EQ. CITATION: BNWJ-1020-049

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Effects of Unfair Contract Terms on Insurance Contracts

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Pg. No.: 53-75

EQ. CITATION: BNWJ-1020-049

Abstract

A standard variety of contract is one that's prepared by a celebration to the contract where the opposing party has little or no opportunity to barter which suggests the offer is formed on a 'take it or leave it' basis. The topic of unfair terms in contract has attained profound significance in recent times, in relevancy both consumer contracts and others. Within the previous few decades, many countries have undertaken new laws on the topic touch protect small businesses and consumers and most significantly to grant protection from the disadvantages of the intensive introduction of normal terms of contracts that are one-sided. The Unfair Contract Terms Act (referred to as UCTA) is one such law that is intended primarily to guard consumers who are also prejudiced for the weaker bargaining positions they occupy. The Unfair Contract Terms Act works to manage the contracts and limit the extent to which one party can avoid liability through the utilization of exclusion clauses like disclaimers. If any court or tribunal finds a term 'unfair' within the contract then that term is held void and therefore the remaining terms of the contract will still be binding on both parties. While the unfair contract terms cover almost every standard style of contracts, there are a variety of exceptions, including insurance contracts. But, now it's shortly until the unfair contract terms are going to be extended to insurance contracts as, in 2019, the Treasury released an exposure draft of the Treasury Laws Amendment Bill 2019(the Bill) to increase to unfair contract terms(UCT) regime to insurance contracts.

While in India, the principal legislation regulating the insurance business is that the Insurance Act, 1938, and also the recently enacted Insurance Regulatory and Development Authority (IRDA) Act, 1999. Within the Indian Contracts Act, 1872, and also the Specific Relief Act, 1963 there is no clear demarcation of unfairness provided by the law to date. The web results that the Indian Contracts Act, as stands today cannot come to the protection of consumers when handling business. Hence, it becomes even more important to possess comprehensive sets of laws to accommodate the unfairness of contracts as simple and plain laws wouldn't only put the common buyer in great comfort but would also add a check on frauds. The absence of such guidelines leaves it up to the judicial interpretation which ends up in uncertainty of outcome for the parties involved. Therefore, introducing a higher frontier would ensure both clarity and certainty of law.

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1. Introduction

A standard form of contract is a contract between two parties which needs to constitute an offer and acceptance while making a legitimate contract and doesn't afford any negotiation. In such forms of contracts, one will is exclusively pre-dominant, which dictates its terms. The quality terms and conditions are prepared by one party and are offered to a different on a “take it or leave it” basis.

Within the late 20th century, the Parliament passed its first comprehensive incursion into the doctrine of contractual freedom within the Unfair Contract Terms Act, 1977. The Unfair Contract Terms Act regulates clauses that exclude or limit terms implied by the common law or a statute. In England, the Unfair Contract Terms Act, severely limits the rights of the contracting parties to exclude or limit their liability through exemption clauses within the agreements.

Unlike England, there's no specific legislation in India regarding the exclusion of contractual liability. The law of damages in India is codified in Sections 73 and 74 of the Indian Contract Act, 1872 (Contract Act). While there's no express statutory bar in India against contractually excluding or limiting the liability for damages, section 23 of the Contract Act provides that the consideration or object of an agreement is unlawful inter alia if it's of such a nature that, if permitted, it might defeat the provisions of any law or if the court regards it as immoral or critical public policy. An agreement whose object or consideration is unlawful is deemed to be void. There is a touch possibility of striking down unconscionable bargains either under section 16 of the Contract Act on the bottom of undue influence or under section 23 of that Act, as being critical public policy.

2. Meaning and Scope of Unfair Contract Terms

1. *Meaning*

A contract is an agreement between two or more parties which is enforceable by law. Contracts are either written or formed orally. The terms and conditions of every contract varies from another depending upon the sort of business dealing. Sellers are liberated to set the contractual terms. Generally, contract terms are unfair if they put a party to the contract at an unfair

disadvantage. If a court or tribunal finds the term 'unfair', the term is going to be termed as void. This suggests it would not be binding on the parties of the contract. While the rest terms of the contract will still continue to bind the parties to the contract to the extent it's capable of operating without the unfair term.

2. Scope and Application

Indian Contract Act

Section 16(3) of the Contract Act provides that, where someone, who is in a position to dominate the will of another, enters into a contract with him, and transaction appears, on the face of it or on the evidence adduced to be unconscionable, the burden of proving that such contract was never induced by undue influence shall lie upon the person in position to dominate the will of the alternative. The term unconscionable has not been defined anywhere within the Indian law. Section 16 explains that a contract is obtained by undue influence if one in every of the party dominates the alternative party and uses his unfair position to urge an unfair advantage over the other.

The 199th Law Commission Report explained procedural and substantive unfairness within the proposed bill and laid out guidelines to hunt out if a contract is substantially or procedurally unfair.[56] As per section 19 of the Act, the contract obtained by undue influence is 'voidable' at the selection of the party whose consent was so obtained. Section 23 of the Act explains that the agreement is void if the thing of the agreement is unlawful, fraudulent, immoral, or opposition public policy. The law of damages in India is codified in Sections 73 and 74 of the Indian Contract Act, 1872. Section 73 of the Act provides that a celebration that suffers a breach of contract is entitled to receive from the alternative party that has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose within the standard course of things from such breach or which the parties knew, after they made the contract, to be likely to result from a breach. Section 73 of the Contract Act bars the grant of compensation for remote and indirect loss or damage sustained on account of breach of contract.

[56] 199th Law Commission Report. (2006).

This divergence between the damages and towards the losses, that naturally arise within the standard course of actions (first limb) and also the losses which the parties knew, after they entered into the contract, to be likely to result from the breach of the contract (second limb), appears to be borrowed from the principle laid down within English people decision of Hadley v. Baxendale.[57] The first limb is popularly remarked as indemnification, while the second limb is noted as special damages i.e. additional loss caused by a breach on account of a special circumstance or outside the quality course of things, which was in contemplation of the parties.

Australian Consumer Law

The Australian Consumer Law protects small businesses from unfair terms in standard sorts of contracts. Australian Law could be a national, state, territory law from January 1, 2011, and includes unfair contract legislation introduced on 1 July, 2010. Enforcement of the unfair contract term laws is shared between the ACCC, ASIC, and also the state and territory consumer protection agencies. The Law applies to plain style of contracts entered into or renewed on or after 12 November 2016. a typical form contract is that the one that has been prepared by one party to the contract and also the opponent has little or no opportunity to barter the terms of the contract i.e. it's offered on a 'take it or leave it' basis. The UCT regime currently applies to most financial products and services through the Australian Securities and Investments Commission Act, 2001. The effect of the legislation is that a term during a consumer or small business contract which is unfair is void. A term is unfair where:

- it causes a big imbalance within the parties' contractual rights and obligations;
- the term isn't necessary to shield the legitimate interests of the advantaged party; and
- the term would cause it detriment if it were to be relied on.

English Law

The Unfair Contract Terms Act, 1977 is an Act of the Parliament of the UK. Within the late 20th century, it passed the primary comprehensive incursion into the doctrine of contractual freedom within the Unfair Contract Terms Act, 1977.

[57] Hadley v. Baxendale, (February 23, 1854).

The Act regulates contracts by limiting the operation and legality of some contract terms. It limits the extent to which one party can avoid liability through the employment of 'exclusion clauses' like disclaimers. It applies to exclusion terms within the bulk of contracts, including notices that may bring into existence contractual obligations. What constitutes an exclusion clause isn't defined. The UCTA applies to contracts made within the course of business. Therefore, it excludes the contracts made between individuals. Additionally, it doesn't apply to:

- contracts of employment
- contracts concerning interests in property and land
- contracts associated with material possession rights

The Act renders terms excluding or limiting liability, ineffective or subject to reasonableness, depending upon the character of the requirement speculated to be excluded and whether the party purporting to exclude the liability, is acting against a consumer. It's normally utilized in conjunction with the Unfair Terms in Consumer Contracts Regulations 1999 (Statutory Instrument 1999 No. 2083),[58] likewise because of the Sale of products Act 1979 and therefore the Supply of Products and Services Act 1982.

3. Effects of Unfair Terms of Contract on Insurance Contracts

1. Insurance Contracts

The insurance policy has been existing during this world from the very start i.e. quite a couple thousand years ago.[59] People across the state have an outlook to safeguard their life and interests from any possible risk or contingency. Earlier, there accustomed be no written kind of documents or contracts to support insurance policies but still, people discovered ways to safeguard their lives against the risks. Insurance in a very layman definition is defined to have proper coverage against a risk and if anyone desires to guard or safeguard their own life, they will buy an insurance policy. An insurance policy may be a written material that is ready to precise a contract between the insurer and therefore the person purchasing the policy i.e. the insured.

[58] Unfair Terms in Consumer Contracts (Amendment) Regulations 2001. (n.d.).
[59] Desai, G. R. (1973). *Life insurance in India* : Its history and dimensions of growth. Delhi.

The Law that governs and regulates the Insurance business in India, is that the Insurance Act, 1938. However, the Act doesn't contain a correct definition of the term insurance in it but it defines "life insurance business" in section 2(11) as:

> *"business of effecting contracts of insurance upon human life, including any contract whereby the payment of cash is assured on death (except death by accident only) or the happening of any contingency addicted to human life, and any contract which is subject to payment of premiums for a term addicted to human life….."*[60]

This definition includes an entire lot of life contingency contracts which consist of death, disability, redemption of capital, and annuities. But there are many provisions and practices underlying the insurance that don't seem to be mandated by the Insurance Act or the other legislation.

In India, all contracts including life assurance are governed and controlled by the provisions of the Indian Contract Act, 1872. Although, insurance has been differentiated into various forms like fire, marine, life, etc., but there are certain principles that apply to any or all varieties of insurance. A contract is an agreement between parties, which are enforceable at law.[61] So as to be enforceable by law, the contract must possess all the essentials of a sound contract is contained in section 10 of the Act. Insurance is an intangible good, therefore, there's a contract of promise where one party i.e., the insured, fulfills the promise to pay earlier the premium while the insurer's a part of the promise gets into activation at the time of the event insured.[62] In India, the premium on insurance should be paid at the time of the proposal.

2. Extension of Unfair Terms of Contract to Insurance Contracts

Existing UCT Legislation

The UCT regime currently applies to most of the financial products and services through the Australian Securities and Investment Commission Act, 2001 (ASIC Act). At present, the UCT regime does not extend to the insurance contracts, as section 15 of the ICA expressly provides that a contract of insurance isn't capable of being made the topic of relief under the other Act i.e. a State Act, or an Act or Ordinance of a Territory. The rationale for this exclusion has been

[60] Kutty, S. K. (2008). *Managing life insurance*. New Delhi Prentice-Hall Of India.
[61] Padhi, P. K. (2013). Legal aspects of business. Phi Learning.
[62] Sudhir Kumar Jain, "Consumer Orientation – insurance product", IRDA Journal, April, 2012, 27.

that insurance contracts are categorized as a special category of contracts that have their own given protections, like the duty of utmost honesty under the ICA, and also that insurance contracts have specific characteristics that make them unsuitable for defense under the UCT regime.[63]

Extension of the UCT Regime

The extension of this regime to insurance contracts has been considered and supported by a variety of inquiries, including the 2017 Senate Economics References Committee's inquiry into the overall insurance industry, the 2017 Australian Consumer law review, and therefore the 2018 Parliamentary Joint Committee on Corporations and also the Financial Services' inquiry into the life assurance industry. The rationale for the extension of the UCT regime to insurance contracts included**:**

- The symmetrical nature of good faith duty is incompatible with the highly asymmetrical nature of the link between a private or small business coping with the big, powerful insurance companies.[64]
- The duty of utmost honesty connotes fair dealing and community standards of fairness, but it's generally seen as being restricted to operating within the four corners of the contractual bargain, and also the UCT regime offers the prospect of re-writing the contractual bargain.
- There are various terms prevalent within the insurance industry which are potentially problematic and unfair. These are:
    1) Terms that allow a claim to be denied on the premise of a blanket status exclusions in travel insurance;
    2) Terms that prevent an insured from making a disability claim if they weren't diagnosed with the incapacity before leaving work with relevance line of credit insurance; and
    3) Total permanent disability provisions that offset policy benefits against those paid under other policies held.

[63] Australian consumer law review, final report (p. 52). (2017).
[64] Parliamentary Joint Committee on Corporations and financial services (2018), life insurance industry, page 47.

In June 2018, the govt. issued a proposal that outlined a proposed model regarding the extension of the UCT regime to the insurance contracts and sought stakeholder and shareholder views. On 4 February 2019, the govt. confirmed that it'd extend the UCT regime to insurance contracts in response to the recommendation 4.7 of the Royal Commission Final Report which endorsed the need to introduce the UCT regime to the insurance contracts. Recommendation 4.7 made by the Royal Commission included that the provisions should be amended to supply a meaning of the 'main subject matter' of an insurance contract because the terms of the contract that describe what's being insured. It was also recommended that the duty of "utmost good faith" contained in section 13 of the Act should operate independently i.e. doesn't include the provisions of unfair contract terms. While making recommendation 4.7, the Royal Commission's primary objectives were to:

- Ensure that every one consumer and tiny businesses who purchased insurance received the identical access to protections from unfair terms in those insurance contracts as they are doing in other financial services contracts;
- Increase incentives for insurers to boost the quantity of clarity and transparency with relevance to the terms, and take away potentially unfair terms from their contracts, and to
- Provide appropriate remedies to the consumers, additionally as provide enforcement powers to the Australian Government to require advantage in cases where unfair contract terms don't seem to be covered.

Here is, what could be a summary of the key terms included within the proposed legislation of the new exposure draft Bill:

- The UCT regime will apply to plain styles of insurance contracts issued to consumers and little businesses to which ICA currently applies. A policy is treated as being standard form even where it provides options for levels of premium, excess and amount insured.
- Terms that describe the insured risk (such as house, car, or any person) are excluded from the UCT regime, so will the terms that outline the upfront price of the contract and therefore the excess or deductible amounts (provided these are transparently disclosed).
- Third-party beneficiaries will enjoy the correct to bring an instantaneous claim under the UCT regime, consistently with their existing rights to create a right away claim against an insurer under Part V of the ICA.

The already existing statutory duty of "utmost good faith" won't be impacted by the proposed legislation and can still apply as earlier to the insurance contracts.

3. Effects of Unfair Terms of Contract on Insurance Contract

The effect of having an unfair contract term means that if a Court or tribunal finds the term "unfair", that term will be termed as void i.e., it will not be binding on the parties and will be struck out of the contract. The remaining contract will continue to be valid and function similarly as before to bind the parties to the extent the contract is capable of operating without unfair terms. The unfair contract terms cover almost every standard form of contract but there are exceptions, insurance contracts being a part of them. Most insurance contracts that are not included are home insurance, car insurance, consumer credit insurance (which might be covered under the Insurance Contracts Act, 1984) while some contracts including private health insurance, are covered.

Exclusion Clauses

There are certain terms in a contract that allows a party to avoid or limit the amount of their liability or obligation towards the other under a contract, which has been often ruled as unfair by the court. The most common terms in an insurance contract that do this are identified as exclusion clauses. The UCTA, 1977 regulates the clauses which exclude the terms implied by the common law and regulates the contracts that limit or exclude the extent to which one party to the contract can limit their liability towards the opponent through the use of "exclusion clauses" such as disclaimers. Perhaps, the term 'exclusion clause' has not been specifically defined in the Act.

Exclusion clauses which are at the highest risk of being considered unfair are those that exclude liability for damages or losses that the insured would definitely expect to be covered and secured, either because of the fact that it is generally covered under the type of insurance or because the coverage is implied on policy documentation or marketing materials. For example, consider an insurance policy that contains a broad exclusion for liability arising from acts of war. But however, this exclusion might as well be considered 'unfair' if it is used to exclude

the liability for a hacking attack carried out by a terrorist act or govt. organization that would ordinarily be covered if carried out by an ordinary criminal.

One of the first cases relating to exclusion clauses was George Mitchell Ltd. V. Finney Lock seeds.[65] Here, in this case, it was held that the exclusion clause did not extend to the seeds sold, hence, limiting the extent of liability of the seed seller to damages for replacement rather than extending them to the greater loss of profits suffered by the claimant after the failure of crop, was unreasonable and to claim for them would torture the language of the contract. Therefore, it was observed that on the facts of the case, this was an unfair term and could have been struck out by the court under the UCTA, 1977.

The Directive and the Regulations

The Unfair Terms in Consumer Contracts Regulations were enacted first in 1994, in order to implement Council Directive 93/13/EEC on unfair terms in consumer contracts i.e. "the Directive". After entering into a contract with the trader there are certain protections available under the Directive. It is a consumer protection measure which applies to unfair terms in standard contracts between buyer and sellers (not been individually negotiated).[66] The goal of the Directive is to protect the consumer from the abuse of power of the supplier. It protects the aggrieved party from one sided unfair contracts and the unfair exclusion of essential terms in a contract.

Five years later, the Regulations got replaced by the Unfair Terms in Consumer Contracts Regulations 1999 i.e. "the Regulations". However, the Regulations have given a little rise in the way of cases reported in context to insurance. The financial services authority has used its powers of enforcement under the Regulations to secure the undertakings in relation to 'unfair terms' from an amount of UK firms in the insurance industry. The earlier legislation on unfair contract terms i.e. the UCTA, 1977 excluded the insurance contracts from its scope therefore, increasing the importance of 1999 regulations. The Regulations require standard forms of contracts to be just and fair. The contracts are not expected or allowed to create any amount of imbalance between the rights and obligations of a consumer with that of the seller. A term is 'unfair' if it is harmful to the consumer's interests or if puts the consumer at a risk of an unfair disadvantage. "Effect of unfair terms" which provides that an unfair term in a concluded

[65] George Mitchell (Chesterhall) Ltd. V. Finney Lock Seeds [1983] 2 AC 803
[66] Article 3(1) and Regulation 5 (1)

contract between two parties shall not be binding on the consumer. And, it shall continue to bind the parties to the contract if it is capable of existing without the unfair terms. A term is 'unfair' if, it causes a significant imbalance between the rights of the parties and in the obligations arising in the contract to the detriment of the consumer, which is contrary to the requirement of good faith (which is not defined).[67]

In the case of Banco Español de Crédito SA v Camino, a borrower entered into an agreement of loan with a bank. The charge per unit on late payment was fixed at 29% and also the term of the loan was seven years. Within the second year of the term, the borrower didn't make seven of the monthly repayments. The bank made an application within the Spanish court for repayment of the outstanding sum, contractual interest (including interest for late payment), and costs. The court held that the term was unfair and void but amended it and also the interest on late payments was fixed at 19%. One of the questions put to the ECJ was whether Article 6(1) of the Directive precluded legislation of a member state which allowed a national court to revise the content of a term which is found to be unfair. The ECJ answered this question within the affirmative. In reaching its conclusion, the ECJ relied on the wording of Article 6(1), which expressly required member states to produce that unfair contract terms "shall not be binding on the consumer", and on the target and overall scheme of the Directive. In relevance to the latter, the future objective of the Directive is to stop the employment of unfair terms in contracts that are concluded between consumers and sellers or suppliers. The ECJ was concerned to preserve the "dissuasive effect" of the Directive. It agreed with Advocate General, who had described Article 6(1) as having a "deterrent effect" on sellers or suppliers, and effectively raising the stakes for sellers or suppliers who gambled on including unfair terms in their contracts. The Advocate General had earlier stated that if national courts were ready to change or modify, instead of just declaring void, unfair terms, the risks to a supplier or seller from the utilization of unfair terms in standard contracts would be reduced considerably. During this way, if national courts were permitted to amend the matter of unfair contractual terms, sellers and suppliers would be persuaded to still use those terms. Whether or not they were declared to be invalid, the national court could amend the unfair terms in such how to safeguard the interests of sellers and suppliers. Not only this could encompass the achievement of the long-term objective of preventing the employment of unfair terms in consumer contracts by sellers or suppliers, it might not ensure such efficient protection of consumers because of the refusal to use, in their totality, terms found to be unfair. The implications of the Camino ruling for English

[67] Article 3(1) and Regulations 5 (1)

law are clear: terms found to be unfair cannot be modified by the courts and must be disregarded in their entirety. The approach taken in Bankers Insurance Co Ltd v South to the development of the Regulations disregarded in their entirety. Within the light of the interpretation of the Directive by the ECJ, incorrect as a matter of law and cannot be followed. The impact of the ruling in practice is a smaller amount certain. it's not quite common for the Regulations to have relied on litigation involving insurance policies, and reference isn't, if ever, made to Bankers Insurance Co Ltd v South. However, the ECJ also considered a side of Spanish law and held that the Directive precluded procedural arrangements in national courts which failed to allow the court to assess of its own motion at the outset or at any time the fairness of a term. The judgments in the Camino case entirely gives rise to the appealing prospect of courts raising of their own motion, the question of whether a term in an exceedingly consumer insurance contract is unfair within the meaning of the Regulations.

4. Concerns and Remedies related to Unfair Contract Terms

At present, there are not any amount of penalties imposed upon the utilization of unfair terms during a contract, the court only declares the unfair term as void and treats it because it never existed while the remainder of the contracts continues to process the identical. There is no amount of penalty or fine imposed on the party guilty for using unfair terms in a very standard contract. Also, there is not always complete transparency of the terms. A term is taken into account to be transparent in it's legible, presented clearly, expressed in plain language, and is quickly available to any party stricken by the term. Any term lacking these characteristics is also considered as not transparent it should also include terms that are hidden in fine print or schedules or terms phrased in complex legal or technical language. Even a transparent term is often found unfair at certain times. That's why, it should be the duty of the courts to also assess the fairness of a selected term in context to the contract as a full, including any term which can offset the fairness of the opposite terms within the contract. For example: a possible unfair term may be counterbalanced by some additional benefit being offered to the alternative party to the contract. This suggests that a term can be unfair in one contract but might not be unfair in another.

Benefit to the Consumers

A legislation to bring this into effect has been glided by the Parliament in February 2020, which can get effect from April 2021. This legislation has been already available to most of the commercial contracts but this point it's able to be applied to the sector of insurance. The centralized is consulting to introduce penalties within the UCT Regime. If the penalties are introduced, then the companies will have to have rather more guidance as possible regarding the unfair terms in an exceedingly contract like whether a specific term is unfair or not, etc. The central considers to own a broader definition of what constitutes the 'main subject matter' of an insurance contract instead of having a narrow one. This may lead to an increased number of terms that can be subject to the fairness test, eventually increasing the benefit to consumers and tiny businesses. These proposed changes will communicate be of great interest to the insurers who write down consumer products or insure within the SME market with standard sorts of products. Following the Royal Commission and throughout the COVID-19 pandemic to this point, there has been renewed specialty in ensuring customers are sold products useful to them. The govt. has also recently consulted UCT Regime and intends to introduce civil pecuniary penalties for including such terms in standard form contracts. While on the opposite hand, are a variety of important factors that insurance intermediaries or brokers will get accustomed with the introduction of the UCT Regime to the insurance industry which includes:

- The policy must be a consumer contract or a little business contract
- The contract must be a financial product and this includes insurance
- The policy must be a customary variety of contract
- The provisions of the contract must fulfill the concept of an unfair term of contract as set within the legislation.

However, not all terms of a contract are captured by the regime. The regime doesn't apply to terms of a contract that:

- define the most material of the contract;
- set the upfront price payable under the contract;
- set the quantity of an excess or deductible provided this can be a transparent term; or
- is the term required, or expressly permitted, by a law of the Commonwealth or a State or Territory.

Remedy for the Insurers

Insurers should be reviewing their standard form consumer and tiny business policy wordings already. The primary task should be to make sure that policy wordings are "transparent" - in plain and clear language, during a legible-size font, and taken off in an exceedingly single document that's easily accessible to the policyholder. The second task should be to review the substance of policy wordings carefully to spot clauses which will be in danger of being considered unfair under the extended UCT regime. Insurers and stakeholders should undertake legal review of affected policy wordings and will even have to engage with underwriters and actuaries where policy conditions and coverage have to be amended. Although unfair contract terms laws are in situ within the financial services industry for a few time, insurance contracts operate differently and can still be subject to the ICA. A selected insurance-focused lens is therefore required when implementing these laws, keeping in mind other insurance regulatory changes which is able to get effect at a later date.

5. Analysis of Unfair Contract Terms

Position in India

Today India stands at an edge where there's no express statutory bar against contractually excluding or limiting the liability for damages. There are certain provisions present within the Contract Act but they sure don't seem to be completely enough. Section 23 of the Act provides that if an object or consideration is unlawful then the agreement shall be deemed void.

In 1986, the Supreme Court introduced to India the principle that courts will not enforce an unfair or unreasonable contract or an unfair or unreasonable clause during a contract, entered into between parties who do not seem to be equal in bargaining power.[68] Illustrative instances of such inequality in bargaining power were enumerated, including where it's a results of the nice disparity within the economic strength of the contracting parties, where the weaker party is in an exceedingly position within which he can obtain goods or services or means of livelihood only on the terms imposed by the stronger party or go without them, where a person

[68] Central Inland Water Transport Corporation. v. Brojo Nath Ganguly Brojo Nath Ganguly (1986) 3 SCC 15.

has no meaningful choice, but to grant his assent to a contract or to register the line in an exceedingly prescribed or standard form or to simply accept a group of rules as a part of the contract, however unfair, unreasonable and unconscionable a clause therein contract, form or rules is also. Contracts that contain terms so unfair and unreasonable that they shock the conscience of the court were held to be void as against public policy. Though the court was managing a provision for termination of employment, which was found to be unfair, the aforesaid findings were made in an exceedingly more general context, and after touching on English judgments coping with commercial matters, including contracts that contained exclusion or limitation of liability clauses. The court did, however, exclude the applicability of this principle to cases where the bargaining power of the parties is equal or almost equal, or where both parties are businessmen and therefore the contract may be a commercial transaction.

In Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd.,[69] the Supreme Court was coping with a clause, which limited the liability of a courier company just in case of any loss or damage to a shipment, within the terms and conditions printed on a consignment note for shipment of a package. The Supreme Court upheld the choice of the National Consumer Disputes Redressal Commission, which limited the number awarded to the consignor for deficiency of service, to the number per the limitation of liability clause. The court held that parties who sign documents containing contractual terms are usually bound by such contract and rejected the contention that there was no consensus ad idem between the parties on limitation of liability, visible of the National Commission's finding of incontrovertible fact that the consignor had signed the consignment note.

In 2010, a Single Judge of the Delhi High Court dealt with the issue of whether contractual clauses could disentitle a person from claiming damages, which he is otherwise entitled to claim under law i.e. whether parties can contract out of Section 73 of the Contract Act.[70] In this case, the court considered a clause in a very government construction contract, which barred a claim for compensation by the contractor from being admitted, where works were delayed and time for completion was extended on account of certain specific instances beyond the control of the contractor. The court was faced with two conflicting decisions of the Supreme Court, which interpreted the identical clause. Within the first decision, the Supreme Court held that the clause in question would bar the contractor's entitlement to damages, additionally to

[69] (1996) 4 SCC 704.
[70] Simplex Concrete Piles (India) Limited v. Union of India ILR (2010) II Delhi 699.

extension of your time for completion, on account of delay.[71] Within the other, the Supreme Court held that the clause only prevented the department (relevant authority of the employer) from granting damages, but wouldn't prevent an arbitrator from awarding damages, which were otherwise payable by the employer on account of its breach of contract.[72] The Delhi court held as follows:

- Clauses which bar and disentitle a contractor from claiming damages, which it's entitled to assert by virtue of Sections 55 and 73 of the Contract Act, are void by virtue of Section 23 of the Contract Act.
- A law, which is formed for individual benefit, is waived by a private, but when such law includes a public interest/public policy element, such rights arising from the law cannot be waived because the identical becomes a matter of public policy/public interest.
- Provisions regarding breach of contract (including Sections 55 and 73 of the Contract Act) are the very heart, foundation and basis of the existence of the Contract Act. According precedence to the sanctity and binding nature of contracts over the entitlement of a celebration to breach the contract by virtue of clauses with no remedy to the aggrieved party, could be a matter of public policy.
- To permit a clause that has the thing of defeating the contract itself could be a matter of grave public interest and defeats the very basis of the existence of the contract.

Clauses like the one within the present case would be void under Section 23 of the Contract Act, as they deem to be violative of public interest and public policy.

It is also very important to contemplate the scope of the clause excluding or limiting liability further as any exceptions which will be specified therein. In Simplex Infrastructure v. Siemens Limited,[73] The Bombay judicature had occasion to contemplate a limitation of liability clause in an exceedingly works contract. The petitioner therein sought certain interim reliefs, including restraint against encashment of a bank guarantee, pending conclusion of arbitral proceedings on various grounds, including the actual fact that the contract limited the petitioner's liability to a particular amount. The limitation of liability clause excluded the petitioner's liability for specific losses, including loss of production, loss of use, loss of profit,

[71] Ramnath International Construction (P) Limited v. Union of India (2007) 2 SCC 453.
[72] Asian Techs Limited v. Union of India (2009) 10 SCC 354.
[73] 2015 (5) Mh.L.J. 135.

loss of knowledge and/or data, and any indirect or consequential damage, and capped the petitioner's liability for all losses, claims or damages arising out of the contract. However, the clause also on condition that it might not apply to any damage or loss or claims caused or arising intentionally or by wilful misconduct. The court clearly found that the respondent therein invoked the bank guarantee inter alia to recover additional expenses that it had to incur on account of various defaults by the petitioner, which such recoveries wouldn't be covered by the limitation of liability clause, which was limited in scope. The court also found that the petitioner's conduct would fall within the wilful misconduct exception, and so the petitioner's contention that its liability was capped under the contract was rejected.

The Madras state supreme court also refused to enforce a clause limiting the liability of a shopkeeper, which was printed on the reverse of the bill handed over to the customer, to 50% of the market value or value of the articles just in case of loss.[74] The court found such a term to be critical public policy, public interest, and therefore the fundamental principles of the law of contract and held that imposition of such a condition is in flagrant infringement of the law regarding negligence.

Position in England

The position during this regard was codified within the Unfair Contract Terms Act, 1977 ("UCTA"), which inter alia prescribes limits on the extent to which liability for breach of contract, negligence, or other breaches of duty are often contractually avoided through exclusion or limitation of liability clauses. Clauses that try to exclude liability for death or personal injury, resulting from negligence are rendered void, whilst clauses excluding liability for the other loss or damage resulting from negligence are subject to a test of reasonableness. [75] In cases where one party is dealing with the other's written standard terms of business, the latter cannot, by relation to any term of the contract, exclude or restrict any liability in respect of his breach, except insofar because the contractual term satisfies the necessity of reasonableness.[76] This is applicable only to cases where parties are governed by the quality business terms of 1 of the parties. The aforesaid limits don't apply to international supply

[74] Lily White v. R. Munuswami AIR 1966 Mad 13.
[75] Section 2 of the UCTA.
[76]. Section 3 of the UCTA.

contracts, which are defined inter alia as contracts purchasable of products made by parties whose places of business are within the territories of various States.[77]

The UCTA provides that a term is reasonable if it's a good and reasonable one to be included, having relevancy circumstances which were, or ought reasonably to own been, known to or within the contemplation of the parties when the contract was made.[78] The factors to be considered while determining whether the restriction of liability to a specified sum of cash satisfies the need of reasonableness, are the resources which the person restricting his liability could expect to be available to him for the aim of meeting the liability should it arise, and the way far it absolutely was hospitable him to hide himself by insurance. Certain other guidelines for determining reasonableness are specified, including the strength of the bargaining power of the parties relative to every other, whether the customer received an inducement to comply with the term and whether the customer knew or ought reasonably to own known of the existence and extent of the term.[79] The UCTA places the burden of showing that a contractual term satisfies the need of reasonableness on the person claiming that it does. Most of the provisions of the UCTA don't apply to consumer contracts, which are separately governed by the patron Rights Act, 2015.

Contracts, which aren't the quality business terms of 1 of the parties, are going to be subjectively examined to see the bargaining powers of the parties to such contracts. The House of Lords, in Photo Production Ltd. v. Securicor Transport Ltd.,[80] held that an exclusion clause would apply even just in case of a fundamental breach of the contract which it'd be wrong to put a strained construction upon words in an exclusion clause, which are clear and fairly susceptible of just one meaning, in commercial contracts negotiated between businessmen capable of taking care of their own interests and of deciding how risks inherent within the performance of varied varieties of contracts will be most economically borne. The UCTA wasn't applied during this case because the go for question was executed before the UCTA came into force.

[77] Section 26 of the UCTA.
[78] Section 11 of the UCTA.
[79] Schedule 2 to the UCTA.
[80] [1980] 2 WLR 283.

Position in Australia

Since 2010, Australia has had laws coping with unfair contract terms (UCT Laws) in consumer contracts. These are contained in sections 23 to twenty-eight of the Competition and Consumer Act 2010 (ACL) and, in respect of monetary products and services, sections 12BF to 12BM of the Australian Securities and Investment Commission Act 2001 (ASIC Act). From 12 November 2016, the scope of the UCT Laws was extended to 'small business contracts' (a small business is one that employs but 20 people, including casual employees employed on an everyday and systematic basis). The govt. announced in December 2017 that it'd extend the UCT Laws to use to contracts of insurance in 2018. The central has finally released proposals in respect of the proposed extension of the UCT laws. The applying of the proposed model to insurance contracts would mean that:

- an insurance contract is going to be considered as standard form whether or not the patron or small business can make a choice from various options of policy coverage
- when determining whether a term is unfair, a term is going to be reasonably necessary to shield the legitimate interests of an insurer if it reasonably reflects the underwriting risk accepted by the insurer in regard to the contract and it doesn't disproportionately or unreasonably disadvantage the insured
- examples specific to insurance are going to be added to the list within the ASIC Act of samples of sorts of terms which will be unfair, which could include terms that let the insurer to pay a claim supported the value of repair or replacement that will be achieved by the insurer, but couldn't be reasonably achieved by the policyholder
- where a term is found to be unfair, as an alternate to the term being declared void, a court is going to be able to make other orders if it deems that more appropriate
- the definition of 'consumer contract' and 'small business contract' will include contracts that are expressed to be for the advantage of a personal or small business, but who aren't a celebration of the contract
- for insurance policies, as defined by the insurance Act 1995, which are guaranteed renewable, it'll be made clear that a term which provides a life insurer with the power to unilaterally increase premiums won't be considered unfair in circumstances within which the premium increase is within the bounds and under the circumstances laid out in the policy.

6. Consequences of the Breach

In a standard sort of contract, there are certain terms that permit a celebration to terminate the contract or have severe consequences for minor breaches on the part of the buyer are considered unfair and if the implications don't seem to be necessary to safeguard a party's legitimate interests.

Within the context of Insurance, section 54 of the ICA already functions and prevents the insurers from depending upon the breaches made by the insured to refuse payments of claim, until and unless the breach actually prejudices the claim.

However, the new extended UCT Regime may additionally effect the terms which impose other unreasonably severe consequences for breaches, besides denial of coverage. Similarly, clauses which prevent the insured or policyholder from terminating the contract under any given circumstances, or do not give the insured reasonable rights in a very breach of contract by the insurer, might additionally be considered unfair.

7. Conclusion

The current position of India today in context to the applicability and availability of laws and legislation with respect to unfair terms in a contract is beneath several countries. Unlike England, in India, there is no specific legislation regarding the exclusion of contractual liability from the standard contracts. There are a few provisions and sections present like section 16 and section 23 of the Indian Contract Act that have a possibility of striking out unconscionable bargains.

Hence, it becomes very necessary to have a law dealing with the 'unfairness' in contracts, and equally necessary to have a justified differentiation between procedural and substantive unfairness. To date, this kind of division has not been done in any country. While conducting the research, this has been analyzed and examined that there are various laws and provisions present in different countries and none of them describes a clear picture of the difference between substantive and procedural unfairness. A contract or a term in a contract is procedurally unfair if it has resulted in unfair and unjust advantage or disadvantage to one party

accounting of the conduct of the other party (see section 5 of the Bill).[81] Similarly, a provision relating to 'general substantive unfairness' in section 12 says that a term in a contract or a contract as a whole shall be treated as unfair if the terms of the contract are harsh or oppressive or unconscionable. Section 13 of the Bill contains guidelines to adjudge the substantive unfairness.

Thus, it is the need of the hour to impose and implement the suggestions proposed in the 103rd and 199th Law Commission Report. The legal system needs to consider the provisions of UCC and enact a law allowing the courts to refuse enforceability of unconscionable contracts. Therefore, it is very much needed to introduce a certain set of laws that would deal with unfairness and at the same time will ensure clarity and certainty of the law.

[81] Reddy, Shri v. Vijayasai. (2019). UNFAIR (PROCEDURAL AND SUBSTANTIVE) TERMS IN CONTRACT BILL, 2018 A. http://164.100.47.4/billstexts/RSBillTexts/AsIntroduced/unfair-E-21619.pdf