will be said to be unconscionable, if it satisfies the test of procedural as well as substantive unconscionability, indicated respectively by the words ‘absence of meaningful choice’ and ‘terms unreasonably favourable’ in the above definition; and where more of one is present, less of the other is required. Procedural unconscionability arises when there is an element of oppression or wrong doing in the process of the making of the contract and would include, use of fine print or technical language, lack of knowledge or understanding and inequality of bargaining power. “Substantive unconscionability” on the other hand affects the actual substance of the contract and its terms and will include wide exclusion clauses, or excessive prices etc.

We have referred to this dichotomy in Chapter I. We shall also be referring to these concepts in latter chapters.

## **AUSTRALIA**

New South Wales (NSW) has a legislation in relation to unfair or unjust consumer contracts in general.

### **The Contract Review Act, 1980 (New South Wales):**

The Contract Review Act, 1980 (CRA) protects persons from using unjust contracts or provisions. Section 6(2) states that relief under the Act is not available so far as contracts entered into in the course of or for the purpose of a trade, business or profession carried on or proposed to be carried on by the person, other than a farming undertaking in New South Wales. Under Section 7, there are various avenues available to the Court on a finding of an unjust contract or contractual provisions. The CRA provides that a court can grant relief in relation to a consumer contract if it finds the contract or a provision of the contract to have been “unjust” in the circumstances relating to the contract at the time it was made. The court can refuse to enforce any or all of the provisions of the contract and declare the contract void, in whole or in part; make an order varying the provisions of the instrument or terminating or otherwise affecting its operation or effects. The CRA operates concurrently with the Uniform Consumer Credit Code (UCCC). (See Unfair Contract Terms, A Discussion Paper, January 2004) (Queensland and Victoria).

“Unjust” is defined in the CRA as including what is unconscionable, harsh or oppressive.

Section 9(1) of the CRA sets out the matters which the court must consider in determining if the contract or a term is unjust: the public interest and all the circumstances of the case, including such consequences or results as those arising in the event of:

- (a) compliance with any or all of the provisions of the contract, or

(b) non-compliance with, or contravention of, any or all of the provisions of the contract.

Under section 9(2) wherever relevant, the Court is also to have regard to procedural issues such as material inequality of bargaining power, relative economic circumstances, educational background, literacy of the parties, any unfair pressure, whether or not legal or expert advice was sought, but also substantive issues such as:

(d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract; and

.....  
.....

(g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed.

Section 9 which bears the title ‘Matters to be considered by the Court’ reads as follows:

**“9 Matters to be considered by Court**

(1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and

to all the circumstances of the case, including such consequences or results as those arising in the event of:

- (a) compliance with any or all of the provisions of the contract, or
  - (b) non-compliance with, or contravention of, any or all of the provisions of the contract.
- (2) Without in anyway affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, including the following:
- (a) whether or not there was any material inequality in bargaining power between the parties to the contract,
  - (b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,
  - (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,
  - (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract,
  - (e) whether or not:
    - (i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or

- (ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented, because of his or her age or the state of his or her physical or mental capacity,
- (f) the relative economic circumstances, educational background and literacy of:
  - (i) the parties to the contract (other than a corporation), and
  - (ii) any person who represented any of the parties to the contract,
- (g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed,
- (h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,
- (i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,
- (j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:
  - (i) by any other party to the contract,

- (ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract, or
- (iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract,
- (k) courses of dealing to which any of them has been a party, and
- (l) the commercial or other setting, purpose and effect of the contract.

(3) For the purposes of subsection (2), a person shall be deemed to have represented a party to a contract if the person represented the party, or assisted the party to a significant degree, in negotiations prior to or at the time the contract was made.

(4) In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made.

(5) In determining whether it is just to grant relief in respect of a contract or a provision of a contract that is found to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

Section 7 which deals with ‘principal relief in respect of unjust contracts reads as follows:

**“Principal relief:**

- (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:
  - (a) it may decide to refuse to enforce any or all of the provisions of the contract,
  - (b) it may make an order declaring the contract void, in whole or in part,
  - (c) it may make an order varying, in whole or in part, any provision of the contract,
  - (d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that:
    - (i) varies, or has the effect of varying, the provisions of the land instrument, or
    - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.
- (2) where the Court makes an order under subsection (1)(b) or (c), the declaration or variation shall have effect as from the time

when the contact was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

- (3) The operation of this section is subject to the provisions of section 19”.

Section 8 refers to ancillary relief which could be granted by a Court. Section 8 reads as follows:-

**“Ancillary relief**

Schedule 1 has the effect with respect to the ancillary relief that may be granted by the Court in relation to an application for relief under this Act.”

The CRA (NSW) is not limited to “standard” terms although whether a term was negotiated or not is a consideration for the court. Sections 9(2) (d) and (g) in particular lean towards the substantive issues. A person’s rights under the Act cannot be excluded or restricted in any way.

The Act also provides a mechanism for relief by an individual consumer on a case by case basis, and for grant of systemic relief is possible under section 10 as under:

“Where the Supreme Court is satisfied, on the application of the Minister or the Attorney General, or both, that a person has embarked, or is likely to embark, on a course of conduct leading to



the formation of unjust contracts, it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class.”

The Act vests the Supreme Court and the District Court with jurisdiction to consider contracts under the Act (while the jurisdiction of the Local Court and the Consumer, Trader and Tenancy Tribunal is more limited). The District Court’s jurisdiction depends on its monetary jurisdictional limit. In general, the provisions of the CRA may be used either in actions commenced specifically or by way of defence in other proceedings arising out of, or in relation to, the contract.

While it appears that the NSW Court described the Act as a ‘revolutionary legislation whose evident purpose is to overcome the common law’s failure to provide a comprehensive doctrinal framework to deal with ‘unjust’ contracts (West v. AGC (Advances) (1986)(5) NSWCR 610, the Act was criticized for failing to distinguish between procedural and substantive unconscionability as ‘the list of factors, to which the Court is required to have regard, in determining whether a contract is unjust, is a mish-mash of process-oriented and outcome oriented considerations’ (Duggan (1991)17 Mon LR’ some reflections on common provision and the law reform process”.

### **Trade Practices Act, 1974 (Australia):**

At the federal level, the Trade Practices Act, 1974 implies various provisions into consumer contracts for sale, exchange, lease, hire or hire

purchase. Any term that attempts to exclude these provisions is treated as void.

Section 51AB of TPA, together with its mirror provisions in State and the National Capital Territory fair trading legislation, prohibits conduct which is, in all the circumstances, unconscionable, in relation to certain defined situations. In deciding whether the conduct in a particular case is unconscionable, the court may have regard to matters such as:

- the relative bargaining strength of the parties;
- whether undue influence or pressure was exerted or unfair tactics used;
- whether the consumer was required to comply with conditions which were not reasonably necessary for the protection of legitimate interests of the supplier; and
- the amount for which, and the circumstances under which, the consumer could have acquired equivalent goods or services from another party.

On finding unconscionable conduct, the court can either grant an injunction or it can make certain other orders if it considers that they will compensate a party, in whole or, in part, for loss or damage or will prevent or reduce any loss or damage.

**Uniform Consumer Credit Code (UCCC) (Australia) (w.e.f. 1.1.1996):**

In 1993, the States and Territories made the Uniform Credit Laws Agreement. The Queensland Parliament passed the template legislation in 1994. Other jurisdictions followed and the uniform system, hereinafter referred to as “UCCC”, came into effect across Australia on 1 November 1996. (See Uniform Contracts Terms, Discussion Paper, Jan 2004) (Victoria).

The UCCC in general applies to the provision of credit to a natural person or strata corporation by a credit provider who provides credit in the course of, or incidental to, a business where a charge is made for providing the credit so long as the credit is predominantly for personal, domestic or household purposes. The UCCC also applies to consumer leases, related insurance contracts and related sales contracts (as defined).

Unjust contracts can be re-opened under Section 70. The definition of “unjust” is the same as that in the Contract Review Act, 1980 (NSW), that is, it includes unconscionable, harsh or oppressive contracts.

Section 70 of UCCC referred to above is concerned with procedural and substantive injustice. The list of matters which may be taken into account by the court under Section 70(2) are very similar to those which the court must take into account under Section 9(2) Contract Review Act, 1980 (NSW). Whether or not a term was the subject of negotiation is a matter for the court to consider.

If the court considers that a matter is unjust, it may re-open the transaction that gave rise to the contract. It may then, inter-alia, re-open an account, relieve the debtor from payment to the extent it considers reasonable, set aside wholly or in part or revise or alter an agreement, make an order for payment of an amount it thinks is justly due to the party under the contract as per Section 71. Action is only available to the individual debtor.

Under section 72, the court may review unconscionable interest, fees or other charges.

**Fair Trading Act, 1999 (Victoria):**

**Fair Trading (Amendment) Act, 2003 (Victoria):**

Victoria amended the Fair Trading Act, 1999 which came into force on 9<sup>th</sup> October, 2003. It included provisions to address unfair contract terms. The provisions draw heavily on the United Kingdom Unfair Terms in Consumer Contracts Regulations. (See Uniform Contracts Terms, A Discussion Paper, Jan 2004) (Queensland and Victoria).

The provisions cover “consumer contract”, which is defined as: ‘an agreement whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use, for the purposes of the ordinary personal,

household or domestic use of those goods or services.’ The summary of the Act is as follows:

- (1) A term in a consumer contract is unfair if contrary to the requirement of good faith and in all the circumstances it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer;
- (2) If a consumer believes a term to be unfair, he or she can take the issue to court; a term found to be unfair is void: the rest of the contract continues to bind the parties if it is capable of existing without the term;
- (3) In assessing whether a term is unfair, the court can have regard to whether the term was individually negotiated; whether it is a prescribed term; and whether it has an object or effect set out in the Act.
- (4) Standard form contracts terms can be prescribed by regulation to be unfair and it is an offence to use or recommend the use of a prescribed term;
- (5) The Director can apply to the Tribunal for an injunction where it is believed that a person is using or recommending the use of an unfair term in a consumer contract or a prescribed term in standard form contracts as per section 32-ZA.

An oral contract is covered with respect to common contracts; a term relating to price is covered by the provisions; a contract to which the UCCC

(referred to earlier) applies, is not covered, and business to business contracts are not covered.

Whilst the individual consumer can take their contract to court, the Victorian Civil and Administrative Tribunal can deal with matters systemically in relation to standard form contracts. Unlike the United Kingdom, Victoria has the ability to develop a ‘black’ list of terms through regulations which prescribe unfair terms and is also able to prosecute if these are used.

Under section 163, a general provision in the (Victorian) Fair Trading Act, 1999, states that a written contract must be easily legible, in a minimum of 10 point if printed and must be clearly expressed. The Director can apply to the (Victorian) Civil and Administrative Tribunal if it is believed that a term does not comply with this section. The Tribunal can prohibit the supplier using the provision and there is a penalty for failure to comply with the order.

“Unconscionability” has proved popular in Commonwealth jurisdictions where it has undergone something of a renaissance in the last decade especially in Australia. The concept of unconscionability although expressed in wide terms, the courts exercise an “equitable jurisdiction” according to recognized principles. This equitable jurisdiction, exists when one of the parties, ‘suffers from some special disability or is placed in some special situation of disadvantage, Commercial Bank of Australia Ltd v. Amadio (1983) 151 CLR 447, as cited in Mulla’s Indian Contract and Specific Relief Acts, 12th

edn. Vol.-I p.479. The courts do not set aside bargains simply because they appear to be unfair, harsh or unconscionable in the eyes of Judges” Louth v. Diprose (1992) 175 CLR 621, as cited in Mulla’s Indian Contract and Specific Relief Acts, 12<sup>th</sup> edn. Vol. 1, p. 479.

### **Amadio’s case**

In **Commercial Bank of Australia Ltd. Vs. Amadio** (1983), all the five Judges of the High Court confirmed the existence of an equitable jurisdiction to set aside contracts on the basis of unconscionable dealings.

The facts of the case are: Two elderly Italian migrants to Australia who were not familiar with the English Language, executed, at the request of their son, a mortgage in favour of a bank over their land for securing an overdraft of a company which the son controlled. The son had represented to his parents that the mortgage would be limited to \$50,000 and for six months. The bank did not disclose to the couple that the bank had been selectively dishonoring the company’s cheques, and that they had agreed that the overdraft was to be reduced and cleared within a short time. The couple signed the mortgage believing it to be for an amount of \$50,000 and for six months, but the documents actually signed by the couple included a guarantee containing an ‘all moneys’ clause, securing all amounts owing or which might be owed by the company to the bank. The bank was aware that the couple was misinformed about the instrument.

The majority found that the Amadios were under a special disability, were not given full information about the extent of the guarantee and were

ignorant about the perilous financial state of the company. Their son, who could have assisted them, had deceived them. Applying the objective test, the majority held that the bank was aware of the need of the Amadios to have independent advice, and in proceeding with the transaction in the light of this knowledge, the bank had acted unconscionably. The principle of unconscionable dealings which was applied was summarized as follows:

“The jurisdiction is long established as extending generally to circumstances in which: (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them; and (ii) the disability was sufficiently evident to the stronger party to make it prima facie unfair or ‘unconscientious’ when he procures, or accepts, the weaker party’s assent to the impugned transaction in circumstances which are shown to have existed and an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.”

Under the Amadio approach, the weaker party emphasised mainly to the manner in which the transaction was concluded. This is the procedural unconscionability in which a party must show that the stronger party acted unconscionably. On the other hand, the questions of substance, namely, the nature of the terms, would be concerned at the second stage of the proceedings when the onus is cast on the stronger party to show that the transaction was ‘fair, just and reasonable’.

### **Position in United Kingdom:**



In U.K., the laws relating to contracts accept the basic principle of freedom of contract i.e. the parties should be free to agree on any terms that they like provided that their agreement is not illegal or otherwise contrary to public policy. In practice, however, there have been restrictions on this principle. The restrictions are justified by the fact that parties may not have sufficient bargaining power to protect their interests or parties are not always sufficiently well informed.

The principal control over unfair terms until 1994 centred on “exclusion” and “limitation of liability” clauses though some legislation to combat with this problem was first passed in the 19<sup>th</sup> century. The doctrine of common law and the Court of equity were inadequate to deal with the problem that emerged with the development of standard form contracts, essentially the pre-printed contracts drawn up in advance by one party for use on more than one occasion.

### **Unconscionability and equity jurisdiction of Courts in United Kingdom**

There is long-established jurisdiction to set aside harsh and unconscionable bargains. Courts of equity, in the eighteenth century often set aside express contractual provisions on grounds of unconscionability. However, nearly all these cases fell into certain special classes, that is, mortgages and bonds and the sale of mortgage of revisionary interests. The equity jurisdiction was used to be unduly exercised to reopen all bargains. The equity jurisdiction was invoked to setting aside grossly unfair contracts

entered into by poor and ignorant persons. Towards the end of the nineteenth century, the equitable jurisdiction fell into disuse partly because conditions changed and partly because the Moneylenders Act of 1900 gave statutory control over some of the activities formerly regulated by the equity jurisdiction. The equity jurisdiction seemed contrary to the fundamental basis of classical contract theory.

In modern times attempts have been made to revive the old equitable jurisdiction. Lord Denning in **Lloyd's Bank** (1974(3) All ER 757) suggested that there was a general equitable jurisdiction to set aside contracts where the parties were of unequal bargaining power and one of them had used his superior bargaining power to extract some unfair or unconscionable advantage. Equity has never proclaimed any general power to relieve from bargains and its jurisdiction to interfere has traditionally been limited to cases where it would be unconscionable for a plaintiff to rely strictly upon his legal rights.

### **Unconscionability at Common Law in United Kingdom**

The medieval common law provided some form of remedy upon many informal agreements by the use of the writs of debt and detinue. The evolution of the action on the case of an assumpsit, and the action on the case of a debt also permitted certain agreements of an informal character to be sued upon at common law. The law in the U.K. about unconscionability bargains has been stated in Halsbury's Laws of England (4<sup>th</sup> Edn. Reissue, vol. 16, Equity, para 673) as follows:

“Where by reason of the unfair manner in which it was brought into existence (‘procedural unfairness’) as where it was induced by undue influence, or where it came into being through an unconscientious use of the power arising out of the circumstances and conditions of the contradicting parties; in such cases equity may give a remedy; but where by reason of the fact that the terms of the contract are more unfavourable to one party than to the other (‘contractual imbalance’), contractual or inadequacy of consideration is not, however, in itself a ground for relief in equity, but it may be an element in establishing such fraud as will avoid the transaction, or the transaction may be so unconscionable as to afford in itself evidence of fraud. A bargain cannot be unfair and unconscionable, however, unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience, as by taking advantage of the weakness or necessity of the other.”

Lord Denning M.R. was the propounder or perhaps the originator at least in U.K. of this theory in **Gillespie Bros & Co. Ltd. v. Roy Bowles Transport Ltd.** (1973 Q.B. 400 at 416) where Lord Denning for the first time construed an unreasonable indemnity clause in a contract and questioned: are the courts to permit party to enforce unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable, and stated:

“When it gets to this point, I would say, as I said many years ago, ‘.... There is the vigilance of the common law which, while allowing

freedom of contract, watches to see that it is not abused'. It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so.”

It was in **Lloyds Bank Ltd. v. Bundy** (1974 (3) All ER 757) that Lord Denning M.R. then enunciated his theory of “inequality of bargaining power”. By virtue of it, the English Law gives relief to one who enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the strains in which he finds himself. It would not be meant to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.

In the House of Lords, Lord Diplock outlined the theory of unreasonableness or unfairness of a bargain and the need to relieve a party from a contract, where the relative bargaining power of the parties was not equal. In **A. Schroeder Music Publishing Co. Ltd. v. Macaulay** (1974 (3) All ER 616) the song writer had contracted with the publisher on terms more onerous to him and favourable to the publisher. The song writer was relieved from the bargain of the contract on the theory of the restraint of trade which was opposed to public policy. The distinction was made even in respect of standard forms of contract emphasizing that when parties in a commercial transaction having equal bargaining power have adopted the

standard form of contract, it was intended to be binding to the parties. The court would not relieve the party from such a contract but the contracts are between the parties to it, or approved by any organization representing the interests of the weaker party, they have been directed by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: If you want these goods or services at all, these are the only terms on which they are obtainable. "Take it or leave it."

The observations of Lord Denning in **Levison v. Patent Steam Carpet Cleaning Co. Ltd.** (1977 (3) All ER 490) are also useful as they reiterated that unreasonable clauses in the contract would be applied to the standard form contract where there was inequality of bargaining power. The judgment in **Alec Lobb Garages) Ltd. v. Total Oil GB Ltd.** (1983 (1) All ER 944) support the recognition of a general principle entitling a court to intervene on the grounds of unconscionable bargains where agreements to set aside transaction on the ground of their being unconscionable bargains was not accepted. Three elements of unconscionability which have to be invariably present before the court can interfere, were formulated as: First, one party has been at a serious disadvantage to the other; whether through poverty, or ignorance, etc.; second, the weakness of one party has been exploited by the other party in some morally culpable manner; and third, the resulting transaction has been not merely hard or improvident, but overreaching and oppressive.

The judgment hints at requiring subjective knowledge on the part of the stronger party both of the weakness of the other party, and of the fact

that a bargain was obtained. The general principle has not been accepted in the English law, because the doctrine of undue influence has been considered as a preferable technique.

### **Legislation in United Kingdom:**

The Canals and Railways Act of 1854 is said to be the first statute invalidating such clauses in a contract. Over the years, various other legislative controls were provided in the Hire Purchase Act, 1938. Wider control even of the exclusion and limitation of liability clauses, did not come until the 1970s. In 1962, the Final Report of the Committee on Consumer Protection (the Malony Committee) had recommended a prohibition on sellers in consumers contract “contracting out” of their implied obligations under the Sale of Goods Act, 1893 (SGA). In 1966 the matter was referred to the Law Commission, which in 1969 published the First Report, recommending number of changes to the Sale of Goods Act, 1893. The recommendations were put into effect by the Supply of Goods (Implied Terms) Act 1973 (SOGITA), which prevented any seller from excluding or restricting liability. In consumer sales, sellers were prevented from excluding or restricting their liability under sections 13-15 of the SOGITA 1973 (merchantability, fitness for particular purpose and corresponding with description or sample): in other sales those liabilities could be excluded or restricted, but only to the extent that it could be shown to be fair and reasonable to allow reliance on the exclusion or restriction.

In 1975 Law Commissions published Exemption Clauses Second Report (Law Com. No.69; Scot Law Com. No. 39), which recommended

wider controls over exclusion and limitation of liability clauses in contracts between businessmen and consumers, businessmen and businessmen and private contracts. This resulted in enactment of the Unfair Contract Terms Act 1977, (hereinafter called UCTA) which incorporated in slightly modified form, the controls in SOGITA. In 1999 came the Unfair Terms in Consumer Contracts Regulations, 1999 (UTCCR) and applied to terms that exclude or restrict obligations or liabilities.

**The basic features of Unfair Contract Terms Act, 1977 (UK):  
(UCTA)**

The UCTA has separate provision for England and Scotland. It does not apply to all contracts but applies to both consumer contracts (sections 4 & 5) and contracts between business [section 6(1) and (3) – (s.20 (i), 20(2) (ii)] and also to terms and notices excluding certain liability in tort. The Act applies only to exclusion and limitation of liability clauses (and indemnity clauses in consumer contracts). The Act makes certain exemption clause automatically ineffective, as with attempts to exclude or restrict liability for negligently caused death or personal injury but for most part it renders exemption clauses ineffective unless they satisfy the requirement of “reasonableness” as per section 11 of the act. Whether a contract satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 of the Act. The burden of proof is on the party claiming that the exemption clauses satisfies the requirement of reasonableness.

**The basic features of Unfair Terms in Consumer Contracts Regulation, 1999 (UTCCR):**

UTCCR are only concerned with contracts between consumers and sellers or suppliers. There are no terms that are automatically of no effect. Basically, the Regulations apply a 'fairness' test to terms in contracts between 'consumers' and 'sellers' or 'suppliers', which have not been individually negotiated and any unfair term does not bind the consumer. The test of unfairness (under Regulation 5) requires that contrary to the requirement of good faith, there should be significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. In addition, Schedule 2 under Regulation 5(5) contains an indicative and non-exhaustive list of terms, which may be regarded as unfair. Certain 'Core' terms are excluded from being the subject matter of fairness test, provided they are in plain intelligible language. The Director General of Fair Trading and qualifying bodies are given powers to try to prevent the continued use of unfair term drawn up for general use. Under the Regulation it is always for the consumer to prove that the term is unfair.

**U.K. Law Commission's Consultation Paper (2002):**

The UCTA and UTCCR are completely unrelated to each other and use different concepts and terminologies resulting in complexity and inconsistency between the two. The UCTA despite its name, is not concerned with unfair terms. Whether a term is unfair is not a test of its validity under this Act. Some terms are simply struck out, other terms are



valid, if reasonable. Similarly, the regulations can be used to attack any term which can be argued to be unfair.

Therefore, in January, 2001, the U.K. Law Commission and Scottish Law Commission received a joint reference from the Parliament Under Secretary for State and Consumers and Corporate Affairs to consider the desirability and feasibility of replacing the two legal regimes with a unified regime which would be consistent with Council's Directive, more accessible and clearer to the reader.

The Law Commissions thus on 3<sup>rd</sup> July, 2002 issued a joint consultation paper No.166 on 'Unfair Terms in Contracts' inviting public views on the provisional proposals suggested therein. The U.K. Law Commission proposed a single piece of legislation for the whole of U.K. Protection against unfair terms is envisaged for both consumers as well as business contracts. The envisaged unified legislation would subject all terms to a fair and reasonable test. The basic test in the new legislation on what is 'fair and reasonable' should be whether, judged by reference to the time, the contract was made. The new legislation also contains detailed guidelines relating both to fairness in substance and to procedural fairness. (See paras 4.96 - 4.99-4.101). The Commissions invited public views on the question whether the burden should either (i) be on the party claiming that the term is fair and reasonable to show that it is; or (ii) be on the party claiming that it is not fair and reasonable to show that it is not, unless it falls within Schedule-2, in which case it is for the party claiming that the term is fair and reasonable to show that it is.

**The U.K. Law Commission: Final Report (No.292) (2004):**

The issue of unfair terms in contract continues to engage the attention of law reform agencies, courts and of the legislature. In United Kingdom, the Law Commission and the Scottish Law Commission presented to the Parliament on February, 2004 its Report (Law Commission No.292) on Unfair Terms in Contract. The Report considered two major legislations dealing with Unfair Contract Terms, viz. The Unfair Contract Terms Act, 1977 and the Unfair Terms in Consumer Contracts Regulation, 1999. The Unfair Contract Terms Act, 1977 extends to all contracts, i.e. consumer contracts, business contracts, employment contracts and private contracts. The Act, however, focuses primarily on exemption clauses. It strikes at clauses excluding or restricting liability in certain clauses of contract and also introduces the test of reasonableness. The reasonableness would depend upon the unfairness of the terms in the light of the circumstances, which ought to have been known, or in the contemplation of the party. It puts the burden of proving that a term is reasonable on the party seeking to rely on the clause. The Unfair Terms in Consumer Contract Regulations, 1999 (which implements the European Council Directive on Unfair Terms in Consumer Contracts) apply to consumer contracts of all kinds in the whole of the United Kingdom and subjects the terms to a fairness test. It does not contain detailed guidelines as to how the test should be applied but contains a list of terms, which may be regarded as unfair.

Law Commission took up the task to consider as how to replace these two legislations with a single unified Act that will set out the law on unfair contract terms in a clear and accessible way. The Commission set out recommendations for a unified regime to apply to consumer contracts, for business contracts in general, and extending the wider controls of the Unfair Terms in Consumer Contracts Regulations to contracts with small business. The Report also addresses upon the issues relating to employment contracts, international contracts and choice of law. (Summary of Records are contained in paras 8.2 to 8.89. Appendix 1 thereof contains Draft Bill with Explanatory Notes in 35 sections and number of Schedules).

Part 1 deals with ‘Business Liability for Negligence’, Section 1. Section 2 deal with Exceptions and Section 3 with Voluntary Acceptance of Risk;

Part 2 deals with ‘Consumer Contracts’ – contracts in general. Section 4 refers to terms of which are of no effect unless fair and reasonable; section 5 to sale or supply to consumer, section 6 to sale or supply to business, section 7 to Regulations and enforcement, section 8 to ambiguity;

Part 3 deals with ‘Non Consumer Contracts’ i.e. Business Contracts. Section 9 deals with standard forms, section 10 to sale or supply of goods, section 11 to non-negotiated terms, section 12 to Written standard terms, section 13 to sale or supply of goods;

Part 4 deals with the 'Fair and Reasonable' Test. (section 16). Burden of proof is contained in section 15 in Consumers Liability for negligence; section 16 in Consumer Contracts; section 17 in business contracts;

Part 5 deals with Choice of Law. Section 18 deals with "Consumer Contracts, section 19 to business contracts, section 20 with small business contracts;

Part 6 is 'Miscellaneous & Supplementary'. Section 21 deals with unfairness issue raised by Court; section 22 with exceptions; section 23 with secondary contracts; section 24 with effect of unfair terms on contracts; section 25 deals with interpretation, i.e. definition of 'consumer contract' and business contract (section 26); section 27 defines 'small business; section 28 defines 'associated person'; section 29 defines 'small business contract' and section 30 with 'excluding or restricting liability'; section 31 defines 'hire purchase' or hire; section 32 refers to general interpretation of various terms. Sections 33 to 35 are general.

**Consumer Contracts:** The Commissions recommended legislation to allow a consumer to challenge any kind of term that is not a 'core' term, whether or not a term was negotiated. 'Core' terms are those terms in consumer contracts that set the price or define the product or service being supplied. The terms other than core term should be subject to the fair and reasonable test. Further, the burden of proving that a term is fair will be on the business.

**Business Contracts:** The Commission recommended a comprehensive regime for non-consumer contracts. It provides for the review of terms in business contracts where one party deals on the written standard terms of business of the other party. As regards small business contracts, the class of terms that can be challenged by small businesses is significantly narrower. The small businesses have further to bear the burden of proving that the term is not fair and reasonable.

**Employment Contracts:** Unfair Contract Terms Act, 1997 has been applied to employment contracts by the Courts either by treating the employee as a consumer or by treating the employment contract as the employer's written standard terms of business. The Commission recommended that the employee could challenge the relevant term of employment only where the relevant term is a part of the employer's written standard terms of business. In other words, where the employment is on the employers standard terms, a term that purports to exclude or restrict the employers liability or to allow the employer to render a performance substantially different from that reasonably expected will be subject to the fair and reasonable test.

**European Council Directive (1993) Applicable to UK and the Regulations of 1994, 1999 and 2001:**

However, in 1993 the European Council of Ministers passed the Directive on Unfair Terms on Consumer Contracts which applies (with limited exceptions) to Unfair Terms on any type in consumer contracts. The Directive was implemented in U.K. by the Unfair Terms in Consumer

Contracts Regulations 1994 (herein after called UTCCR) which have now been repealed and replaced by the UTCCR, 1999. This was further amended by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001. The 1999 Regulations set out to transcribe the spirit and details of the Directive into the English law. The Regulations did not amend or repeal UCTA; they provided an additional set of controls.

The Unfair Terms in Consumer Contracts (Amendment) Regulations, 2001 amended the Unfair Terms in Consumer Contracts Regulations 1999 ("the principal Regulations") by adding the Financial Services Authority to the list of qualifying bodies in Part One of Schedule 1. These Regulations also amend the principal Regulations to reflect changes in the names of certain of the qualifying bodies listed in Part One of Schedule 1, and to reflect the fact that the functions of the Director General of Electricity Supply and of the Director General of Gas Supply have been transferred to the Gas and Electricity Markets Authority under Part I of the Utilities Act 2000.

The principal Regulations provide a power for the Director General and the public qualifying bodies to require traders to produce copies of their standard contracts, and give information about their use, in order to facilitate investigation of complaints and ensure compliance with undertakings or court.

Thus, in the field of Contract Law in UK, the Unfair Contract Terms Act, 1977 (UCTA) and the Unfair Terms of Consumer Contracts Regulations, 1999, (UTCCR) are probably the two single most pieces of

legislations. What the Law Commissions have now proposed in 2004, to be integrated into a single Act.

### CANADA

In Canadian jurisdictions unconscionable conduct is an offence. All common law Provinces have an Unconscionable Transactions Relief Act, which allows for the re-opening of unfair credit transactions.

(A) The Ontario Business Practices Act, 1990 deems “an unconscionable consumer representation” to be an unfair practice. Unconscionability would include the procedural matters such as physical infirmity, ignorance, illiteracy, and inability to understand the language of an agreement, but also:

2.2.ii. that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;

2.2.v. that the proposed transaction is excessively one-sided in favour of someone other than the consumer; and

2.2.vi. that the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable.

(See Discussion Paper, Unfair Contract Terms) (2004)  
(Victoria)

(B) The Saskatchewan Consumer Protection Act, 1996 also prohibits unfair practices and section 6(q) refers to:

“Taking advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one sided.”

(C) The Alberta Fair Trading Act, 1998 includes in a list of unfair practices:

Sec.6(2)(d) refers to charging a price for goods or services that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference in price and the reason for the difference; and

Sec. 6(3)(c) to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided.

(D) In the British Columbia the substantive provisions of the Business Practices and Consumer Protection Act, 2004 that address unfair contract terms are, in large part, a restatement of the law as it was set out in the British Columbia’s two former Consumer Protection Statutes, the Trade Practice Act, 1996 and the Consumer Protection Act, 1996. The Trade Practice Act, 1996 of British Columbia, in determining whether an act or practice is unconscionable, requires a court to consider all the surrounding circumstances of which the supplier knew or ought to have known, including procedural matters and Sec. 4(3)(c) that, at the time the consumer transaction was entered, the price grossly exceeded the price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers; and Sec. 3(3)(e) that the terms or conditions on, or



subject to, which the consumer transaction was entered by the consumer are so harsh or adverse to the consumer as to be inequitable.

The Business Practices and Consumer Protection Act, 2004 adopts the approach of the Trade Practice Act which contained a provision that was intended to be statutory embodiment of the judicial doctrine of unconscionability. Broadly, the provisions of the Business Practices and Consumer Protection Act, 2004 relate to the consolidation and regulatory structure rather than the substantive law. The British Columbia Law Institute in its recent Report on Unfair Contract Terms [BCLI Report No.35, February, 2005] studied various options to reform the law of unfair contract terms. However, it did not recommend any legislative change in respect of unfair contract terms.

(E) Quebec Civil Code (1991) has a different approach to the Common Law Jurisdiction (sections 1432 to 1438).

### **NEW ZEALAND**

New Zealand does not have a single specific piece of legislation, which protects against unfair terms in consumer contracts. The two main pieces of consumer legislation in New Zealand are the Fair Trading Act, 1986 (NZ FTA) and the Consumer Guarantees Act, 1993 (CGA). (See Unfair Contract Terms, Discussion Paper, Victoria, 2004).

The (NZ) FTA covers misleading and deceptive conduct in trade, trade descriptions, unfair practices, consumer information and product safety. Liability is strict (as the breach may be innocent). The type and amount of any awarded civil remedy is discretionary. Unlike the TPA, 1974 (Australia) on which it is largely based, it does not have unconscionable conduct provisions.

The (NZ) CGA applies to the supply of goods or services which are intended for ordinary household use. The Act provides consumers with a number of implied guarantees. It imposes obligations on sellers and manufacturers and provides a number of remedies that enable the consumer to pursue the manufacturer or seller of the goods or services.

There are a number of New Zealand statutes that reform the Common Law approach to contractual relationships.

The Contractual Remedies Act, 1979 allows a party to a contract to recover damages (assessed as if the representation was a term of the contract) for an innocent or negligent misrepresentation, which induced the contract and also governs the circumstances in which a party is entitled to cancel a contract. Cancellation of a contract results in all parties being relieved from further performance but the Act also provides the courts with broad discretionary powers to grant remedial relief to any party to prevent injustice when a contract is cancelled.

The Contractual Mistakes Act, 1977 and the Illegal Contracts Act, 1970 largely codify the established Common Law rules relating to contracts which are entered into by mistake or contrary to law. Both statutes, however, confer on the court a broad statutory discretion to grant remedial relief in respect of contracts subject to those Acts.

### **South African Law Commission**

#### **Discussion Paper 65 on Unreasonable Stipulations in Contracts and the Rectification of Contracts (1996) and Final Report (1998)**

The object of project 47 of S.A. Law Commission was to consider whether the courts should be enabled to remedy contracts or contractual terms that are unjust or unconscionable and then to modify the application to particular situations before the courts of such contracts or terms so as to avoid the injustice which would otherwise ensue. The next question was whether the review power of the courts should extend to all types of contracts, to non-consumer transactions, to international agreements or to standard term contracts only.

This Discussion Paper 65, was published in 1996 in order to inform the public of the prima facie views of the Commission and participation of readers in the debate and eventual formulation of a legislation, if it is deemed necessary. The Working Committee however, in the Discussion Paper 65, proposed that courts should be empowered to rescind or amend a contract or any terms thereof or to make such other order as may in the

opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties vide para (2.4.11) establishing an ombudsperson to ensure that pre-formulated standard contract terms are not unreasonable, unconscionable or oppressive.

The Commission gave the report in April 1998 after considering the view of the participants and the legal position in various countries. The Commission was of the view that there was a need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressiveness in all contractual phases, namely at the stages when a contract comes into being, when it is executed or when its terms are enforced.

The Commission thus proposed a Bill on the control of unreasonableness unconscionableness or oppressiveness in contracts:-. To provide that a court may determine whether contractual orders of contracts are unreasonable, unconscionable or oppressive; to set down the powers of the High Court in regard with terms which are unreasonable, unconscionable or oppressive; to establish the office of ombudsperson; to set down the powers of the ombudsperson; to provide for appointment of officers and staff to the office of the Ombudsperson; and for matters connected therewith. The Commission also felt the need to provide some definition to the concepts of unreasonableness, unconscionability and oppressiveness by setting out guidelines in proposed legislation.

The final Report (1998) gives the summary of its recommendations in parts (xiii) to (xx) (para 1.1 to para 1.12).

Chapter 1 refers to the ‘problem as defined in Discussion Paper 65.

Chapter 2 contains para 2.1 to 2.9.5 (pages 30 to 213) on the following:

- (a) desirability of enacting legislation (para 2.3)
- (b) should courts and/or tribunals be empowered to act against unfair or unconscionable contracts? (para 2.3)
- (c) shortcomings in providing redress in courts (para 2.3.4)
- (d) powers to be granted to courts (para 2.4) (comparative study)
- (e) the fairness criterion (para 2.5)
- (f) guidelines (para 2.6) (comparative study)

(g) scope of proposed legislation (para 2.7) (comparative study)

(h) changed circumstances after the conclusion of contract (para 2.8)

(i) parole evidence rule (para 2.9)

Annexure A contains the South African Law Commission's Bill in the context of unreasonableness, unconscionableness or oppressiveness in contracts or terms.

The Bill (1998) contains 6 sections bearing the titles referred to below:

Section 1: Court may determine whether contractual terms are unreasonable, unconscionable or oppressive and issue appropriate orders.

Section 2: A Court may take guidelines into account for determining unreasonableness, unconscionableness or oppressiveness in contracts or terms.

It has clauses (a) to (z).

Section 3: Application of Act (i.e. to all contracts).

Section 4: Taking into account circumstances which existed at the time of conclusion of the contract and the effect of subsequent changes of circumstances.

Section 5: Admissible evidence to assist interpretation of a contract.

Section 6: Ombudsman

The section enumerates the powers of ombudsman, to receive complaint, require information, regulate, prepare draft cores, to give direction to parties to come up with undertakings and in failure of the parties, to apply to the High Court for directions.

## CHAPTER-VI

### COMMON LAW: UNFAIRNESS IN REGARD TO SPECIFIC PERFORMANCE OF CONTRACT TERMS

In this Chapter, we shall refer to common law principles relating to specific performance of contracts in the context of Unfair Terms.

(a) Common-law: ‘Unfairness’ in ‘Specific Performance’ of contracts:

Under common-law, if a term is unfair, the Court may exercise discretion not to enforce the terms or the contract but the Court cannot declare the terms or contract as void.

The question is as to what we mean by the word ‘fairness’ in Contracts which requires to be protected by Courts in suits for specific performance.

Under common-law, ‘fairness’ was always a necessary condition for specific performance of contracts. Lord Hardwicke stated in Buston vs. Lista (3 Atk 386):

“Nothing is more established in this Court than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this Court will not decree specific performance.”



In Lord Walpole vs. Lord Orford (3 Ves 420), Lord Loughborough (afterwards Lord Rosslyn) stated:

“I lay it down as a general proposition to which I know no limitation, that all agreements, in order to be executed in this Court, must be certain and defined: Secondly, they must be equal and fair; for this Court, unless they are fair, will not execute them; and thirdly, they must be proved in such manner as the law requires”.

We shall next refer to the common law principles as to ‘fairness’ in contracts

(b) Common law: Fry on “procedural” and “substantive” unfairness and “hardship” in contracts relevant to specific performance:

Fry, in his celebrated commentary on ‘Specific Performance’ (6<sup>th</sup> Ed., 1921) (Indian reprint 1997) deals exclusively (see para 387) with ‘Want of Fairness in the Contract’ in Chapter V of his work. He says that there are many instances in which, “though there is nothing that actually amounts to fraud, there is nevertheless a want of that equality and fairness in the contract which, as we have seen, are essential in order that the Court may exercise its extraordinary jurisdiction in specific performance. In cases of fraud, the Court will not only not perform the contract, but will rescind it; but there are many cases in which the Court in the exercise of the jurisdiction in specific performance will stand still, and interfere neither for this one purpose nor the other. (Willan vs. Willan) (16 ves 83).

But under the modern concept of ‘unfairness’ of a contract or a term, the Court can declare the contract or term not only as unenforceable but also as invalid or void. However, that was not so under the common law which only gave discretion to the Court not to enforce ‘unfair’ terms or contracts.

Unfairness, according to Fry, (see para 388) may be either in the terms of the contract itself, (which today we call ‘Substantive’ unfairness), or it may be in matters extrinsic and the circumstances under which it was made (which to day we call ‘procedural’ unfairness): with regard to the latter, parol evidence is of course admissible.

A principle which has been in vogue over centuries is that the (see para 309 of Fry) ‘fairness’ of the contract, like all other qualities, must be judged of as at the time the contract was entered into, or at least when the contract becomes absolute, and not by subsequent events, for the fact that events, uncertain at the time of the contract, may afterwards happen in a manner contrary to the expectation of one or both of the parties, is no reason for holding the contract to have been unfair. This aspect also has been and requires to be considered in the present debate.

But, states Fry (see para 393) in order to bring a contract within this principle, the uncertainty as to the subject matter of the contract must, at the time of the contract, have been a real one to both parties, either from the nature of things or from the state of knowledge of both parties. Further (see para 393) the principle will not apply where, though the terms of the contract may express an uncertainty, that uncertainty was not understood by the parties to comprise the event which actually happened.

Again, in contracts to sell at a price (see Fry para 396) to be fixed by a third person, the Court would no doubt consider the unfairness of the valuer's conduct as a bar to the right to specific performance.

In judging the fairness (i.e. procedural fairness) of a contract (says Fry in para 399), the Court will look not merely at the terms of the contract itself, but at all the surrounding circumstances such as intimidation and duress of the defendant, the mental incapacity of the parties, though falling short of insanity, their age or poverty and the manner in which the contract was executed. The circumstance that the parties were acting without a solicitor, that the property was reversionary or that the price was not the full value are relevant. Thereafter, he says: (see para 400)

“whenever there are evidences of distress in the party against whom performance is sought, or he is an illiterate person, or whenever there are circumstances of surprise, or want of advice, or anything which seems to impart that there was not a full, entire and intelligent consent to the contract, the Court is extremely cautious in carrying it into effect. Still, it is not the doctrine of the Court that a man cannot contract without his solicitor at his elbow, or that a man in insolvent circumstances, or in prison, is disabled from selling his estate; and if a contract made under such circumstances will bear the careful examination of the Court and the full light of day, it will be specifically enforced.”

It is not necessary to prove 'intentional' unfairness or dishonesty it is sufficient if unfairness is proved (see para 401 of Fry).

Unfairness arising out of misstatement of facts is considered as part of misrepresentation (para 402 of Fry); and cases relating to silence or suppression of fact by one party are considered as part of fraud; but yet, it seems possible that there may be cases where silence is not fraudulent but yet creates such a case of hardship as prevents Court's assistance. Courts may also not enforce an agreement (see para 404) which may be injurious to third parties. Likewise, the Court will not (see para 407 of Fry) generally exercise its power to enforce an agreement, where to do so would necessitate breach of trust or of a prior contract with a third person or would compel a person to do what he is not lawfully competent to do, even though at the time of contract, the act might have been lawful.

On 'hardship' (which is part of sec. 20 of the Indian Specific Relief Act, 1930), Fry devoted a full chapter (Chapter VI) in his celebrated work. Hardship may or may not be related to unfair terms. While it is the principle that 'hardship' is to be generally judged as at the time of the contract, he says (para 425) that in considering the hardship which may flow from the execution of a contract, the Court will consider whether it is the result obviously flowing from the terms of the contract, so that it must have been present at the time of the contract in the minds of the contracting parties or whether it arises from something collateral and so far concealed and latent, as that it might not have been thus present in their minds. It is obvious, he says, that a far higher degree of hardship must be present in the

former, than in the latter class of cases, for it to operate on the discretion of the Court.

The above are the general principles under common law in regard to specific performance of contracts.

## **CHAPTER-VII**

### **NEED TO HAVE PROCEDURAL AND SUBSTANTIVE DIVIDE**

Several authors have criticized existing statutes as not having met the challenge of dealing with ‘procedural unfairness’ and ‘substantive unfairness’ separately and in not defining these words nor in providing separate guidelines for judging each of them. We have referred to this aspect in Chapter I.

Most statutes do refer in the same sections to substantive and unfairness aspects of the contract, though there is no independent treatment. Courts are, therefore, unable to focus upon these issues in depth or lay down clear-cut principles. That is why in Chapter VIII, we propose to segregate the procedurally unfair provisions in statutes of other countries and in Chapter IX, the substantive unfair provisions in those countries. In Chapter X, we propose to list out the procedural unfair provisions of the Indian Contract Act, 1872 and of the Specific Relief Act, 1930.

In this chapter, we shall deal with the criticism in regard to the absence of separate statutory focus on these two concepts.

(a) The UK and Scottish Law Commission Report 2004, does not refer to this distinction except in one place while dealing with its comments on Clause 14 of the Bill prepared by it. Section 14(1)(b) of the Bill attached to the UK and Scottish Law Commissions Report, 2004 refers to this aspect in

the Explanatory Notes, Part 4 (para 42) which deals with clause 14 and Schedule 2 of the ‘fair and reasonable test’. Para 42 reads as follows:

“42. Paragraph (b) of clause 14(1) and (2) requires that in determining whether in an individual case, the term or notice was fair and reasonable, both substantive fairness (the circumstances of the term) and procedural fairness (the circumstances existing at that time) be taken into account.”

(b) The Tasmania Law Reform Commission explained in its ‘Report on Harsh and Unconscionable Contracts’ (Report 71) that

“procedural unconscionability relates to bargaining process of the transaction and the particular conduct of the parties, whereas substantive unconscionability focuses on the content of the contract.”

(c) The Report of the New Zealand Law Commission while referring to the guidelines drafted by it states that ‘the contract be substantively as well as procedurally fair’.

(d) In the Discussion Paper on Unfair Contract Terms, 2004 of Victoria (Australia), prepared by the Standing Committee of Officials of Consumer Affairs, it is stated in the Executive Summary:

“The Courts have tended to require that there must be some aspect of procedural unfairness (a problem surrounding the circumstances leading up to and at the time of making the contract).”

and the Paper further states (at para 2.1.1) that

“there are two contrasting aspects of unconscionable conduct as related to contracts:

firstly, procedural unfairness which is concerned with the circumstances leading up to and at the time of making of the contract; and secondly, substantive unfairness which is concerned with the unfairness of the terms of the contract themselves which lead to injustice.”

The Paper points out that “the common law was more concerned with ‘procedural injustice’ while sec 51AB of the (Commonwealth) Trade Practices Act, 1974 enumerated, apart from the bargaining strength, undue influence or pressure and capacity to understand provisions (which are procedural), the following substantive aspects:

- a. Whether the consumer was required to comply with conditions which were not reasonably necessary for the protection of the interests of the supplier; and
- b. The amount for which, and the circumstances under which, the consumer could have acquired equivalent goods or services from another party”.

The Paper refers to the following comments by Parkinson (Laws of Australia) in regard to sec. 51AB of the (Commonwealth) Trade Practices Act, 1974:



“There is a question whether and to what extent sec 51AB is concerned with the bargaining process and/or contractual outcomes. The equitable doctrine is confined to procedural unconscionability, that is, unfairness in the bargaining process, but the statute is not limited in that way and may permit relief from contracts which are unfair in their terms, despite the absence of any unfairness in the bargaining process. No policy choice is made plain in the legislation on this point. The section directs the Court’s attention to a number of factors, some of which go to the negotiations and others to the outcome of them. The factors in ss 51AB(2)(b) and (e) suggest that the Court may have regard to unfairness in the Contract (substantive) ....”

The Paper points out that the (New South Wales) Contracts Review Act, 1980 also refers in sec 92 to the ‘procedural’ issues such as material inequality of bargaining power; relative economic circumstances; educational background; literacy of the parties; any unfair pressure; whether or not legal or expert advice was sought. It also refers in clauses (d) and (g) to substantive issues such as:

(d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or are not reasonably necessary for the protection of the legitimate interests of any party to the contract; and

(g) where the contract is wholly or partly in writing, the physical form of the contract and the intelligibility of the language in which it is expressed.’

It says that the Contracts Review Act, 1980 (NSW) is not limited to ‘standard’ terms although whether a term was negotiated or not is a consideration for the Court. Sub-sections 9(2)(d) and (g) referred to above, in particular lean towards the substantive. A person’s rights under the Act cannot be excluded or restricted in any way.

The Paper refers to the fact that Goldring et al (Quoting Duggan, ‘Some Reflections on Consumer Protection and the Law Reform Process’ (1991)17 Mon LR at 274), that in the TPA and the Uniform Consumer Credit Code, there was failure to treat procedural and substantive unfairness separately. They said:

“The Contracts Review Act and by inference, the other legislation (TPA and Uniform Consumer Credit Code) has been criticized for failing to distinguish between procedural and substantive unconscionability as ‘the list of factors to which the Court is required to have regard, in determining whether a contract is unjust, is a mish-mash of process-oriented and outcome-oriented considerations.”

One of the conclusions of the Discussion Paper of Victoria at the end of Part A is that ‘the current statutory regimes in Australia have created some confusion in practice because of their failure to distinguish between procedural and substantive unfairness (per Goldring et al and Duggan).

Again in Chapter 4 (para 4.5) of the Paper it is stated that “whilst it has been argued that there is probably sufficient coverage of the procedural aspect of unfair contract terms, the criticism noted earlier by Goldring et al, that current Australian legislation is problematic in that it does not distinguish between procedural and substantive issues, is considered to be valid. In order to create clarity, the opportunity might be undertaken, whilst addressing the issue of unfair contract terms, to rectify this situation”. At the end of the para, it is stated,

“There would be better Court outcomes for aggrieved individuals due to the differentiation between procedural and substantive matters.”

(e) A Paper on ‘Why we must regulate Unfair Contract Terms’ prepared under the auspices of the Consumer’s Federation of Australia in conjunction with the Australian Consumers’ Association, states under the heading ‘the current laws fail consumers’ that unfortunately,

“unconscionable conduct laws are focused on procedural, not substantive unfairness. Procedural fairness looks at the actions of the parties to the contract at the time of signing and the circumstances in which the contract was entered into. The fact that a person may have had a disability at the time of signing a contract is a good example of procedural unfairness. Substantive unfairness looks at what is written on the contract itself – what the nature of the bargain is... Paying ten times the market value of something is a good example of substantive unfairness.

Because they are procedurally focused, unconscionable contract laws must consider the individual circumstances of particular cases if they are to be applied, and therefore, can only deal with cases at one time. This means that they are no good fighting the systematic use of unfair terms in standard form of contracts, which is how most unfair contract terms are used.

Because they depend on ‘oral evidence’ about ‘who said what’ and ‘what happened when’, cases based on procedural unfairness are difficult to fight in the Courts, where well-resourced businesses can quickly outgun a battling consumer. A case based on substantive unfairness is easier, because the only relevant evidence is a copy of the unfair contract itself.”

The Paper states that in UK, the Office of Fair Trading (OFT) received more than 1000 complaints during 2002-2003 alone and 1,477 contract terms were abandoned or deleted as a result of OFT enforcement action.

The Australian Paper above referred under the heading ‘What must be done’, says that the “variety of consumer protection laws that focus either wholly or predominantly on procedural unfairness, and operate poorly or not all in the context of substantive unfairness. As a result, a wide range of markets regularly employ contracts that contain unfair contract terms, against which consumers are given no adequate or accessible remedies.”

The Paper further states that “While procedural unfairness is already regulated, that regulation is neither unfair nor consistent. There is likely to be great benefit to all market participants in codifying what matters are likely to constitute unfair conduct, and clarify what remedies are available to consumers who are induced to enter into unfair or unconscionable transactions. We support unfair regulations of consumer contracts in their entirety.

(f) The source of the labels ‘procedural unconscionability’ and ‘substantive unconscionability’ is an American law review article by Arthur Allen Leff, Asst. Prof. Washington University Law School, on ‘Unconscionability and the Code – The Emperor’s New Clause’. (1967) 115 University of Pennsylvania Law Review, p. 485. We have referred to his views in Chapter I.

Prof. Leff starts in his lengthy paper by a criticism of s. 2.302 of the Uniform Commercial Code. He says:

“If reading this section makes anything clear, it is that reading this section alone makes nothing clear about the meaning of ‘unconscionable’ except perhaps that it is pejorative. More particularly, one cannot tell from the statute whether the key concept is something to be predicated on the bargaining process or on the bargain or on some combination of the two, that is, to use our terminology whether it is procedural or substantive. Nonetheless, determining whether the section’s target is a species of quasi-fraud or

quasi-duress, or whether it is a species of quasi-illegality, is obviously the key to the bite and scope of the provision.

One central thesis of this essay is that the draftsman failed fully to appreciate the significance of the unconscionability concepts' necessary procedure-substance dichotomy and that such failure is one of the primary reasons for section 2-302's final amorphous unintelligibility and its accompanying commentary's irrelevance"

He observed (p. 539):

“To summarise, there are two separate social policies which are embodied in the equity unconscionability doctrine. The first is that bargaining naughtiness, once it reaches a certain level, ought to avail the practitioner naught. The second is directed not against bargaining conduct (except in so far as certain results often are strong evidence of certain conduct otherwise approved) but against results, and embodies the doctrine (also present in *laisio enormis* statutes) that the infliction of serious hardship demands special justification”

(g) This distinction between the two concepts was highlighted by Lord Brightman in the Privy Council in Hart vs. O'Connor :1985 A.C. 1000 at p 1017-18 (1985(2) All ER 880 at 887). He said:

“If a contract is stigmatised as ‘unfair’, it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It will be convenient to call it ‘procedural

unfairness'. It may also, in some contents, be described (accurately or inaccurately) as 'unfair' by reason of the fact that the terms of the contract are more favourable to one party than to the other. In order to distinguish this 'unfairness' from procedural unfairness, it will be convenient to call it 'contractual imbalance'. The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimization. Equity will relieve a party from a contract which he has been induced to make as a result of victimization. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing. Of the three indicia of unfairness relied upon by the Judge in Archer vs. Cutler (1980)(1) NZLR 386 (assuming unfairness to have existed), the first was contractual imbalance and the second and third were procedural unfairness'.

It is because Equity may not grant relief in case of 'contractual imbalance' i.e. substantive unfairness, that the legislatures have come forward to remedy not only procedural unfairness but also substantive unfairness'.

(h) The distinction between 'procedural' and 'substantive' unfairness was also explained in the Judgment of the New South Wales Supreme Court by McHugh JA in West vs. AGC (Advances) Ltd. (1986)(5) NSWLR 610.

Summary:

In the light of the views expressed as above, it appears to us that if any legislation is to be more effective and realistic, it is necessary to make separate provisions dealing with 'procedural' and 'substantive' unfairness.

We are aware that in certain quarters it has been considered that it is difficult to put these concepts in separate compartments in a statute but we do not agree. We have not found any difficulty. In fact, as pointed by several authors, the focus should not be confined only to 'procedural unfairness' and we must move forward to deal with 'substantive unfairness' also rather than merely state that where parties have signed contracts with the eyes wide open, if such contracts contained a term which was unfair in itself, the party had himself or itself to blame. This was the method of interpretation of contracts at a time when principles of substantive unfairness were not effectively developed. Today, we find in practice that there are a large number of substantively unfair terms in different types of contracts i.e. contracts or terms which are by themselves unfair. Therefore, the law must be reformed to be able to stretch its hands to rectify such substantive unfairness.



## **CHAPTER-VIII**

### **PROCEDURAL UNFAIRNESS: COMPARATIVE LAW**

In this chapter we propose a closer focus on the ‘procedural’ unfairness provisions dealt with in various countries, though they have not been expressly segregated in any particular statute.

#### **United Kingdom: procedural unfairness:**

##### **UCTA (1977): (procedural unfairness)**

The (UK) Unfair Contract Terms Act, 1977 (UCTA) came forward with a test of ‘reasonableness’ in sec. 11. Sec. 11(1) stated that the term must be ‘fair and reasonable’ having regard to the circumstances which were or ought reasonably to have been, known to or in contemplation of the parties when the contract was made. This relates obviously to ‘procedural’ unfairness.

UK ‘guidelines’ in Schedule 2 of the 1977 Act also contain provisions which deal partly with procedural and partly with substantive unfairness, though they are mixed up. Those that refer to ‘procedural’ unfairness are clauses (a), (b), (c). Clause (a) refers to the strength of the bargaining position, clause (b) as to whether the customer received inducement to agree to a term, and clause (c) to whether the customer knew or ought to have known of the existence of the term.

UTCCR (1999): (procedural unfairness)

Under the (UK) Unfair Terms Consumer Contracts Regulation, 1999, (UTCCR) - Regulation 5(1) stated that a 'contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to requirement of good faith, it causes a significant imbalance in the party's rights and obligations under the contract, to the detriment of the consumer. Regulation 5(2) states that a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term. Regulation 5(4) puts the onus on the supplier to prove that a term was individually negotiated to show that it was no unfair.

Regulation 6 refers to the need to consider the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it was dependent.

Schedule 2 of the Regulation refers to several guidelines to be considered while judging unfairness but they all deal with substantive unfairness. (In the UK Law Commission Report, 2004, in para 3.91, it was suggested that 'good faith' clause has to be omitted).

The New Draft Bill, 2004 (UK & Scottish Law Commission): (procedural unfairness)

The Draft Bill, 2004 annexed to the Law Commission Report deals with several matters concerning procedural unfairness.

Part 1 deals with ‘Business Liability for Negligence’; Part 2 with ‘Consumer Contracts’; Part 3 with ‘Non-Consumer Contracts’ which deals with Business Contracts, small Business Contracts, Employment Contracts and Private Contracts; Part 4 deals with ‘the ‘Fair and Reasonable’ Test; Part 5 deals with Choice of Law; Part 6 with “Miscellaneous and Supplementary”.

Schedule 1 deals with ‘Consumer Contract Terms etc.: Regulation and Enforcement’; Schedule 2 deals with ‘contract terms which may be regarded as not fair and reasonable’; Schedule 3 deals with Exception; Schedule 4 deals with calculating the number of employees in a Business; Schedule 5 deals with ‘minor and consequential amendments’.

We shall, however, refer to a few provisions of the Bill which deal with ‘procedural’ unfairness.

Terms as to subject matter, price:

Sub-sections (2) to (4) of sec. 4 of the Bill require that in respect of ‘Consumer’ contracts, the subject matter and the price are unfair if they are not transparent and as reasonably expected by the consumer. These are procedural safeguards.

Fair and Reasonable Test: (procedural)

Sec. 14 of the Bill refers to the ‘fair and reasonable test’ and contains the manner in which both ‘procedural’ and ‘substantive’ aspects of unfairness have to be tested. So far as the procedural aspects are concerned sec 14(4) refers to the following:

“Section 14(4)(1): the knowledge and understanding of the party adversely affected by the term; and

(i) the strength of the parties’ bargaining position,

(rest of the clauses (a), (b) of subsection (1), clauses (a) and (b) of subsection (2), (a) to (d) of clause (3), clause (a) to (g) and (j) of subsection (4) deal with ‘substantive fairness’ which we shall refer to in the next chapter).

As far as the time at which fairness or reasonableness is to be reckoned, para 3.96 of the Report reiterates that it is the time of the contract that is relevant and one has to take into account the substance and effect of the terms in all the circumstances of the contract.

Non-negotiated terms:

In regard to non-negotiated terms included in a standard term contract, sec. 11 of the Bill states that if a term not negotiated is detrimental to a party, the other party cannot rely on it unless it is ‘fair and reasonable’.

The 'fair and reasonable' test is to be treated as satisfied if the term is (a) transparent, (b) substantially the same as the other party reasonably expected etc. These are procedural in nature.

## **South Africa**

### **Procedural unfairness:**

In South Africa, 'procedural' unfairness is referred by the Law Commission in its Report 1998 (Project No.47) in 'Unreasonable Stipulations in Contracts and the Rectification of Contracts'. The Bill attached thereto contains important procedural provisions.

Sec. 1 of the Draft Bill states that

“(1) If a Court is of the opinion that

(a) the way in which a contract between the parties or a term thereof came into being; or

(b) ---                    ---                    ---

(c) the execution of a contract, or

(d) ---                    ---                    ---

is unreasonable, unconsiderable or oppressive, the Court may declare that the alleged contract

(aa) did not come into existence; or

(bb) came into existence, existed for a period, and then, before the action was brought, came to an end; or

(cc) is in existence at the time the action is brought, and it may then

- (i) limit the sphere of operation and/or the period of operation of the contract; and/or
- (ii) suspend the operation of the contract for a specified period or until specified circumstances are present; or
- (iii) until such other order as may in the opinion of the Court be necessary to prevent the effect of the contract being unreasonable, unconscionable or oppressive to any of the parties”

These are procedural aspects in the Bill.

Guidelines to Court: Procedural aspects:

Sec. 20 of the Draft Bill in South Africa provides that a Court may take certain guidelines into account for determining unreasonableness, unconscionableness or oppressiveness in contracts or terms. They are listed. The ‘procedural’ ones are as follows:

- “2(a) the bargaining strength of the parties to the contract relative to each other;
- (b) .....
- (c) .....
- (d) in relation to commercial contracts, reasonable standards of fair dealing or in relation to consumer contracts, commonly accepted standards of fair dealing;
- (e) whether or not, prior to or at the time of contract was made, its provisions were subject to negotiation;

- (f) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alternation of the contract or to reject any of the provisions thereof;
- (g) whether Latin expressions are contained in a term or whether the term of a contract is otherwise difficult to read or understand;
- (h) .....
- (x) .....
- (y) the context of the contract as a whole, in which case the Court may take into account:
  - the identity of the parties and their relative bargaining position,
  - the circumstances in which the contract was made,
  - the existence and course of and negotiations between the parties,
  - any usual provisions in contracts of the kind, or
  - any other factor which, in the opinion of the Court, should be taken into account.

**Canada (procedural unfairness):**

Ontario Law Commission was of the view that the distinction between procedural and substantive unfairness is too rigid and can lead to a sterile debate. We do not agree. We have referred to our reasons in Chapter VII as to why such a division has to be made.

Ontario Business Practices Act, 1990 applies to consumer contracts and refers to ‘unconscionability’ as including procedural matters such as infirmity, ignorance, illiteracy and inability to understand the language of the agreement.

In the Report of the British Columbia Law Institute (2005) titled ‘Unfair Contract Terms: An Interim Report’, there is elaborate discussion in Chapter II of specific cases dealing with unfair contracts – such as automatic renewals, acceleration clauses, terms excluding or limiting liability; in Chapter III to the currently available tools in British Columbia to deal with Unfair Contract Terms and in Chapter IV to Options for Reform.

There is a very useful discussion on the procedural and substantive divide in the terms of contracts in several countries. As the Report is an Interim Report, there are no final conclusions. We have referred to this Report in Chapter VII.

**Australia (procedural unfairness):**

In Australia, as far as ‘procedural’ unfairness is concerned, the Discussion Paper (2004) of the Standing Committee of Officials of Consumer Affairs concluded that the Australian Law had responded to procedural unfairness, that is to the circumstances leading up to and/or at the time of making of the contract which create unfairness (but that the Courts have been reluctant to find unfairness on substantive grounds) and that the current statutory regimes have created some confusion in practice



because of their failure to distinguish between procedural and substantive unfairness.

The NSW Contract Review Act, 1980, has, as already stated in Chapter VII, been commented upon in the Discussion Paper as having failed to distinguish between procedural and substantive unconscionability. Sec. 9 of that Act refers to matters to be considered by the court and so far as ‘procedural’ unfairness is concerned, subsection (2) thereof states:

“Sec. 9(2):

- (a) whether or not there was any material inequality in bargaining power between the parties to the contract,
- (b) whether or not, prior to or at the time the contract was made, its provisions were the subject of negotiation,
- (c) whether or not, it was reasonably practicable for a party seeking relief under the Act to negotiate for the alternative of or to reject any of the provisions of the contract,
- (d) ... ..
- (e) whether or not
  - (i) any party to the contract (other than a corporate) was not reasonably able to protect his or her interests, or
  - (ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented, because of his or her age or the state of his or her physical or mental capacity,

- (f) the relative economic circumstances, educational background and literacy of:
  - (i) the parties to the contract (other than a corporate) and
  - (ii) any person who represented any of the parties to the contract.
- (h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,
- (i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act and whether or not that party understood the provisions and their effect,
- (j) whether undue influence, unfair pressures or unfair tactics were exerted on or used against the party seeking relief under this Act:
  - (i) by any other party to the contract,
  - (ii) by any other person acting or appearing or purporting to act for or on behalf of any other party to the contract, or
  - (iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract,
- (k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party, and
- (l) the commercial or other setting and effect of the contract.

(3) For the purposes of subsection (2), a person shall be deemed to have represented a party to a contract if the person represented the party, or assisted the party to a significant degree, in negotiation prior to or at the time the contract was made.

(4) In determining whether a contract or a provision of a contract is unjust, the Court should not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made.

(5) In determining whether it is just to grant relief in respect of a contract or a provision of a contract that is found to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

#### Section 14: Executed Contracts:

Sec. 14 states that the Court may grant relief in accordance with this Act in relation to a contract, notwithstanding that the contract is fully executed.

In 1993, the States Territories in Australia made the Uniform Consumer Credit Code which applies to credit agreements and it defined the word 'unjust' as in the 1980 Act, by including in the definition what is 'unconscionable, harsh or oppressive'. Sec. 70 concerned both aspects of procedural and substantive injustice. The list of matters which the Court

was to take into account under that Act is similar to sec. 9(2) of the 1980 Act (these are all ‘procedural’ in nature). The court was granted power to reopen the transaction that gave rise to the agreement, set aside wholly or partly or revise or alter the agreement.

Under the Fair Trading Act, 2003 (Victoria), the provisions were similar to UK Unfair Terms in Consumer Contracts Regulations, 1999. ‘Good faith’ was a circumstance if it created a significant imbalance in rights and obligations of parties, to the detriment of the consumer and the Court should have regard to whether the term was individually negotiated, whether it was in a prescribed form and whether it was within the object set out in the Act.

**New Zealand (procedural unfairness):**

New Zealand Law Commission in 1990 proposed guidelines and among them the ‘procedural’ ones are as follows:

“A contract or a term in a contract, maybe unfair, if a party to the contract is seriously disadvantaged in relation to another party to the contract because he or she

- (a) is unable to appreciate adequately the provisions or the implications of the contract by reason of age, sickness, mental, educational or linguistic disability, emotional distress, or ignorance of business affairs; or

- (b) is in need of the benefits for which he or she contracted, to such a degree as to have no real choice whether or not to enter into the contract; or
- (c) is legally or in fact dependant upon or subject to the influence of, the other party or persons connected with the other party in deciding whether to enter into the contract; or
- (d) reasonably relies on the skill, care or advice of the other party or a person connected with the other party in entering into the contract; or
- (e) has been induced to enter into the contract by oppressive means, including threats, harassment or improper pressure; or
- (f) is for any other reason, in the opinion of the Court, or a serious disadvantage;

and that the other party knows or ought to know of the facts constituting that advantage or the facts from which that disadvantage can reasonably be informed.”

The Court, under another provision, is required to see whether the disadvantaged party received appropriate legal advice or other professional advice.

We have thus focussed separately on the ‘procedural’ aspects of unfairness in contracts in different countries. In the next chapter (Chapter IX), we shall likewise separately focus on the ‘substantive’ aspects of unfairness of contracts in several countries.

## **CHAPTER-IX**

### **SUBSTANTIVE UNFAIRNESS: COMPARATIVE LAW**

In this chapter, we shall refer to the ‘substantive’ unfairness provision in several countries, though they have not been expressly segregated in any particular statute.

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#### **United Kingdom**

#### **UCTA (1977) (substantive unfairness)**

##### **Section 2: Relevant matters**

Schedule 2 of the UK Unfair Contract Terms Act, 1977 (UCTA) stated that among relevant matters are the following:

“(d) Where the term includes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with the condition would be practicable.”

**UTCCR, 1999: (substantive unfairness)**

In the Unfair Terms of Consumer Contracts Regulations, 1999, Regulation 7 states that a seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

Schedule 2 of the Regulation enumerates in sec. 1 to a number of guidelines for judging unfairness. All the clauses (a) to (q) refer to substantive unfairness. The term is one which terms:

- (a) deals with exclusion or limiting liability of a seller or supplier in the event of death of a consumer or personal injury to him on account of acts or omissions of the seller or supplier,
- (b) inappropriately excluding or limiting legal rights of consumer in the event of breach,
- (c) imposing conditions which depend on the sole will of seller or supplier,
- (d) retention of consumer's money without delivering goods,
- (e) requiring consumer to pay disproportionately upon the latter's breach,
- (f) authorize seller or supplier to breach the contract unilaterally without a corresponding right given to consumer,
- (g) enabling seller or supplier to terminate the contract according to his discretion,
- (h) automatically extending a contract of fixed duration,
- (i) irrevocably binding consumer to terms for which he had no opportunity to become acquainted,

- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason,
- (k) enabling the seller or supplier to alter unilaterally the characteristics of the goods or service to be provided,
- (l) allowing seller or supplier to unilaterally increase price of goods,
- (m) giving unilateral right to seller or supplier to determine whether the goods or services are in conformity with the contract,
- (n) limiting seller's or supplier's obligation in respect of commitments undertaken by their agents,
- (o) obliging consumer to perform obligations even if seller or supplier does not,
- (p) giving seller or supplier opportunity to transfer his rights or obligations to the detriment of consumer,
- (q) excluding the rights of consumer to take legal action.

**Bill of 2004 prepared by UK and Scottish Law Commissions:**

**(substantive unfairness)**

- (a) Exclusion of liability for negligence: (a) exclusion in case of death or injury void; (b) exclusion in other cases must be fair and reasonable:

On 'substantive' unfairness, the Bill attached to the UK and Scots Law Commission Report 2004, refers in Part 1 to 'Business liability for negligence'. It says:

"Sec.1: Business liability for negligence



- (1) Business liability for death or personal injury resulting from negligence cannot be excluded or restricted by a contract term or a notice.
- (2) Business liability for other liability for loss or damage resulting from negligence cannot be excluded or restricted by a contract term or a notice unless the term or notice is fair and reasonable.
- (3) 'Business liability' means liability arising from –
  - (a) anything that was or should have been done for purposes related to a business, or
  - (b) the occupation of premises used for purposes related to the occupier's business.
- (4) The reference in subsection (3)(a) to anything done for purposes related to a business includes anything done by an employee of that business within the scope of his employment.
- (5) 'Negligence' means the breach of –
  - (a) an obligation to take reasonable care or exercise reasonable skill in the performance of a contract where the obligation arises from an express or implied term of the contract,
  - (b) a common law duty to take reasonable care or exercise reasonable skill,
  - (c) the common duty of care imposed by the Occupiers' Liability Act, 1957 or the Occupiers Liability Act (Northern Ireland), 1957, or

(d) the duty of reasonable care imposed by sec. 2(1) of the Occupiers' Liability (Scotland) Act, 1960.

(6) It does not matter –

- (a) whether a breach of obligation or duty was, or was not, inadvertent, or
- (b) whether liability for it arises directly or vicariously.

Section 30 referred to herein below explains the meaning of 'excluding or restricting' liability.

(b) Section 2: Exceptions to sec. 1:

(1) Sec. 1 does not prevent an employee from excluding or restricting his liability for negligence to his employer.

(2) Sec. 1 does not apply to the business liability of an occupier of premises to a person who obtains access to the premises for recreational or educational purposes if –

- (a) that person suffers loss or damage because of the dangerous state of the premises, and
- (b) allowing that person access to those premises for those purposes is not within the purposes of the occupiers liability.

(c) Section 3: Voluntary acceptance of risk:

The defence that a person voluntarily accepted a risk cannot be used against him just because he agreed to or knew about a contract term, or a

notice, appearing to exclude or restrict business liability for negligence in the case in question.

(d) Terms of no effect unless fair and reasonable:

Section 4: Sec. 4(1) declares terms to be of no effect unless fair and reasonable. Sec. 4(2) states that subsection (1) does not apply to a term which defines the main subject matter of a consumer contract, if the definition is

- (a) transparent, and
- (b) substantially the same as the definition of the consumer reasonably expected.

Other subsections (3) to (6) refer to the same conditions in the matter of price or other clauses if they are as in (a), (b) above and we do not propose to detail them.

(e) Section 8: Interpretation:

As far as ‘interpretation’ is concerned, sec. 8 refers to ‘Ambiguity’ in consumer contracts and states as follows:

- (1) If it is reasonable to read a written term of a consumer contract in two (or more) ways, the term is to be read in whichever of those ways it is reasonable to the .... the more (or the most) favourable to the consumer.

(2) .....

(f) Section 9: Written standard terms (consumer contracts):

Sec. 9(1) which applies to non-consumer business contracts refers to ‘written standard terms’ and says (subsection (2)) that ‘unless the term is fair and reasonable, it cannot be relied upon to exclude or restrict liability for breach of contract. Subsection (3) states that unless the term is fair and reasonable, a party to it cannot rely on any of those terms to claim that it has the right –

- (a) to carry out its obligations under the contract in a way substantially different from the way in which the other party reasonably expected them to be carried out or
- (b) not to carry out all or part of those obligations.

(g) Section 10: Sale or supply of goods:

“Sec. 10 : sale or supply of goods:

- (1) In the case of a business contract for the sale of goods, the seller cannot rely on a term of the contract to exclude or restrict liability arising under sec. 12 of the 1979 Act (implied term that seller entitled to sell)
- (2) In the case of a business contract for the hire-purchase of goods, the supplier cannot rely on a term of the contract to exclude or restrict liability arising under sec. 8 of the 1973 Act (implied term that supplier entitled to supply)

(3) In the case of any other business contract for the transfer of property in goods, the supplier cannot rely on a term of the contract to exclude liability arising under sec. 2 or 11B of the 1982 Act (implied term that supplier entitled to supply)”

(Note: Act of 1979 is Sale of Goods Act, 1979; Act of 1973 is Supply of Goods (Implied Term) Act, 1973; Act of 1982 is Sale of Goods and Services Act, 1982. These provisions deal with seller title or right to sell goods to the purchaser. The purport of sec. 10 as proposed is that the seller cannot stipulate that he is not liable if it found that he has no right to sell).

(We have already referred to sec. 11 of the proposed UK Bill which refers to ‘non-negotiated terms’ while dealing with ‘procedural’ unfairness).

(h) Fair and Reasonable Test: Substantive:

We have referred to sec. 14 of the proposed Bill which refers to the ‘Fair and Reasonable Test’. Subsections (1), (2), (3) and some clauses of subsection (4) deal with ‘substantive’ fairness. These are as follows:

“Sec. 14: The test:

(1) Whether a contract term is fair and reasonable is to be determined taking into account -

(a) the extent to which the term is transparent, and

(b) the substance and effect of the term, and all the circumstances existing at the time it was agreed.

- (2) Whether a notice is fair and reasonable is to be determined by taking into account -
- (a) the extent to which the notice is transparent and
  - (b) the substance and effect of the notice, and all the circumstances existing at the time the liability arise (or, but for the notice, would have arisen)
- (3) 'Transparent' means -
- (a) expressed in reasonably plain language,
  - (b) legible,
  - (c) presented clearly, and
  - (d) readily available to any person likely to be affected by the contract term or notice in question.
- (4) Matters relating to the substance and effect of a contract term, and to all the circumstances existing at the time it was agreed, including the following:
- (a) the other terms of the contract,
  - (b) the terms of any other contract on which the contract depends,
  - (c) the balance of the parties' interests,
  - (d) the risks to the party adversely affected by the term,
  - (e) the possibility and probability of insurance,
  - (f) other ways in which the interests of the party adversely affected by the term might have been protected,
  - (g) the extent to which the term (whether alone or with others) differs from what would have been the case in its absence,
  - (h) .....
  - (i) .....

(j) the nature of the goods or services to which the contract relates.”

(Notice referred in subsection (2) refers to notices given after the contract, excluding liability for tort for negligence) (sec. 14(4)(h) & (i) deal with ‘procedural’ fairness and have already been referred to).

(i) Section 15: Burden of proof: business liability exclusion:

Sec. 15 relates to burden of proof and states that in the matter of Business liability for negligence under sec. 1(2) (i.e. for negligence other than for death or personal injury), it is for the person wishing to rely on a contract term or a notice which purports to exclude or restrict liability of the kind mentioned in sec. 1(2) to prove that the term or notice is fair and reasonable.

(j) Sections 16. 17: burden of proof: consumer contracts and business contracts.

In sec. 16 and 17, respectively relate to consumer contracts and business contracts. While subsection (1) of each of them lays the burden of proof to prove fairness of any term is on the person relying thereon, and there is an exception in the case respectively of ‘regulation and enforcement of consumer contracts’ and ‘non-negotiated terms in small business contracts’ that it is for the person who is claiming that the term is not fair and reasonable to prove that it is not.

(k) Section 21: unfairness issues raised by Court:

Sec. 21 is important and refers to ‘unfairness issue raised by Court’ (i.e. suo motu). It reads :

“A court may, in proceedings before it, raise an issue about whether a contract term or a notice is fair and reasonable even if none of the parties to the proceedings has raised the issue or indicated that it intends to raise it.”

(l) Section 24: effect of certain terms being declared unfair:

Sec. 24 states the ‘effect of unfair term on contract’. It says that ‘where a contract term cannot be relied on by a person as a result of this Act, the contract continues, as far as practicable, to have effect in every other respect’.

(m) Section 30: excluding or restricting liability:

Sec. 30 defines ‘excluding or restricting liability’ as follows:

“Sec. 30: A reference to excluding or restricting a liability includes –

- (a) making a right or remedy in respect of the liability subject to restrictive or onerous condition;
- (b) excluding or restricting a right or remedy in respect of a liability;
- (c) putting a person at a disadvantage if he pursues a right or remedy in respect of a liability;



(d) excluding or restricting rules of evidence or procedure.

(2) .....

(3) A written agreement to submit current or future disputes to arbitration is not to be regarded as excluding or restricting the liability in question.”

Schedule 2, Part 2 lists items 2 to 21, as example of unfair terms and Part 3 refers to exceptions etc. Schedule 3 also refers to exceptions. There are other schedules which go into various details.

There are the provisions of the UK Bill, 2004 dealing with ‘substantive’ unfairness.

**South Africa: Provisions of the Draft Bill attached to the S.A. Law Commission Report, 1998 (p 47): (substantive unfairness)**

**Section 1(1): ‘substantive unfairness’: What reliefs can be granted**

Sec. 1 (1) If a Court is of the opinion that

- (a) .....
- (b) the form or the content of a contract or
- (c) .....
- (d) the enforcement of a contract is

unreasonable, unconscionable or oppressive, the Court may declare that the alleged contract

- (aa) did not come into existence; or
- (bb) came into existence, existed for a period, and then before action was brought, came to an end; or
- (bb) is in existence at the time action is brought and it may then
  - (i) limit the sphere of operation and/or the period of operation of the contract; and/or
  - (ii) suspend the operation of the contract for a period or unit/specified circumstances are present; or
  - (iii) make such other order as may in the opinion of the Court be necessary to prevent the effect of the contract being unreasonable, unconscionable or oppressive to any of the parties.

Section 1(3): Preventing unfairness:

Preventive action is proposed in sec. 1(3)

“1(3) where the High Court is satisfied, for the application of any organization or any body or person, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of contracts or terms which are unreasonable, unconscionable or oppressive, it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class”

Section 2: Guidelines to Court: Substantive

Among the ‘substantive’ guidelines in sec. 2 which a Court may take into account for judging whether a contract or term is unreasonable, unconscionable or oppressive, are the following:

“2 (a) ... ..

(b) whether the goods or services in question could have been obtained elsewhere without the term objected to;

(c) any prices, costs or other expenses that might reasonably be expected to have been incurred if the contract had been concluded on terms and conditions other than those on which it was concluded:

provided that a Court shall not find a contract or term unreasonable, unconscionable or oppressive for the purposes of this Act solely because it imposes onerous obligations on a party; or the term or contract does not result in substantial or real benefit to a party; or a party may have been able to conclude a similar contract with another person on more favourable terms or conditions;

(d) ... ..

(e) ... ..

(f) ... ..

(g) whether one sided limitations are imposed on the right of recourse of the party against whom the term is preferred.

(h) ... ..

(i) whether the manner in which a term states the legal position that applies is one-sided or misleading;

(j) whether the party preferring the term is authorized to make a performance materially different from that agreed upon, without the party against whom the term is preferred in that event being able to

cancel the contract by returning that which has already been performed, without incurring any additional obligation;

(k) whether prejudicial time limits are imposed on the other party;

(l) whether the term will cause a prejudicial transfer of the normal trade risk to the party against whom the term is preferred;

(m) whether a term is unduly difficult to fulfill or imposes obligations or liabilities on a party which are not reasonably necessary to protect the party;

(n) whether the contract or term excludes or limits the obligations or liabilities of a party to an extent that is not reasonably necessary to protect his or her interests;

(o) whether there is a lack of reciprocity in an otherwise reciprocal contract;

(p) whether the competence of the party against whom the term is preferred to adduce evidence of any matter which may be necessary to the contract or the execution thereof is excluded or limited and whether the normal incidence of burden of proof is altered to the detriment of the party against whom the term is preferred;

(q) whether the term provides that a party against whom the term is preferred shall be deemed to have made or not made a statement to his detriment if he or she does or fails to do something, unless

(i) a suitable period of time is granted to him or her for the making of an express declaration thereon and

(ii) at the commencement of the period, the party proffering the term undertakes to draw the attention of the party against whom the term is preferred, to the meaning that will be attached to his or her conduct;

- (r) whether a term provides that a statement made by the party proffering the term which is of particular interest to the party against whom the term is proffered, shall be deemed to have reached the party against whom the term is proffered, unless such statement has been sent by prepaid registered post to the chosen address of the party against whom the term is proffered;
- (s) whether a term provides that a party against whom the term is proffered shall, in any circumstances absolutely and unconditionally forfeit his or her competence to demand performance;
- (t) whether a party's right of denial is taken away or restricted;
- (u) whether the party proffering the term is made the judge of the soundness of his or her own performance, or whether the party against whom the term is proffered is compelled to sue a third party first before he will be able to act against the party proffering the term;
- (v) whether the term directly or indirectly amounts to a waiver or limitation of the competence of the party against whom the term is proffered to apply set off;
- (w) whether to the prejudice of the party against whom the term is proffered, the party proffering the term is otherwise placed in a position substantially better than that in which the party proffering the term would have been under the regulatory law, had it not been for the term in question;
- (x) the degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled;
- (y) ... ..
- (z) any other fact which in the opinion of the Court should be taken into account.

### Section 3: Applicability of the Act

So far as the applicability of the Act is concerned, the provision of sec. 3(1) state that (subject to subsection (2)), the provision apply to all contracts concluded after the commencement of this Act and between all contracting parties.

Sub-section (2) of section 3 excludes

- (a) contractual acts and relations which arise out of or in connection with the Labour Relations Act (60 of 1995) or which arise out of the application of that Act;
- (b) contractual acts which arise out of or in connection with or out of the application of the Bills of Exchange Act (Act 34 of 1964);
- (c) contractual acts to which the Companies Act (Act 61/63) or the Core Companies Act (Act 69 of 1984) apply or which arise out of the application of these Acts;
- (d) contractual terms in respect of which measures are provided in international treaties to which the Republic of South Africa is a signatory and which depart from the provisions of this Act.”

### Section 3(3): Overriding effect:

Sec. 3(3) otherwise give overriding offer to the Act. It says that any provision on contractual term purporting to exclude the provisions of this Act or to limit the application thereof, shall be void.

Section 3(4): Act binding on State:

Sec. 3(4) is important. It says that the ‘Act shall be binding upon the State’. This is consistent with the principle laid down by Courts in several cases that the State should be an ideal for others to follow.

Section 4: Subsequent change in circumstances:

One other new innovation in the South African Bill is as to the ‘effect of subsequent change in the circumstances’. After considerable discussion that normally the conditions obtaining at the contract alone be taken into account, the SA Law Commission made an important exception to this principle when it stated in sec. 4 that the exception is not to be given effect to if it become ‘excessively onerous’ as opposed to ‘more onerous’. It says:

“Sec.4: Taking into account circumstances which existed at the time of the conclusion of the contract and the effect of a subsequent change of circumstances:

4(1) In the application of this Act, the circumstances which existed at the time of the conclusion of contract shall be taken into account and a party is bound to fulfill his or her obligations under the contract even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance he or she receives has diminished.

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound

to enter into negotiations with a view to adapting the contract or terminating it, provided that -

- (a) the change of circumstances occurred after the time of conclusion of the contract, or had already occurred at that time but was not and could not reasonably have been known to the parties; and
  - (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract; and
  - (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.
- (3) If the parties fail to reach agreement within reasonable period, the Court may -
- (a) terminate the contract at a date and on terms to be determined by the Court, or
  - (b) adapt the contract to distribute between the parties in a just and equitable manner, the losses or gains resulting from the change of circumstances; and
  - (c) in either case, award damages for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith.”

### Section 5: Admissibility of evidence

As to the type of evidence that can be adduced, sec. 5 deals with “admissibility of evidence to assist in the interpretation of a contract”.



“Sec. 5: Whether or not the words of the contract appear to be ambiguous, evidence of what passed during negotiations between the parties and after the execution of the contract and surrounding circumstances, is admissible to assist in the interpretation of any contract.”

The above provisions proposed in the Bill accompanying the 1998 Report of the South Africa Law Commission indeed contain certain special features not found in other countries.

**Canada: (substantive unfairness)**

The British Columbia Law Institute, in its Interim Report on ‘Unfair Contract Terms’ (2005) stated that the Report will concern itself with two questions:

- a. review of specific contract terms, and
- b. applications of principles of contractual fairness in areas other than consumer protection.

The Report employs the word ‘unfair’ in the place of ‘unconscionable’. It treats cases of automatic renewals, acceleration clauses (i.e. payment of an amount on the happening of an event), terms excluding or limiting liability as substantively unfair. It also requires that it is the duty of the party which takes advantage of onerous terms to put the other party on special notice of such terms. Fundamental breach of a contract regulates the enforcement of

contract-terms that limit or exclude liability by presenting a party who breaches a contract from relying on those contract terms. Whenever a Court determined that a fundamental breach occurred, the contract would be ‘brought to an end’ and the rule of law would operate. The Interim Report refers to various options –

All the common law provinces have an Unconscionable Transaction Relief Act which allows for the reopening of unfair credit transactions. In Canadian jurisdictions unconscionable conduct is an offence.

Ontario Business Practices Act, 1990 states that unconscionability includes where

- “(i) the price grossly exceeds the price at which similar goods or services are readily available to consumers,
- (ii) the proposed transaction is excessively one-sided in favour of someone other than the consumer or
- (iii) the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable.”

The Saskatchewan Consumer Protection Act, 1998 prohibits unfair practices and refers to (a) the ‘taking advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one-sided; and (b) include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided.

The Trade Practices Act, 1996 of British Columbia, apart from procedural matters include where

- (a) at the time the consumer transaction was entered, the price grossly exceeded the price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers; and
- (b) the terms or conditions on, or subject to, which the consumer transactions were entered into by the consumers are so harsh or adverse to the consumer as to be inequitable.

The Quebec Civil Code, 1991, states in sec. 1435 that in a consumer contract or a contract of adhesion, however, an external clause is null, if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew it.

Sec. 1436 refers to clauses which are illegible or incomprehensible to a reasonable person unless the other party proves that an adequate explanation of the nature and scope of the clause was given to the consumer or adhering party.

Sec. 1437 describes an 'abusive' clause as one which is excessively and unreasonably detrimental to the consumer or the adhering party and is, therefore, not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the case. Such clauses can be declared null or the obligations may be reduced.

**Australia: (substantive unfairness)**

Under the (NSW) Contract Review Act, 1980, though sec. 6(2) states that a person may not be granted relief under the Act in relation to a contract so far as the contract was entered in the course for the purpose of a trade, business or profession – other than a farming undertaking – still, some of the provisions are quite useful.

Sec. 4 defines ‘unjust’ as including unconscionable, harsh or oppressive terms and ‘injustice’ is also to be considered in a corresponding manner.

Sec. 9 refers to matters to be considered by the Court in determining whether a ‘contract’ is ‘unjust’ and the matters relevant to ‘substantive’ unfairness.

Subsection (1) generally states that the Court will have regard to ‘public interest’ and all the circumstances of the case and to the following:

“Sec. (2):

- (a) ... ..
- (b) ... ..
- (c) ... ..
- (d) whether or not any of the provisions of the contract impose conditions which are unreasonably difficult to comply with or not

reasonably necessary for the protection of the legitimate interests of any party to the contract;

(e) ... ..

(f) ... ..

(g) where the contract is wholly or partly in writing, the physical form of the contract and the intelligibility of the language in which it is expressed;

(h) ... ..

(l) ... ..”

Executed contracts:

As already stated, sec. 14, the Act applies ‘fully executed’ contracts. Exclusion of provision of the Act is void under sec. 17 and an offence under sec. 18.

Uniform Consumer Credit Code 1993 is applicable to all States and Territories. It applies to credit transactions where credit is given for a variety of purposes including for real purposes ‘unjust’ contracts can be reopened. ‘Unjust’ includes ‘unconscionable, harsh or oppressive’. Sec. 70 contains procedural and substantive matters. List is similar to sec. 9(2) of the 1980 Act. The court can reopen transaction and set aside the contract wholly or partly. Sec. 72 applies to unconscionable interest, fees or charges.

The Fair Trading Amendment Act 2003 (Victoria) amended the Fair Trading Act, 1999 and introduced provision similar to those in (UK) Unfair

Terms in Consumer Contracts Regulations. A term is unfair if it is contrary to good faith (The UK Law Commission in its Report 2004, omitted good faith criteria). ‘Standard form’ contracts can be prescribed as unfair by regulation and it is an offence to use or recommend the use of a prescribed term.

Trade Practices Act, 1974 defines ‘unconscionable’ conduct in sec. 51AB(2) to

- (a) ... ..
- (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not necessary for the protection of the legitimate interests of the corporation;
- (c) ... ..
- (d) ... ..
- (e) the amount for which and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

Sec. 51AC(3) contains similar provisions.

**New Zealand: (substantive unfairness)**

New Zealand Law Commission, 1990 in the Report on ‘unfair’ contracts (Nu11) proposed a definition as follows:

- “(1) A term of a contract is also unfair if, in the context of the contract as a whole, it is oppressive;
- (2) A term of a contract is oppressive if it:
- (a) imposes a burdensome obligation or liability which is not reasonably necessary to protect the interests of the other party; and
  - (b) is contrary to commonly accepted standards of fair dealing.
- (3) A transaction that consists of two or more contracts is to be treated as a single contract if it is in substance and effect a single transaction.”

The Commission gave a number of examples of ‘substantive’ unfairness.

It also stated that a contract is not unfair unless, in the context of the contract as a whole,

- (a) it results in a substantially unequal exchange of values; or
- (b) the benefits received by a disadvantaged party are manifestly inappropriate to his or her circumstances; or
- (c) the disadvantaged party was in a fiduciary relationship with the other party.

The above are the ‘substantive’ unfair terms in contract or guidelines relating thereto, which are found in other countries.

**CHAPTER-X****SEGREGATING PROCEDURAL AND SUBSTANTIVE  
PROVISIONS OF THE INDIAN CONTRACT ACT, 1872  
AND THE SPECIFIC RELIEF ACT, 1963**

In this Chapter, we shall try to segregate the existing provisions of the Indian Contract Act, 1872 and the Specific Relief Act, 1963, in so far as procedural and unfairness of contracts is concerned.

Before we refer to Indian statutes on 'unfairness' we shall make a brief reference to Ramanatha Iyer's Law Lexicon.

The author states that the word 'unfair' means 'not fair, marked by injustice, partiality or deception; not equitable in business dealings. (sec. 16 (1) of the Indian Contract Act, 1872)

He defines 'Unconscionable bargain' as one which no man in his senses, not under a delusion, would make on the one hand, and which no fair and honest man would accept on the other. Irreconcilable with what is right or reasonable. (sec. 16(3) illustration (c) of Indian Contract Act, 1872)

'Oppressive' means unjustly severe, rigorous or harsh. (sec. 397 of Indian Companies Act, 1956 and Order 7 Rule 11 of the Code of Civil Procedure, 1908) An act or omission may amount to oppressive conduct if



it is designed to achieve an unfair advantage: (In re Five Minutes Car Wash Service Ltd: 1966 (1) All ER 242, Oppression means ‘burdensome, or harsh or wrongful’ according to Lord Simonds in Scottish Cognitive Society Ltd v. Meyar 1958 (3) All ER 66, as followed by the Orissa High Court in Shantiprasad Jain v. Kalinga Tubes, AIR 1962 Orissa 202)

**(A) Procedural unfairness: Indian statute law:**

**(a) Indian Contract Act, 1872 (Procedural unfairness):**

The Indian Contract Act, 1872 refers to several aspects of procedural unfairness. Sec. 13 requires consent of all the parties to a contract for its formation.

Sec. 14 deals with ‘free consent’ and states that a ‘consent’ is free where it is not caused by

- (1) coercion, as defined in sec. 15, or
- (2) undue influence, as defined in sec. 16, or
- (3) fraud, as defined in sec. 17, or
- (4) misrepresentation, as defined in sec. 18, or
- (5) mistake, subject to sections 20, 21 and 22, or
- (6) undue influence as defined in sec. 19A.

Sec. 19 states that contracts vitiated by coercion, fraud or misrepresentation are ‘voidable’. In this section, ‘undue influence’ was initially there but was deleted by sec. 3 of Act 6 of 1889 and under the same

Act of 1889, sec. 19A was inserted to say that any contract vitiated by ‘undue influence’ may be set aside either wholly or subject to conditions. Sec. 20 states that a contract is ‘void’ if both parties are under a mistake as to a matter of fact.

These are provisions of the Indian Contract Act, 1872 which deal with ‘procedural’ unfairness.

**(b) Specific Relief Act, 1963 (Procedural unfairness):**

Principles of ‘fairness’ are the basis of sec. 20 of the Specific Relief Act, 1963 which deals with the ‘Discretion as to decreeing specific performance’. Discretion, says subsection (1) is not to be arbitrary but sound and reasonably guided by judicial principles. Subsection (2) enumerates certain guidelines in which the Court may properly exercise not to decree specific performance. Clauses (a) and (c) of sub-section (2) of sec 20 deal with procedural unfairness and refer to the following situations:

- (a) where ..... the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage, over the defendant; or
- (b) where the defendant entered into the contract under circumstances which though not render the contract voidable, makes it inequitable to enforce specific performance.”

There are two Explanations below sub-section (2) of sec. 20. Explanation I states that mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within clause (b). Explanation II states that the question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

Subsection (3) of sec. 20 states that the ‘Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance’.

Subsection (4) of sec. 20 states that the ‘Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party’.

**(B) Substantive unfairness: Indian Statute Law:**

**(a) Indian Contract Act, 1872: (substantive unfairness)**

There are several provisions of the Indian Contract Act, 1872 which deal with substantive unfairness of the terms of a contract. There are terms which are by themselves unfair.

Section 10 states that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void.

Section 23 says that the consideration or object of an agreement is lawful, unless it is forbidden by or is of such a nature, that, if permitted, it would defeat the provisions of law; or is fraudulent, or involves or implies injury to the person or property of another; or the Court regard it as immoral, or opposed to public policy. Such agreements whose object or consideration is unlawful are void.

Section 24 states that if any part of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Under section 20, an agreement is void where both parties are under a mistake of fact; sec 21 states that a contract is not voidable because it was caused by a mistake of law in force in India; but a mistake as to a law not in force in India has the same effect as a mistake of fact. Section 22 states that a contract is not voidable because of mistake of fact of one of the parties.

Under sec. 25, an agreement without consideration is void, unless it is in writing and registered, or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.

Sec. 26 states that an agreement in restraint of marriage is void.

Sec. 27 states that an agreement in restraint of trade is void.

Sec. 28 states that agreement in restraint of legal proceedings is void.

Sec. 29 states that agreements the meaning of which is uncertain or is not capable of being made certain, are void.

Sec. 30 makes agreement by way of wager void.

Sec. 56 deals with contracts 'frustrated' and thereby become void.

These are provisions in the Indian Contract Act, 1872 which can be said to deal with substantive unfairness.

**(b) Specific Relief Act, 1963 (Substantive unfairness):**

There are two provisions in sec 20 of the Specific Relief Act, 1963 in part of cl.(a) and in cl.(b), which relate to substantive unfairness and they are as follows:

Under clause (a) of sub section (2) of sec 20

- (a) Where the terms of the Contract are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

Under Clause (b) of sub section (2) of sec 20:

- (b) When the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non performance would involve no such hardship on the plaintiff.

Are the above provisions of Indian law as to ‘procedural’ and ‘substantive’ unfairness sufficient?

It will be seen that the sections of the Indian Contract Act, 1872 which deal with procedural unfairness, while they do deal with undue influence, coercion, fraud, and misrepresentation and those of sec 20 of the Specific Relief Act, 1963, do not deal with other circumstances under which a contract is entered into which may lead to an unfair advantage to one party, thereby making it unfair, such as

- (a) where the terms are not negotiated or
- (b) where they are contained in standard terms of contract or
- (c) where the terms are in small print or are camouflaged and not transparent and other situations.

These and other aspects, in our opinion, require to be considered in depth for the purpose of ‘procedural’ fairness.

Likewise, in the matter of ‘substantive’ unfairness, the sections 10, 21 to 30 of the Contract Act, deal with several types of ‘void’ contracts and sec 20 of the Specific Relief Act, 1963 with other situations, but not with contracts or terms which are otherwise oppressive, harsh or cast

unreasonable burden on one of the parties. Such provisions require to be considered and added.

Nor does sec 67A as proposed in the 103<sup>rd</sup> Report of the Law Commission (1984) deal with the other ‘procedural’ and ‘substantive’ aspects of unfairness which today have been brought into the law in several countries. We have already segregated the ‘procedural’ unfairness provisions in other countries from the ‘substantive’ unfairness provisions in those countries in Chapters VIII and IX, with a view to consider which of them can be brought into our law with such modifications as may suit our country.

It is, therefore, proposed to deal with certain new provisions regarding unfairness, both procedural and substantive, which require to be incorporated into the statute law, in addition to what are contained in the Contract Act, 1872 and the Specific Relief Act, 1963 and such general provisions of unfairness, procedural and substantive, will be dealt with in Chapter XI.

## CHAPTER-XI

### NEED TO DEFINE ‘GENERAL PROCEDURAL UNFAIRNESS’ AND ‘GENERAL SUBSTANTIVE UNFAIRNESS’ UNDER THE INDIAN LAW

No country in its legislation has so far enacted procedural and substantive aspects of unfairness distinctively in its statutes. Several writers have stated that legislations have to focus on these aspects separately than to make a “mish mash” of both in each section. We have referred to these views in Chapter VII.

We shall first give a brief sketch of how we want to go about such segregation in the proposed Bill.

- (a) Existing “procedural” provisions of the Contract Act, 1872 and of the Specific Relief Act, 1963 to be “listed” in the Bill:

Several sections of the Indian Contract Act, 1872 deal with ‘voidable contracts’ (procedural unfairness) as referred to in Chapter X are as follows:

- (a) section 15 which deals with coercion,
- (b) section 16 which deals with undue influence,
- (c) section 17 which deals with fraud,
- (d) section 18 which deals with misrepresentation,
- (e) section 19A which deals with undue influence.



Similarly, so far as procedural provisions are concerned, the Specific Relief Act, 1963, contains some provisions which refer to the manner of enforcement of voidable contracts in

- (a) second part of clause (a) of subsection (2) of section 20,
- (b) clause (6) of subsection (2) of section 20
- (c) clause (a) of subsection (1) of section 27.

We have deliberately used the word ‘listed’ because we propose just to highlight the ‘procedural’ or ‘substantive’ nature of the provisions of these two statutes. We do not propose to interfere with them or involve them in the ‘unfairness’ principle. We merely propose to refer to these as ‘procedural provisions’.

- (b) Existing provisions of Contract Act, 1872 and Specific Relief Act, 1963 are not exhaustive:

In our view, there can be other situations than those in these acts where, due to the conduct of the parties or the circumstances under which the terms of the contract are arrived at or the contract is entered into which may have resulted in some unfair advantage or unfair disadvantage to one of the parties. This we propose to describe as ‘general procedural unfairness’ in the Bill.

- (a) Several such circumstances have been referred to in Chapter VIII “Comparative Law – Procedural Unfairness” and Chapter IX ‘Comparative

Law - Substantive Unfairness'. We do not want to repeat all those circumstances referred to in Chapter V, namely, the statutes or Bills in UK, Canada, Australia, New Zealand and South Africa and so on. Such circumstances are equally in existence in India.

As stated in Mulla's commentary on the Indian Contract Act, 1872 and Specific Relief Act, 1963, in the Preliminary Chapter,

“The Contract Act does not profess to be a complete Code dealing with the law relating to contracts. As appears from the preamble, the Act purports to do no more than define and amend certain parts of that law. It treats some particular contracts in separate chapters, but there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts.”

In Irrawady Flotilla Co. vs. ILR 18 Cal. 620 (PC), the Privy Council observed:

“But there is nothing to show that the legislature intended to deal exhaustively with any particular chapter of subdivision relating to the law of contracts.”

But, it has been also held that “to the extent it deals with a subject, it is exhaustive upon the same and it is not permissible to import the principles of English law or the statutory provisions”. (Satyabrata Ghose vs. Mugneeram Bangur & Co.: AIR 1954 SC 44), unless the statute is such that

it cannot be understood without the aid of English Law (State of West Bengal vs. B.K.Mondal AIR 1962 SC 779).

(b) Likewise, if we take up the procedural unfairness provision of the Specific Relief Act, 1963, as pointed again in Mulla's Commentary on the Contract Act and Specific Relief Act in the preliminary Chapter, the Specific Relief Act, 1963 is also not exhaustive.

Immediately after the passage referred to above from that treatise, it was further stated therein

“The same view was taken if the similarity worded preamble of the Specific Relief Act (Act 1 of 1877) Ramdas Khaitan & Co. vs. Atlas Mills Ltd AIR 1931 Bom 151; Meghu Mian vs. Kishan Ram AIR (1954) pat 477”.

The provisions of the Specific Relief Act, 1963 are, therefore, not again exhaustive. In fact, dealing with section 20 of that Act, the Supreme Court in Sardar Singh vs. Krishna Dev 1994(4) SCC, it stated that the circumstances specified in sec 20 are only 'illustrative and not exhaustive. The Court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the Contract Act.

If the provisions of the Contract Act, 1872 are not exhaustive on 'procedurally unfairness', it follows that the provisions of the Specific Relief Act, 1963 are equally not exhaustive.

- (c) ‘General procedural unfairness’ to be defined in the Bill and Guidelines be given:

Therefore, while we propose that the law relating to voidable contracts under the Contract Act, 1872 and the Specific Relief Act, 1963, need not be disturbed, it will be necessary and will be permissible to add new provisions for purpose of ‘general procedural unfairness’ referred to in the situations stated in Chapter VII.

We have referred to the meaning of ‘procedural fairness’ in the earlier chapters. In addition we shall refer to Blake’s Law Dictionary, 7<sup>th</sup> Ed. (1999). It defines ‘procedure unconscionability’ as follows:

“procedural unconscionability” as ‘unconscionability by resulting from improprieties in Contract formation (such as oral misrepresentations or disparities in bargaining position) rather than from the terms of the contract itself. This type of unconscionability suggests that there was no meeting of the minds.

- (d) The general provision as to ‘procedural unfairness’ will give a general definition of ‘procedural unfairness’.

(e) To supplement that new provision, we propose to add another section which will give a non-exhaustive list of guidelines drawn from Chapter VII which may help in deciding whether a particular contract or term is vitiated on account of ‘procedural unfairness’.

We propose to define ‘general procedural unfairness’ (without prejudice to the specific provisions of the Contract Act, 1872 and Specific Relief Act, 1963, referred to above), in the following words:

“a contract or a term is procedurally unfair if it has resulted in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party, or the manner in which or the circumstances under which the contract has been entered into or the term thereof has been arrived at by the parties”

(d) Existing ‘substantive’ provisions of the Contract Act, 1872 and Specific Relief Act, 1963 are not exhaustive:

Several sections of the Contract Act, 1872 are substantive in nature and they refer to ‘void’ contracts. These are to be listed in the Bill. They are:

- (a) sections 10, 23, 24: Under which the consideration or objects of a contract are not lawful or the parties are not competent to contract.
- (b) Section 20: under which an agreement can be void where both parties to an agreement are under a mistake.
- (c) Section 25: under which an agreement is without consideration.
- (d) Section 26: under which an agreement is in restraint of marriage of any person, other than a minor.
- (e) Section 27: under which an agreement is in restraint of trade.
- (f) Section 28: under which an agreement is in restraint of legal proceedings.

- (g) Section 29: under which an agreement is uncertain.
- (h) Section 30: under which an agreement is by way of wager.
- (i) Section 56: under which an agreement to do an act impossible in itself is void and a contract to do acts after becoming impossible or unlawful becomes void.

We propose,- without modifying these provisions, - to just “list” them as examples of the class of contracts which are substantive.

Likewise, in the Specific Relief Act, 1963, there is again need, without disturbing the provisions, to classify certain provisions as relating to the class of contracts which are substantive. These are:

- (a) under sec 18, certain terms have come into the contract which were not agreed to:
  - (b) the first part of clause (a) of subsection (2) of section 20, of the Specific Relief Act, 1963 where the terms of a contract give the plaintiff an unfair advantage over the defendant.
  - (c) Where, as stated in clause (b) of sub section (2) of section 20 of the same Act, the performance of the contract would involve some hardships on the defendant which he had not foreseen, where its non-performance would involve no such hardships on the plaintiff.
- (e) General ‘substantive’ unfairness to be defined in the Bill and guidelines be given:

We shall refer to what we mean by ‘substantive unfairness’ in earlier chapters. Here we shall refer to Black’s Law Dictionary. It defines ‘substantive unconscionability’ as unconscionability resulting from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances.

We have referred to various other situations in Chapter VIII – ‘Comparative Law – Substantive Unfairness’ which makes a contract ‘substantively unfair’. We do not again propose to repeat all those circumstances referred to in Chapter VIII, namely, the provisions of the statutes or Bills in UK, Canada, Australia, New Zealand and South Africa and so on. Such circumstances are equally in existence in contracts in India.

We propose to list existing substantive provisions of the two Acts, Contract Act, 1872 and Specific Relief Act, 1963 merely as “substantive provisions”.

We also propose to have a new and separate provision - which deals with ‘general substantive unfairness’. To supplement the same we propose another section which will give guidelines which have to be considered for deciding if a contract or term is ‘substantively unfair’.

We propose to define ‘general substantive unfairness’ as referring, - (without prejudice to the specific provisions of the Contract Act, 1872 and the Specific Relief Act, 1963) - in the following words:

“a contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties.”

In the next chapter, we shall give our recommendations along with the corresponding provisions of the Bill.



## **CHAPTER-XII**

### **DISCUSSION AND RECOMMENDATIONS FOR DRAFT BILL (2006) ON UNFAIR TERMS (PROCEDURAL AND SUBSTANTIVE)**

We have referred in Chapter No. XI to some of the provisions of the proposed Bill. We have stated that we shall bring in new provisions to deal with ‘procedural’ and ‘substantive’ unfairness, and that, at the same time, we do not propose to disturb the existing provisions of the Indian Contract Act, 1872 and of the Specific Relief Act, 1963. In fact, as stated earlier, we propose to merely list existing procedural and substantive provisions of these Acts for purpose of mere classification and will not disturb them. However, we propose to have ‘general provisions’ both for ‘procedural’ and ‘substantive’ unfairness in the new Bill, as stated earlier. We now proceed to explain certain aspects of the proposed Bill.

Initially, we propose to give certain general definitions of ‘procedural unfairness’ and ‘substantive unfairness’ but so far as the existing procedural provisions of the Indian Contract Act, 1872 and Specific Relief Act, 1963, are concerned, we do not want to use the word ‘unfairness’ lest it may be wrongly understood that the existing provisions are subject to the new definitions. Instead, as stated above, we propose just to describe the respective provisions as merely ‘procedural’ and ‘substantive’ and we shall eschew using the word ‘unfairness’ while referring to these sections.

(A) Chapter I of the Bill will contain definitions. There are a few words which require definitions.

(a) 'contract':

The Indian Contract Act, 1872 defines both 'agreement' and 'contract' separately and several sections too use these words separately.

Section 2(e) of the Contract Act defines an 'agreement' as follows:

“2(e): Every promise and every set of promises, forming consideration for each other, is an 'agreement'.”

Section 2(h) defines a 'contract' as follows:

“2(h): an agreement enforceable by law is a 'contract'”.

Section 10 of the Contract Act states as to 'what agreements are contracts' while several other sections use the word 'contract'. Section 19 refers to 'validity of agreement without consent', sec 20 deals with void agreements, so do sections 23, 24, 25, 26, 27, 28, 29 and 30.

Section 2(i) defines 'voidable contract' as follows:

“2(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a 'voidable contract'”.

Section 2(j) defines ‘void contracts’ as follows:

“2(j): A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable”.

For the purpose of definition of ‘contract’, we have considered whether it is sufficient merely to define contract as defined in sec 2(h) of the Contract Act or whether it should include the word ‘agreement’.

We found that sections 15, 16, 17, 18, 19, 19A which deal with ‘voidable contracts’ i.e. if they are vitiated by ‘coercion’, ‘undue influence’, ‘fraud’, ‘misrepresentation’,- they all say that the ‘agreement’ which is a ‘contract’ is voidable. These deal with ‘procedural unfairness’ of contracts.

On the other hand, sections 10, 20, 23, 24, 25, 26, 27, 28, 29, 30 and 56 deal with ‘void’ agreements. This is obviously because they are not enforceable and are distinct from enforceable agreements which are called contracts but which contracts are voidable. These sections deal with agreements which are void because of absence of consideration or due to mutual mistake, unlawful consideration, or are agreements in restraint of marriage, or in restraint of trade, or in restraint of legal proceedings, or agreements which are uncertain, or by way of wager or impossible of performance. These deal with ‘substantive unfairness’ of agreements.

In order therefore to cover both ‘procedural’ and ‘substantive’ aspects in a single definition, we have proposed to define ‘contract’, for the purpose of this Act, as covering both ‘contracts’, (i.e. agreements which are enforceable) and ‘agreements’ simpliciter which are void. When we deal with ‘procedural’ aspects, the word will mean ‘contract’ and when we deal with ‘substantive’ aspects, the word will mean ‘agreement’.

Our definition of ‘contract’ in sec 2(a) of the Bill will be as follows:

“Section 2(a): ‘Contract’ means a contract as defined in clause (h) of section 2 of the Indian Contract Act, 1872 (9 of 1872) and includes an agreement as defined in clause (e) of section 2 of that Act.

(b) ‘Court’:

So far as the definition of ‘Court’ is concerned, obviously it must include civil courts of competent jurisdiction. The definition must include ‘arbitral tribunals’ also which enforce contracts. At one time, there was some doubt if an arbitral tribunal could direct or refuse specific performance. But the decision of the Supreme Court in Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khatain : (1999 (5) SCC 652) has clearly held that though there is an element of discretion involved, the arbitral tribunal is competent to exercise discretion and direct or refuse specific performance. The judgment of the Calcutta High Court was approved and the judgment of Delhi High Court was overruled.

So far as the various consumer fora under the Consumer Protection Act, 1986 are concerned, we are of the view that the said fora must have the benefit of the provisions relating to ‘general procedural unfairness’ in sec. 5 and to the guidelines in sec. 6 and so far as ‘substantive unfairness’ is concerned, to sections 9, 10, 11, 12 and the guidelines in sec. 13 and the burden of proof in sec. 14. In fact, in several countries, the unfair terms contract provisions are applied to consumer contracts. In UK, there is a separate chapter for consumer contracts and in some countries there are such statutes separately for consumer contracts.

Hence, we propose to define ‘Court’ in sec 2(b) as follows:

“2(b): ‘Court’ means a Civil Court of competent jurisdiction and includes every Consumer Dispute Redressal Agency referred to in section 9 of the Consumer Protection Act, 1986 (68 of 1986) and an arbitral tribunal referred to clause (d) of sub section (1) of sec 2 of the Arbitration and Conciliation Act, 1996 (26 of 1996).”

In addition, we propose sec. 2(c) to say that ‘words and expressions not defined in this Act and define in the Indian Contract Act, 1872 (9 of 1872) shall have the meanings assigned to them in respectively in that Act’.

The scheme of the Bill is that ‘procedural provisions and procedural unfairness’ are dealt with together in Chapter II. Procedural provisions are in sec 3, 4 while procedural unfairness is in sec 5.

Section 3 deals with mere listing of the ‘procedural provisions’ of the Indian Contract Act, 1872, namely sections 15, 16, (19A), 17, 18, 19 which deal with ‘voidable contracts’ – that is, contracts which may be avoided if they are vitiated by coercion, undue influence, fraud, misrepresentation or absence of free consent. We nowhere use the word ‘unfair’ in this section.

Likewise, we propose sec. 4 to merely list the existing procedural provisions of the Specific Relief Act, 1963 – which deal with avoidance of contracts – namely, sec 20(2)(a) (second part), sec 20 (2)(c) and sec 27(1) (a). Here too, we do not use the word unfairness.

After stating that sections 3 and 4 deal with ‘procedural provisions’ of the above said two enactments and taking care to see that we do not use the words ‘procedural unfairness’, we next come to the crucial provision, dealing with ‘general procedural unfairness’ under the proposed law in Chapter II.

We propose sec 5 to deal with the concept of ‘general procedural unfairness’, a concept which we propose to introduce for the first time. The 103th Report of the Law Commission (1984) though it dealt with the concept of ‘unfair terms’, did not refer to the dichotomy of ‘procedural’ and ‘substantive’ unfairness. Section 67A as proposed in that report used the words ‘unconscionable’ in the first sub section which combined both procedure and substantive aspects. The second subsection 67(2) dealt with substantive unfairness. The present definition in this Bill is more comprehensive.

Procedural unfairness separately defined in sec. 5:

What we mean by ‘procedural unfairness’ is set out in sec 5 of the Bill as follows:

“Section 5: Without prejudice to the provisions of sections 3 and 4, a contract or a term thereof is procedurally unfair if it has resulted in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party or the manner in which or circumstances under which the contract has been entered into or the term thereof has been arrived at by the parties.”

It will be noticed from the previous chapter that such a general statement of what is ‘procedurally unfair’ has been attempted in other jurisdictions also though no statute precisely devises a full separate section for giving the meaning of these said words.

Here, one important fact has to be noticed. Under the Indian Contract Act, 1872, it is provided in sec 19 that certain contracts are voidable and be avoided. It is also stated that the party concerned may, avoid the contract or he may,

“insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representations made had been true.

The fact remains that if the party wants to avoid a voidable contract, he has under sec 19 of the Contract Act, 1862 only to prove one or other of the grounds, namely, that his consent to the agreement was caused by coercion, fraud or misrepresentation. He need not necessarily prove that any unjust advantage has been gained by the other party or that he has suffered an unjust disadvantage as we are now proposing in section 5.

However, sec 19A of the Contract Act, 1872 which deals with ‘undue influence’, while permitting avoidance of a contract, states that “Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just”.

But, what we propose under sec 5 is not at par with sec 19 but somewhat on par with sec 19A. We propose that where procedural unfairness is alleged, i.e. facts relating to the conduct or manner or circumstances under which the contract is entered into or a term is arrived at, then in addition, the party seeking to avoid has to prove unjust advantage to the opposite party or unjust disadvantage to himself.

Debate whether mere proof of procedural unfairness has to be coupled with some unfair advantage or unfair disadvantage:



There is considerable debate on the question whether it is sufficient for a party to merely prove for purposes of sec 5 “procedural unfairness”, conduct or circumstances and manner in which the contract or its terms have been arrived at or entered into or whether, something more has to be proved.

In the USA, while some courts have taken the view that where there is procedural unconscionability, it is not necessary to prove substantive unconscionability also, while some other Courts have taken the view that it is necessary to prove substantive unfairness also. On the converse proposition whether procedural and substantive unfairness, if proved, whether it is alone sufficient, there is again a conflict of views. These divergent views have been referred to recently in Strand vs. U.S. Bank National Association ND (Supreme Court of Dakota) 2005 ND 68 = 693 N.W. 2d. 918 (2005). Kapsner J, speaking for the Court, summarized the position in US as follows:

“In Construction Assocs: 446 N.W. 2d (at 242-44), however, we impliedly held that some measure of both procedural and substantive unconscionability must be shown to allow a Court to refuse to enforce unconscionable provisions.....      ...      ...      ...

Courts in other jurisdictions have reached varying results on this issue. Some Courts hold that a showing of either procedural or substantive unconscionability is sufficient to invalidate a contract. See Luna vs. Household Fin Corp III, 236 F Supra 2d 1166 (1174) (W.D. Wash. 2002). Other Courts have held that procedural unconscionability by itself is not enough, but substantive unconscionability by itself may be (See Maxwell vs. Fidelity Fin

Servs, Inc 184 Ariz 82, 907 P. 2d. 51 (58-60) (Ariz 1995); see Gillman vs. Chase Manhattan Bank N.A.: 73 N.Y. 2d1 = 534 NE. 2d 824 (828-29) 537 NYS 2d. 787 (N.Y. 1988) (noting that a “determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made”, but recognizing that “there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone”). The majority of Courts, however, have held that a showing of some measure of both procedural and substantive unconscionability is required, and courts are to employ a balancing test looking at the totality of circumstances to determine whether a particular provision is unconscionable and unenforceable. See Roussalis vs. Wyoming Med Ctr., Inc, 4 P 3d. 209 (246)(Wyo 2000) (“most courts require a quantum of both and take a balancing approach in applying them”); 1 James J. White & Robert Summers, Uniform Commercial Code para 4-7 (4<sup>th</sup> Ed. 1995) (“Most Courts take a “balancing approach” to the unconscionability question, and to tip scales in favour of unconscionability, most courts seem to require a certain quantum of procedural, plus a certain quantum of substantive unconscionability”).

The learned Judge referred to what Richard A. Lord stated in the Commentary on, Williston on Contracts (4<sup>th</sup> Ed) (1998):

“The concept of unconscionability was meant to counteract two generic forms of abuses: the first of which relates to procedural

deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, today often analysed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction; and the second of which relates to the substantive contract terms themselves and whether those terms are unreasonably favourable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner, fundamental duties otherwise imposed by the law, fine-print terms or provisions that seek to negate the reasonable expectations of the non-drafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.”

The learned Judge referred to the views of the above authors further as follows:

“It has been said that this formulation requires a showing that the contract was both procedurally and substantively unconscionable when made. It has often been suggested that a finding of a procedural abuse, inherent in the formation process, must be coupled as well with a substantive abuse, such as an unfair or unreasonably harsh contractual term which benefits the drafting party at the other party’s expense. Another way of viewing this problem is that the fact that a contract is one of adhesion does not itself render the contract unconscionable. The distinction between procedural and substantive

abuses, however, may become quite blurred; overwhelming bargaining strength or use of fine print or incomprehensible legalese may reflect procedural unfairness in that it takes advantage of or surprises the victim of the clause, yet the terms contained in the resulting contract – whether in fine print or legal ‘gobbledygook’- would hardly be of concern unless they were substantively harmful to the non-drafting party as well. Thus, the regularity of the bargaining procedure may be of less importance if it results in harsh or unreasonable substantive terms, or substantive unconscionability may be sufficient in itself even though procedurally unconscionability is not.”

In our view, the last part of the above analysis is more true. Though the cases of procedurally voidable situations referred to in the Indian Contract Act, 1862 do not require any substantive unfairness to be proved, and we do not disturb that state of the law, still our formulation of sec 5 is that “procedural unfairness” as now defined requires some ‘unfair advantage’ or ‘unfair disadvantage’ to one party to be proved. But, so far a substantive unfairness is concerned, it can lead to unenforceability without it being simultaneously unfair procedurally. Whereas on our formulation of not only procedural aspects but ‘substantive unfairness’ in sec 12 is therefore that

“a contract or a term thereof is substantively unfair if it is in itself harsh, oppressive or unconscionable to one of the parties”.

whereas our formulation of ‘procedural unfairness’ in sec 5 requires not only procedural aspects but some substantive aspects such as unjust advantage or unjust disadvantage.

We shall refer to some more views elsewhere.

The British Columbia Law Institute in its Interim Report on ‘Unfair Contract Terms’ (Feb. 2005) has referred to Morrison vs. Coast Finance Ltd.: (1965) 55 DLR (2d) 710 (B.C.C.A), which refers to proof of inequality, ignorance, need or distress of one party but also to proof of unfairness of the bargain. Likewise Harry vs. Kreutziger (1978)95 DLR (3d) 231 (CA) also speaks of the need for proof on both:

“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 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.” (per Mc Intyre JA)

That would mean that in the case of procedural unfairness, apart from the circumstances prevailing at the time when the contract was entered into, substantial unconscionability of the terms must also be proved.

The Report of the British Columbia Institute further traces the inequality of bargaining principle to what Lord Denning stated in Lloyds Bank Ltd vs. Bundy: 1974(3) All ER 757(CA). The Report observes stating that in British Columbia, as far as unconscionability is concerned, the

emphasis is still more on procedural unfairness leading to unfair terms but (see p. 35 of the Report) “the application of that doctrine in British Columbia has not proved effective in dealing with substantive unfairness. Its focus has been on protecting vulnerable people from procedural unfairness. This approach may fall wide of the mark in dealing with the issues raised in the Report”. It concludes stating (see p. 38):

“The options to reform the law of unfair terms discussed in this Report remain starting points for discussion at this time. Tellingly, they were not engaged in any substantive way by the respondents to our consultation.”

We shall next refer to the Discussion Paper on ‘Unfair Contract Terms’ (2004) of the Standing Committee of Officials of Consumer Affairs, Victoria (Australia). It discussed various models, including those which deal with procedural unfairness and substantive unfairness or both. The Australian law in sec 51AB of the Trade Practices Act, 1974 concentrates on procedural unfairness as was the position under Common law except for two clauses (b) and (e) of 52AB(2) which deal independently with substantive unfairness. The Paper says: “However, in practice, Courts have been reluctant to base a decision on 51AB solely on substantive grounds”.

The Report says (para 2.1.2) that in New South Wales, under the Contract Review Act, 1980 while the emphasis is again on procedural unfairness, except in clauses (d) and (g) of sec. 9 which deal with substantive issues. Analysis of case law of 20 years by T. Carlin (vol. 23) (Sydney Law Review, p. 133) revealed that out of 160 cases, only in one

case was substantive unfairness applied by the Courts independently. Goldring et al have criticized the above Act for not dealing separately with substantive unfairness. In UK, though guidelines relating to procedural and substantive unfairness are contained in the statute, the sections have mixed up both concepts instead of dealing with them separately.

The Report observed (para 2.2) that in UK, the focus is on ‘substantive’ unfairness rather than procedural. The UK Law Commission Paper notes (see para 2.2.2) that “it must be the case that substantive unfairness alone can be a term unfair under (the UK Regulations)”.

The Report (para 2.3.2) says that in US, sec 2.302 mixed up both concepts.

In Canada, the position according to the Report (para 2.3.3) is that the position is same as in Australia. It says:

“However, similar to Australia, it would seem that Canadian common law jurisdictions have not differentiated between substantive or procedural matters.”

Courts in Australia, the Report says, are reluctant to apply substantive unfairness alone.

It is in the above background of various authorities that in sec 5 we have proposed that so far as ‘procedural unfairness’ is concerned, it is necessary to prove some unfair advantage or unfair disadvantage to one of

the parties. For that purpose, we have provided guidelines in sec. 6 for deciding whether there is procedural unfairness.

(So far as ‘substantive unfairness’ as proposed in sec. 12 is concerned, in our view, if the contract or terms are oppressive, harsh or unconscionable, they must independently be declared unenforceable and it is not necessary to also prove procedural unfairness.)

Guidelines: for procedural unfairness: section 6

We have culled out a number of guidelines for judging whether a contract or its terms are ‘procedurally unfair’ from the available legal literature set out in Chapter VIII.

They are as follows as stated in sec. 6:

“6. For the purposes of section 5, the Court may take into account the following circumstances, namely:-

- (a) the knowledge and understanding of the promisee in relation to the meaning of the terms thereof or their effect;
- (b) the bargaining strength of the parties to the contract relative to each other;
- (c) reasonable standards of fair dealing or commonly accepted standards of dealing;



- (d) whether, or not, prior to or at the time of entering into the contract, the terms were subject to negotiation or were part of a standard terms contract;
- (e) whether or not it was reasonably practicable for the party seeking relief to negotiate for the alteration of the contract or a term thereof or to reject the contract or a term thereof;
- (f) whether expressions contained in the contract are in fine print or are difficult to read or understand;
- (g) whether or not, even if he or she had the competency to enter into the contract based on his or her capacity and soundness of mind, he or she
  - (i) was not reasonably able to protect his or her own interests or of those whom he or she represented at the time the contract was entered;
  - (ii) suffered serious disadvantages in relation to other parties because he or she was unable to appreciate adequately the contract or a term thereof or their implications by reason of age, sickness, physical, mental, educational or linguistic disability, emotional distress or ignorance of business affairs.
- (h) whether or not independent legal or other expert advice was obtained by the party seeking relief under this Act;
- (i) the extent (if any) to which the provisions of the contract or a term thereof or their legal or practical effect were accurately explained by any person, to the party seeking relief under this Act;

- (j) the conduct of the parties to the contract in relation to similar contracts or courses of dealing to which any of them had been party; or
- (k) whether a party relied on the skill, care or advice of the other party or a person connected with the other party in entering into the contract.”

### General substantive fairness: section 12

As stated earlier, we have defined ‘substantive unfairness’ as follows:

“a contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties”

### Guidelines for substantive unfairness: section 13

We have also culled out in sec 13, several guidelines to judge if a contract or its terms are substantively unfair. They are as follows:

“13. For the purposes of sections 9 to 12, the court may take into account the following circumstances, namely:-

- (a) whether or not the contract or a term thereof imposed conditions which are,—
  - (i) unreasonably difficult to comply with, or

- (ii) are not reasonably necessary for the protection of the legitimate interests of any party to the contract;
- (b) whether the contract is oral or wholly or partly in writing;
- (c) whether the contract is in standard form;
- (d) whether the contract or a term thereof is contrary to reasonable standards of fair dealing or commonly accepted standards of dealing;
- (e) whether the contract, agreement or a term thereof has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties;
- (f) whether the benefits to be received by the disadvantaged party are manifestly disproportionate or inappropriate to his or her circumstances;
- (g) whether the disadvantaged party was in a fiduciary relationship with the other party; or
- (h) whether the contract or a term thereof
  - (i) requires manifestly excessive security for the performance of contractual obligations; or
  - (ii) imposes penalties which are disproportionate to the consequences of a breach of contract; or
  - (iii) denies or penalises the early repayment of debts; or
  - (iv) entitles a party to terminate the contract unilaterally without good reason or without paying reasonable compensation; or
  - (v) entitles a party to modify the terms of a contract unilaterally.”

It will be seen that there may be some guidelines in sections 6 and 13 which are common to both procedural unfairness and substantive unfairness. That is quite real.

Special provisions as to substantive unfairness: exclusion of certain liabilities to be substantively unfair:

Apart from the ‘general substantive unfairness’ defined in sec. 12 upon which the Court may have to decide on facts, we have formulated sections 9, 10, 11 as special provisions where the very existence of certain terms is sufficient to declare them as substantively unfair.

The 103<sup>rd</sup> Report of the Law Commission, formulated sec 67A to be introduced into the Contract Act, 1872, and while subsection (1) was general, subsection (2) proposed:

“Section 67A(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 consequences of negligence”

Such a provision is also contained in sec 3 of the (UK) Unfair Contract Terms Act, 1977 which stated that liability arising in contract cannot be

excluded or restricted except in so far as the term satisfies the requirement of reasonableness.

Such provisions are also contained in the UK Regulations, 1999 and are also found in Bill attached to the UK and Scottish Law Commission Report of 2004.

It should not be permissible for excluding liability for negligence. It should not be permissible to exclude liabilities for breach of contract so far as one party is concerned, without justifiable reasons.

We have proposed section 9 as follows:

“Exclusion or restriction of liability to be substantially unfair:

9. A contract or a term thereof shall be deemed to be substantively unfair and void if it

- (a) excludes or restricts liability for negligence;
- (b) excludes or restricts liability for breach of express or implied terms of contract without adequate justification.”

In clause (b), we have added the words ‘without adequate justification’ in as much as in our opinion, it is permissible, where there is adequate justification to exclude or restrict liability for breach of express or implied terms of contracts.

We next come to the proposed sec. 10 of the Bill which deals with another situation concerning sec. 62 of the Sale of Goods Act, 1930.

Section 62 of the Sale of Goods Act states:

“Section 62: Exclusion of implied terms and conditions:

Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage, if the usage is such as to bind both parties to the contract.”

The provision in UK and other countries do not permit one party to exclude the various rights, duties or liabilities of one or other parties under contracts, particularly in relation to sale of goods. Even terms implied by course of dealing or usage will be subject to section 9. The Sale of Goods Act, 1930 which is generally applicable to most contracts relating to goods sold or supplied to consumers permits one party to escape from its duties and liabilities or exclude rights of consumers which are contained in that Act. Such provisions are considered inherently obnoxious, unless there is adequate justification.

We, therefore, propose sec. 10 as follows:

**“Exclusion or restriction of rights, duties or liabilities referred to in section 62 of the Sale of Goods Act, 1930 (3 of 1930) to be substantively unfair unless there is adequate justification**

10. In contracts to which this Act applies as stated in subsection (1) of section 18, any exclusion or restriction of the rights, duties

or liabilities referred to in section 62 of the Sale of Goods Act, 1930 (3 of 1930) shall be deemed to be substantively unfair unless there is adequate justification therefor.”

The Zimbabwe Consumer Contracts Act contains guidelines in sec 5 (1)(d) as follows:

“(d) If the consumer contract excludes or limits obligations or liabilities of a party to an extent that is not reasonably necessary to protect its interest.”

In the Schedule to the Act, it is stated that ‘any provision whereby the seller or supplier of goods, other than used goods, excludes or limits his liability for latent defects in the goods’ may be treated as unfair by the Court. Likewise if it excludes or limits liability of seller or supplier of goods or service.

Such a provision is also contained in Article 3(3)(b) of the European Directive which refers to “inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non performance or inadequate performance by the seller or supplier, of any contractual obligations.

(The above provision is on the lines contained in sec 13(2) of the Bill attached to the UK & Scottish Law Commission’s Report, 2004).

Choice of Law:

We next come to choice of law issue. This aspect is dealt with in sec.

11. It is well known that whenever a foreign element is involved in a contract, choice of law issues arise. Here obviously, we are concerned with the law applicable to the substance of the contract. Parties should not be allowed to choose a law excluding the laws of India where there is no foreign element at all involved in the contract. It is sometimes common for one party to say that a foreign law would apply to the substantive rights of the parties and such stipulation is made even where there is no foreign element i.e. none of the parties is a foreigner, the contract is not entered in a foreign country, nor its performance is in a foreign country etc. If there is no foreign element, it should not be permissible to impose a foreign law and exclude applicability of Indian law.

The (UK) Unfair Contract of Terms Act, 1977 contained a slightly different provision which stated in sec 27(2)(a) that the protective provisions of the Act apply notwithstanding any choice of foreign law where

‘the term appears to the Courts... to have been imposed wholly or mainly for the purpose of enabling the party to evade the operation of the Act’.

The said provision was criticized as being “highly subjective” (see paras 7.31 to 7.34 of the UK & Scottish Law Commission’s Report, 2004). A new provision is formulated now by the UK and Scottish Law



Commissions. As regard sec 27(2)(a) of the UCTA, the Commissions stated as follows:

“7.31 This section has been criticized on the grounds that it introduces a highly subjective element into the law. We felt that it is important to investigate alternative means by which inappropriate evasion of the new legislation might be prevented. Following a suggestion made by Dr. Simon Whittakar in his Report to DTI, we looked at the possibility of introducing a provision along the lines of Art 3(3) of the Rome Convention. That Article provides that the application of the mandatory rules of the country with which a ‘situation’ is wholly connected shall not be prejudiced by the parties’ different choice of law clause in the contract.

7.32 Although adding a welcome degree of objectivity, the approach might allow businesses to evade the controls of the new legislations in a wider range of circumstances than section 27(2)(a) would do. Depending on the circumstances of the case, section 27(2)(a) could potentially apply in any case where the parties adopt a choice of foreign law. On the other hand, a provision modeled on Article 3(3) would only prevent evasion in those cases where the contract, apart from the choice of law, is wholly connected to the UK.

7.33 We decided that the possible objection did not offer a compelling reason for rejecting the proposed approach. Given that we are recommending stricter controls over contracts with small businesses which will make it harder to evade the protective regime

by a choice of foreign law, we think that a small degree of relaxation in the controls over contracts between larger businesses is acceptable. This is particularly compelling where there is a foreign element to the contract, as there must be for the contract to fall outside the terms of the proposed anti-avoidance provision. We found support for this view in the fact that we are not aware of any authorities in which section 27(2)(a) has played a key role in determining the party's contractual rights. If the parties seeking to bring themselves within UCTA (1977)'s protection do not now rely upon the broader provisions of section 27(2)(a), it should not matter if those provisions are restricted. Therefore, we recommend that the revised UCTA-type regime which is instituted by the business contract clauses of the new legislation should apply, notwithstanding a choice of foreign law, where the contract is otherwise wholly connected to the UK.

7.34 We recommend that the business contract part of the new legislation should apply, notwithstanding a choice of foreign law where the contract is, in every other respect, wholly connected to the U.K.”

Section 19(2) of the Draft Bill, 2004 prepared by the Commission on the basis of this recommendation reads thus:

“Section 19(2): This Act has effect in relation to a business contract despite a term of the contract which applies (or appears to apply) the law of somewhere outside the United Kingdom if the contract is in every respect wholly connected with the United Kingdom.”

We agree that this format is better than sec 27(2)(a) of the UCTA 1977 and further, according to well settled principles applicable to choice of law, where a contract, otherwise governed by Indian law, contains absolutely no foreign element, it should not be permissible for parties to agree that a foreign law will be applicable to the substance of the contract.

On these lines, we propose sec 11 as follows:

“Choice of law clauses

11. Where a contract contains terms applying or purporting to apply the law of a foreign country, despite the contract being in every respect wholly unconnected with the foreign country, such terms shall be deemed to be substantively unfair.

### Burden of Proof

We next come to the question of burden of proof in cases falling under the head of substantive unfairness under clause (b) of sec 10 and sec 11. This will be referred to in sec 14 of the proposed Bill.

We have noted that under clause (b) of sec 9, if a contract or a term excludes or restricts liability for breach of express or implied terms of a contract without adequate justification therefore, the contract or term shall be deemed to be substantively unfair. Likewise, under sec 10, any exclusion of the rights, duties or liabilities referred to in sec. 62 of the Sale of Goods Act shall be substantively unfair unless there is adequate justification

therefore. In these two provisions, we have used the qualification that such exclusion must be for adequate justification.

The purport of sec 14 as proposed will be to place the burden of proof of adequate justification of such exclusions on the party who or which relies on such exclusion.

It will be noted that under sec 11(5) and 24(4) of the (UK) UCTA, 1977 the burden of proving that a contract or term is fair or reasonable is on the party claiming it to be reasonable. There was no provision in the (UK) regulation UTCCR, 1999.

The Law Commission of UK and Scotland in their Joint Report 2004 (see paras 3.124 to 3.130) recommended that “where an issue has been raised whether a term is fair and reasonable, the burden will be on the business, i.e. on the seller or supplier.

We, however, recommend such a special provision only for purposes of clause (b) of sec 9 which deals with exclusion or restriction of liability for express or implied term of a contract without adequate justification or under sec 10 which deals with exclusion or restriction of the rights, duties or liabilities referred to in sec 62 of the Sale of Goods Act, 1930 because of the need for proof of adequate justification for such exclusion or restriction.

We, therefore, propose sec 14 in the following language:

#### Section 14: Burden of Proof

“If a contract or a term thereof excludes or restricts liability as stated in clause (b) of sec 9 or excludes or restricts rights, duties and liabilities referred to in sec. 62 of the Sale of Goods Act, 1930, as stated in sec 10, it is for the person relying on such exclusion or restriction, to prove that it is not without adequate justification.”

### Section 15: Act to apply to executed contracts

Another important aspect of the Bill is whether the unfairness provisions, both procedural and substantive, must apply not only at the stage the implementation of the contract but also at any later stage when the contract is either partly or fully executed. The benefit of relief from unfairness must, therefore, extended upto the execution of the contract, either in part or in full but this is naturally subject to a rider that the Court “may” grant relief on the basis of sections 5, 6, 9 to 14 and for that purpose,

“it may consider whether and to what extent restitution is possible in the facts and circumstances of the case and where such restitution is not possible either wholly or partly, whether any compensation is payable.”

Such a provision applying the provisions of an unfair term of contract law to executed contracts is available under sec 14 of the Contract Review Act, 1980 of New South Wales (Australia). However, we have put some qualifications which are not found in that Act, which are underlined as above.

Section 16: Court's power to raise an issue of unfairness of a contract or term thereof.

We have felt it necessary to confer power on the Court, i.e. civil court, consumer fora and also the tribunal, to raise an issue of unfairness on its own under sections 5, 9 to 12 even if none of the parties has raised it in his or its pleadings. There is such a provision recommended by the UK and Scottish Law Commission and is contained in sec. 21 of the Draft Bill, 2004 prepared by them.

Section 17: Reliefs to be granted by Court

As already stated in the definition of 'Court', Court means a Civil Court of competent jurisdiction and includes the consumer fora under the Consumer Protection Act, 1986 and arbitration tribunals under the Arbitration of Conciliation Act, 1996.

“17(1) Without prejudice to the provisions in the Indian Contract Act, 1872 (9 of 1872), Specific Relief Act, 1963 (47 of 1963), Sale of Goods Act (3 of 1930) or to the provisions of any other law for the time being in force, where the Court comes to the conclusion having regard to sections 5, 6, 9 to 14 that a contract or a term thereof is either procedurally or substantively unfair or both, the Court may grant any one or more of the following reliefs:-

(a) refusing to enforce the contract or the term thereof;

- (b) declaring the contract or the term is unenforceable or void;
- (c) varying the terms of contract so as to remove the unfairness;
- (d) refund of the consideration or price paid;
- (e) compensation or damages;
- (f) permanent injunction;
- (g) mandatory injunction; or
- (h) any other relief which the interests of justice require as a consequence of the non-enforcement of the contract or the term thereof which is unfair

provided that where the contract or its term is procedurally unfair as stated in section 5, the person who suffers the disadvantage may, at his option, insist that the contract or term shall be performed, and that he shall be put in the position in which he would have been if the conduct, manner or circumstances referred to in that section did not permit the disadvantageous term to form part of the contract.

(2) For the purpose of granting the reliefs under subsection (1), the Court may determine if any of the terms of the contract which are unfair are severable and thereafter whether and to what extent and in what manner, the remaining terms of the contract can be enforced or given effect to.”

The Court under sec 17 can grant one or more of the reliefs on the basis of the provisions (other than 3, 4, 7, 8) i.e. unfairness:

- (a) refusing to enforce the contract or the term thereof;
- (b) declaring the contract or the term void;
- (c) varying the terms of the contract so as to remove the unfairness;
- (d) refund of the consideration or price paid;
- (e) compensation or damages;
- (f) permanent injunction;
- (g) mandatory injunction; or
- (h) any other relief which the interests of justice require.

As in sec 19 of the Contract Act, 1872, we have added a proviso in sec 17 as follows:

“provided that where the contract or its term is procedurally unfair as stated in section 5, the person who suffers the disadvantage may, in his option, insist that the contract or term shall be performed, and that he shall be put in the position in which would have been if the conduct, manner or circumstances referred to in that section did not permit the disadvantage term to form part of the contract.”

Sub section (2) of sec 17 deals with severability of terms.

“18. The provisions of this Act (other than sections 3, 4, 7 and 8)

(1) shall apply to all contracts entered into after the commencement of this Act; and



- (2) shall not apply to
- (a) contracts and relations between employers and workmen under the labour laws in force;
  - (b) public employment under the Central Government or a State Government or their instrumentalities or under local authorities;
  - (c) employment under public sector undertakings of the Central Government or a State Government;
  - (d) employment under corporations or bodies established by or under statutes made by Parliament or State Legislatures;
  - (e) contractual terms in respect of which measures are provided in international treaties or agreements with foreign countries to which the Central Government is a signatory.”

Section 18” applicability of the Act and exemptions:

In as much as we have introduced new concepts of unfairness, procedural and substantive in sections 5, 6, 9 to 14 it is but necessary to say that the proposed Act shall be prospective in operation in the sense that it will apply only to contracts entered into after the commencement of this Act.

In addition, we have suggested certain exemptions which, in our view, are very much necessary. They are:

- (a) contracts and relations between employers and workmen under the labour laws in force;
- (b) public employment under the Central Government or a State Government or their instrumentalities or under local authorities;
- (c) employment under public sector undertakings of the Central Government or a State Government;
- (d) employment under corporations or bodies established by or under statutes made by Parliament or State Legislatures;
- (e) contractual terms in respect of which measures are provided in international treaties or agreements with foreign countries to which the Central Government is a signatory.

We recommend accordingly.

Draft Bill is annexed herewith.

(Justice M. Jagannadha Rao)  
Chairman

(R.L. Meena)  
Vice-Chairman

(Dr. D.P. Sharma)  
Member-Secretary

Dated: 31.8.2006

**ANNEXURE****Unfair (Procedural and Substantive) Terms in Contract Bill, 2006**

A Bill to declare certain provisions of the laws relating to contracts and specific performance, as procedural and substantive, to further define unfairness in contracts, as procedural and substantive, to determine impact of unfairness on contracts, to provide guidelines for such determination and to enable Courts to grant certain reliefs to relieve parties from the effect of unfairness in contracts.

Be it enacted by Parliament in the Fifty Seventh Year of the Republic of India as follows:-

**Chapter I****Preliminary****Short title, extent and commencement**

1. (1) This Act may be called the Unfair (Procedural and Substantive) Terms of Contracts Act, 2006.
- (2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may [by notification in the Official Gazette] appoint.

### **Definitions**

2. In this Act, unless the context otherwise requires.-
- (a) 'contract' means a contract as defined in clause (h) of section 2 of the Indian Contract Act, 1872 (9 of 1872) and includes an agreement as defined in clause (e) of section 2 of that Act.
  - (b) 'Court' means a Civil Court of competent jurisdiction and includes every Consumer Dispute Redressal Agency referred to in section 9 of the Consumer Protection Act, 1986 (68 of 1986) and an Arbitral Tribunal referred to in clause (d) of sub-section (1) of section 2 of the Arbitration and Conciliation Act, 1996 (26 of 1996).
  - (c) words and expressions not defined in this Act and defined in the Indian Contract Act, 1872 (9 of 1872) shall have the meanings assigned to them respectively in that Act.

### Chapter II

#### **Procedural Provisions and Procedural Unfairness**

**Procedural provisions of the Indian Contract Act, 1872 (9 of 1872)**

3. The following provisions of the Indian Contract Act, 1872 (9 of 1872) are procedural, namely:-

- (a) Section 15 which deals with coercion,
- (b) Sections 16 and 19A which deal with undue influence,
- (c) Section 17 which deals with fraud,
- (d) Section 18 which deals with misrepresentation,
- (e) Section 19 which deals with agreements without free consent.

**Procedural provisions of the Specific Relief Act, 1963 (47 of 1963)**

4. The following provisions of the Specific Relief Act, 1963 (47 of 1963) are procedural, namely:-

- (a) clause (a) of sub-section (2) of section 20 in so far as it deals with the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant.
- (b) clause (c) of sub-section (2) of section 20 which deals with a defendant who entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.
- (c) clause (a) of sub-section (1) of section 27 which deals with a contract voidable or terminable by the plaintiff and where any person interested in the contract sues to have it rescinded and such rescission is adjudged.

### **General procedural unfairness**

5. Without prejudice to the provisions of sections 3 and 4, a contract or a term thereof is procedurally unfair if it has resulted in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party or the manner in which or circumstances under which the contract has been entered into or the term thereof has been arrived at by the parties.

### **Guidelines for purposes of determining general procedural unfairness under section 5**

6. For the purposes of section 5, the Court may take into account the following circumstances, namely:-

- (l) the knowledge and understanding of the promisee in relation to the meaning of the terms thereof or their effect;
- (m) the bargaining strength of the parties to the contract relative to each other;
- (n) reasonable standards of fair dealing or commonly accepted standards of dealing;
- (o) whether, or not, prior to or at the time of entering into the contract, the terms were subject to negotiation or were part of a standard terms contract;

- (p) whether or not it was reasonably practicable for the party seeking relief to negotiate for the alteration of the contract or a term thereof or to reject the contract or a term thereof;
- (q) whether expressions contained in the contract are in fine print or are difficult to read or understand;
- (r) whether or not, even if he or she had the competency to enter into the contract based on his or her capacity and soundness of mind, he or she
  - (i) was not reasonably able to protect his or her own interests or of those whom he or she represented at the time the contract was entered;
  - (ii) suffered serious disadvantages in relation to other parties because he or she was unable to appreciate adequately the contract or a term thereof or their implications by reason of age, sickness, physical, mental, educational or linguistic disability, emotional distress or ignorance of business affairs.
- (s) whether or not independent legal or other expert advice was obtained by the party seeking relief under this Act;
- (t) the extent (if any) to which the provisions of the contract or a term thereof or their legal or practical effect were accurately explained by any person, to the party seeking relief under this Act;
- (u) the conduct of the parties to the contract in relation to similar contracts or courses of dealing to which any of them had been party; or



- (v) whether a party relied on the skill, care or advice of the other party or a person connected with the other party in entering into the contract.

### **Chapter III**

#### **Substantive provisions and substantive unfairness**

#### **Substantive provisions of the Indian Contract Act, 1872 (9 of 1872)**

7. The following provisions of the Indian Contract Act, 1872 (9 of 1872) are substantive, namely:-

- (a) Section 10 which deals with agreements which are contracts if made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, not otherwise expressly declared to be void,
- (b) Section 20 which deals with both the parties to an agreement who are under a mistake,
- (c) Sections 23 and 24 which deal with consideration or objects of an agreement which are not unlawful,
- (d) Section 25 which deals with an agreement without consideration,
- (e) Section 26 which deals with an agreement in restraint of marriage of any person, other than a minor,

- (f) Section 27 which deals with an agreement in restraint of trade,
- (g) Section 28 which deals with an agreement in restraint of legal proceedings,
- (h) Section 29 which deals with an agreement which is uncertain,
- (i) Section 30 which deals with an agreement by way of wager, and
- (j) Section 56 which deals with an agreement to do an act impossible in itself.

**Substantive provisions of the Specific Relief Act, 1963 (47 of 1963)**

8. The following provisions of the Specific Relief Act, 1963 (47 of 1963) are substantive, namely:-
- (a) Clause (a) of section 18 where on account of fraud, mistake of fact or misrepresentation, the written contract of which performance is sought, is in terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract,
  - (b) Clause (a) of subsection (2) of section 20 in so far as it deals with the terms of a contract which gives the plaintiff an unfair advantage over the defendant,
  - (c) Clause (b) of subsection (2) of section 20 which deals with the performance of a contract which would involve some hardship on the defendant which he had not foreseen, where its non-performance would involve no such hardship on the plaintiff.

**Exclusion or restriction of certain liabilities to be substantively unfair**

9. A contract or a term thereof shall be deemed to be substantively unfair if it
- (a) excludes or restricts liability for negligence;
  - (b) excludes or restricts liability for breach of express or implied terms of a contract without adequate justification therefor.

**Exclusion or restriction of rights, duties or liabilities referred to in section 62 of the Sale of Goods Act, 1930 (3 of 1930) to be substantively unfair unless there is adequate justification**

10. In contracts to which this Act applies as stated in sub-section (1) of section 18, any exclusion or restriction of the rights, duties or liabilities referred to in section 62 of the Sale of Goods Act, 1930 (3 of 1930) shall be deemed to be substantively unfair unless there is adequate justification therefor.

**Choice of law clauses**

11. Where a contract contains terms applying or purporting to apply the law of a foreign country despite the contract being in every respect wholly unconnected with the foreign country, such terms shall be deemed to be substantively unfair.

**General substantive unfairness**

12. Without prejudice to the provisions of sections 7 and 8, a contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties.

**Guidelines for purposes of determining general substantive unfairness under sections 9 to 12**

13. For the purposes of sections 9 to 12, the court may take into account the following circumstances, namely:-

- (i) whether or not the contract or a term thereof imposed conditions which are,—
  - (i) unreasonably difficult to comply with, or
  - (ii) are not reasonably necessary for the protection of the legitimate interests of any party to the contract;
- (j) whether the contract is oral or wholly or partly in writing;
- (k) whether the contract is in standard form;
- (l) whether the contract or a term thereof is contrary to reasonable standards of fair dealing or commonly accepted standards of dealing;
- (m) whether the contract, agreement or a term thereof has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties;

- (n) whether the benefits to be received by the disadvantaged party are manifestly disproportionate or inappropriate to his or her circumstances;
- (o) whether the disadvantaged party was in a fiduciary relationship with the other party; or
- (p) whether the contract or a term thereof
  - (i) requires manifestly excessive security for the performance of contractual obligations; or
  - (ii) imposes penalties which are disproportionate to the consequences of a breach of contract; or
  - (iii) denies or penalises the early repayment of debts; or
  - (iv) entitles a party to terminate the contract unilaterally without good reason or without paying reasonable compensation; or
  - (v) entitles a party to modify the terms of a contract unilaterally.

### **Burden of proof**

14. If a contract or a term thereof excludes or restricts liability as stated in clause (b) of section 9 or excludes rights, duties and liabilities referred to in section 62 of the Sale of Goods Act, 1930 (3 of 1930) as stated in section 10, it is for the person relying on such exclusion or restriction to prove that it is not without adequate justification.

### **Provisions of the Act to apply for executed contracts**

15. The Court may grant relief on the basis of sections 5, 6, 9 to 14 of this Act in relation to a contract notwithstanding that the contract has been wholly or partly executed and for that purpose it may consider whether and to what extent restitution is possible in the facts and circumstances of the case and where such restitution is not, either wholly or partly possible, whether any compensation is payable.

### **Court's power to raise an issue of unfairness of contract or a term thereof**

16. A Court may, in proceedings before it, raise an issue as to whether a contract or its terms are unfair under sections 5, 9 to 12, even if none of the parties has raised the issue in its pleadings.

### **Relief that may be granted by Court**

17(1) Without prejudice to the provisions in the Indian Contract Act, 1872 (9 of 1872), Specific Relief Act, 1963 (47 of 1963), Sale of Goods Act (3 of 1930) or to the provisions of any other law for the time being in force, where the Court comes to the conclusion having regard to sections 5, 6, 9 to 14 that a contract or a term thereof is either procedurally or substantively unfair or both, the Court may grant any one or more of the following reliefs:-

(b) refusing to enforce the contract or the term thereof;

- (b) declaring the contract or the term is unenforceable or void;
- (c) varying the terms of contract so as to remove the unfairness;
- (d) refund of the consideration or price paid;
- (e) compensation or damages;
- (f) permanent injunction;
- (g) mandatory injunction; or
  - (h) any other relief which the interests of justice require as a consequence of the non-enforcement of the contract or the term thereof which is unfair

provided that where the contract or its term is procedurally unfair as stated in section 5, the person who suffers the disadvantage may, at his option, insist that the contract or term shall be performed, and that he shall be put in the position in which he would have been if the conduct, manner or circumstances referred to in that section did not permit the disadvantageous term to form part of the contract.

(2) For the purpose of granting the reliefs under subsection (1), the Court may determine if any of the terms of the contract which are unfair are severable and thereafter whether and to what extent and in what manner, the remaining terms of the contract can be enforced or given effect to.

### **Applicability of the Act and exemptions**

18. The provisions of this Act (other than sections 3, 4, 7 and 8)

- (1) shall apply to all contracts entered into after the commencement of this Act; and
- (2) shall not apply to
  - (f) contracts and relations between employers and workmen under the labour laws in force;
  - (g) public employment under the Central Government or a State Government or their instrumentalities or under local authorities;
  - (h) employment under public sector undertakings of the Central Government or a State Government;
  - (i) employment under corporations or bodies established by or under statutes made by Parliament or State Legislatures;
  - (j) contractual terms in respect of which measures are provided in international treaties or agreements with foreign countries to which the Central Government is a signatory.