

EXCLUSION CLAUSES IN CONTRACTS BARRING A CLAIM FOR DAMAGES

- A STUDY ON ENFORCEABILITY OF SUCH CLAUSES IN INDIA

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I. Introduction

Section 73 of the Indian Contract Act, 1872 (“**Contract Act**”) is a statutory declaration of the right of a party to claim damages for a loss or damage caused by breach of the contract.¹ Prior to its statutory incorporation in the Contract Act, the right to claim damages was a common law remedy for common law wrongs such as torts and for breach of contract.²

Section 73 of the Contract Act reads as under:

“73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.”

For ease of understanding of the scope and ambit of Section 73 of the Contract Act, the section can be sub-divided into 5 (five) separate parts as under:

- a) The first part is where a contract is broken, the aggrieved party is entitled to receive compensation from the party who has broken the contract for loss or damage which naturally arose in the usual course of things from such breach. This is commonly referred to as ‘general’ or ‘normal’ damages.
- b) The second part is where a contract is broken, the aggrieved party is entitled to receive compensation from the party who has broken the contract for loss or damage which the parties knew at the time they made the contract as likely to result from such breach. This is commonly referred to as ‘special damages’.³
- c) The third part is that no compensation is payable for any remote or indirect loss or damage sustained by reason of breach.
- d) The fourth part is about applying the same principles where the breach occurs out of obligations resembling contracts.

¹ A.K.A.S. *Jamal v. Molla Dawood Sons & Co.*, AIR 1915 Privy Council 48.

² Andrew Tettenborn and David Wilby QC, *The Law of Damages*, 2nd Edition, at ¶ 1.12.

³ The first and second part under Section 73 of the Contract Act is incorporated from the principles laid down in the landmark English decision of *Hadley v. Baxendale* (1854) 9 EX 341.

- e) The fifth part incorporates the rule of mitigation while assessing the loss or damage arising out of breach of contract.

Having set out the scope and ambit of Section 73 of the Contract Act, the question that arises is what is the measure of damages that can be claimed by a non - defaulting party who suffers a loss or damage on account of breach of contract. The issue has far reaching importance in today's world where large and complex commercial transactions are entered into in relation to specialized works and services involving substantial amounts of money and investments in valuable assets/properties. In large high stake value transactions, the parties must always be conscious of possible risks that they undertake and the potential losses they can suffer in the event of any unexpected deviation from the contract. For instance, there may be situations where on account of breach of a contract, the non – defaulting party claims compensatory and punitive damages far exceeding the overall contractual benefit that the party in breach would have received had the contract been performed. In such situations, any uncertainty in regard to measure of damages that the defaulting party may have to pay can have disastrous impact on the overall commercial health of such party.

In view of uncertainties regarding the measure/ quantum of damages that a party could claim upon breach of a contract, the contracting parties started to include clauses providing for limiting, restricting or even completely excluding their liability towards damages which could be claimed by the non-defaulting party under Section 73 of the Contract Act. For instance, in certain cases, the parties may contractually agree to limit/ restrict their liability towards a claim for damages to the extent of a maximum limit/ cap set forth in the contract. In other cases, the parties may decide to completely exclude their liability by contractually prohibiting a claim towards damages or compensation in the event of breach of a contract. Thus, the limitation of liability clause or an exclusion clause usually act as a necessary security and risk reduction mechanism to deal with prospective liability of a party in the event of breach of contract.⁴

With the widespread incorporation of exclusion clauses in contracts, there were concerns about the validity and enforceability of such clauses, particularly where the exclusion clause was made applicable even in the event of breach of a fundamental term of the contract. As such, the question that arises is whether the parties have an unfettered contractual right to completely exclude their liability towards a claim for damages. In other words, can the parties contract out of provisions of Contract Act or contractually waive the rights created under Section 73 of the Contract Act to claim damages.

From a purely classical understanding of contractual law, exclusion clauses can be said to be valid in law as they stem from the underlying principle of freedom of parties to enter into contracts. Further, in commercial contracts where both parties are of equal bargaining power, such exclusion/ limitation of liability clauses have the effect of managing and apportioning the risk between the parties. As stated above, these clauses act as a necessary security and risk reduction mechanism to deal with prospective liability of the parties and bring about certainty in enforcement of contracts. However, very often, the party imposing the condition of an exclusion clause is at an economically superior position and can dictate its own terms to the other party.⁵ In cases where parties do not share equal bargaining power, one of the parties have no option but to accept the terms imposed by the party who is at an economically superior position, including a prohibition on claiming damages in the event of breach of contract. In such situations, can the courts refuse to enforce exclusion clauses merely because it may be unfair or unreasonable for one of the parties to the contract?

⁴ MP Ram Mohan and Anmol Jain, *Exclusion Clauses under the Indian Contract Law: A need to account for unreasonableness*, NUJS Law Review, 13 NUJS L. Rev. 4 (2020).

⁵ Chitty on Contracts, London Sweet and Maxwell, 26th Edition 1989, Chapter 14 (Exemption Clauses) at ¶ 941.

This paper discusses whether parties have an unfettered right to exclude their liability towards a claim for damages under the Contract Act and whether the courts in India have enforced such exclusion of liability clauses from a purely contractual law point of view. This paper also proposes some suggestions that the legislature and/ or the courts may consider while dealing with the question of validity and enforceability of exclusion clauses.

II. Recognition of ‘exclusion clauses’ by courts in India

The question whether damages otherwise claimable under law can be contractually restricted was considered by the Supreme Court in the case of, *Sri Chunilal V. Mehta and Sons Limited v. The Century Spinning and Manufacturing Company Limited*⁶. In this case, clause 14 of the agreement between the parties specified a liquidated sum to be paid as damages to the claimant (Chunilal) on account of early termination of the agreement by the company (Century Spinning). While answering whether the claimant could have claimed amounts over and above such specified sum named in the agreement, the Supreme Court held that by providing for compensation in express terms, the right to claim damages under the general law was necessarily excluded and therefore, in the face of a clause specifying a fixed sum payable, it was not open for the claimant to claim damages under the general law.

In terms of the above, the Supreme Court held that contractual clauses which stipulate specific amount that can be claimed as damages has the effect of excluding the right of a party to claim damages under the general law. It is, however, important to note that the clause in question in this case did not restrict or exclude the right of a party to claim damages for breach of the contract but merely specified a liquidated sum to be paid as damages on account of early termination of the agreement by one party.

The Supreme Court, as far back as in the year 1955, in *Seth Thawardas Pherumal v. Union of India*⁷ was faced with the question as to whether a contractual clause exonerating a party from any claim arising out of breach of the contract is valid and enforceable. In this case, clause 6 of the contract between the parties provided that the public works department (PWD) shall not be responsible for a claim “for idle labour or for damage to unburnt bricks due to any cause whatsoever”. The Supreme Court held that the contractor cannot claim compensation for damage caused to unburnt bricks due to a breach committed by the PWD as the same was expressly excluded from the contract. It was held that the contractor cannot go back on his agreement and claim compensation for breach of contract merely because it was unsuitable for it to abide by the terms of the contract. In essence, the Court recognized the freedom of parties to incorporate exclusion clauses and held them to be valid and enforceable.

In *Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight*⁸, the Supreme Court was called upon to decide whether the liability of a courier company was limited to the extent specified in the consignment note which was also counter signed by the customer. In this case, a clause in a consignment note limited the liability of the courier company for any loss or damage to the consignment to US \$100 along with further limitation on liability for any consequential or special damages or any other indirect loss. The Supreme Court held that, where the contract limits the liability of a party for any loss or damage, the courts cannot give relief for damages in excess of the limits specified under the contract. Accordingly, the courier company was held liable only to the extent of US \$100 being the extent of liability undertaken under the consignment note/ contract. The Supreme Court accepted the validity of the limitation of liability and exclusion clause by recognizing that

⁶ AIR 1962 SC 1314.

⁷ AIR 1955 SC 468.

⁸ (1996) 4 SCC 704.

contractual terms are binding on parties who have signed the contract document even though they may not be aware of the precise legal effects of such terms.

Thereafter, in *ONGC v. Wig Bros. Builders and Engineers (P) Limited*⁹, the Supreme Court set aside an award passed by an arbitrator which granted compensation to the contractor while ignoring a contractual clause providing that the contractor was only entitled to an extension of time for completion of works but was not entitled to any compensation or damages in the event of any delay by the employer. The Supreme Court held that the arbitrator could not have granted compensation to the contractor in disregard to the exclusion clause contained in the contract. The Supreme Court also relied on its earlier judgements in *Ramnath International Construction (P) Limited v. Union of India*¹⁰ and *Rajasthan State Mines and Minerals Limited v. Eastern Engg. Enterprises*¹¹ wherein similar claims of a contractor for compensation or damages were rejected by the Supreme Court.

Similarly, the Bombay High Court, in the case of, *Maharashtra State Electricity Board, Bombay v. Sterlite Industries (India) Limited*,¹² held that where the parties to a contract agree for special terms and provisions regarding the measure of damages that can be claimed in the event of breach of contract, the parties shall be bound by such provisions and Section 73 of the Contract Act shall not have any application. The Court relied on Section 62 of the Sale of Goods Act, 1930¹³ terming it as a statutory recognition of the right of parties to vary or modify any liability that would arise under a contract of sale by implication of law.

Thus, it is evident from the above judgements that exclusion clauses are generally accepted to be binding and enforceable in India. The courts have treated exclusion clauses like any other clause in the contract and have recognized validity of such exclusion clauses by linking it to freedom of parties to contract and their power to commercially negotiate the terms of the contract. The courts have also approved the principle that a person who signs a document containing certain contractual terms is normally bound by them even though he has not read them and even though he is ignorant of their precise legal effect.¹⁴ The general approach appears to be that unless a party challenges an exclusion clause on the ground of coercion, fraud, misrepresentation, mistake etc. at the time of executing of contract, the parties must be held liable to abide by the terms of the contract.

It is interesting to note that in almost all cases where there was a bar to claim any compensation or damages under the contract, the underlying contract was between a private contractor as one of the parties and the State or an instrumentality of the State as the other party. Invariably, in such contracts, the State (or its instrumentality) is at an economically dominant position which has standard forms of contract where the contractors have little or no bargaining power to negotiate the terms of the contract. Even in cases where the State (or its instrumentality) is not involved, an exclusion clause is usually contained in standard forms of contract between a consumer and the commercial entity/ company providing goods or service. In such contracts as well, a consumer does not have equal bargaining power and ultimately has no option but to accept the terms imposed by the seller/ service provider which may include a complete prohibition on claiming damages in the event of breach of contract. What

⁹ (2010) 13 SCC 377.

¹⁰ (2007) 2 SCC 453.

¹¹ (1999) 9 SCC 283.

¹² AIR 2000 Bom 204.

¹³ "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."

¹⁴ *Supra* note 8 (*Bharathi Knitting Company*).

is relevant to note in such cases is that while there may not be any 'procedural unfairness'¹⁵ at the time of entering into the contract, one of the parties, by virtue of its economic standing, may be in a position to impose exclusion clauses on the other party.

III. Invoking 'Public Policy' to challenge 'exclusion clauses'

As noted above, since exclusion clauses do not fall within the existing vitiating elements of a contract like coercion, undue influence, fraud, misrepresentation or mistake (essentially denoting procedural unfairness)¹⁶, the courts in India have enforced such exclusion clauses even when the contract *prima facie* appears to have been executed between economically unequally situated parties. However, the Delhi High Court in the case of *Simplex Concrete Piles (India) Limited v. Union of India*¹⁷ deviated from this generally accepted position and tested the effect of exclusion clauses from a different perspective.

In that case, the standard clause of contract between the Union of India (Employer) and Simplex (Contractor) provided that in case there was any delay on the part of Union of India, Simplex shall only be entitled to an extension of time for completion of works and no claim for compensation on account of such delays shall be entertained. The Delhi High Court was faced with the question - "*can a person who is guilty of breach of contract and is consequently liable in law to pay damages under Section 73 of the Contract Act or other charges under Section 55 of the Contract Act, 1872, can prevent the aggrieved party from claiming the same by contractually so providing.*" While adjudicating on the issue, the Delhi High Court was also confronted with two conflicting decisions¹⁸ of the Supreme Court wherein the same clause had been interpreted differently. The Delhi High Court, however, decided the issue independent of the two Supreme Court decisions by observing that clauses which bar and disallow a party from claiming its rightful claims, damages, or monetary entitlements to which such party is otherwise entitled to by virtue of Sections 73 and 55 of the Contract Act are void by virtue of Section 23¹⁹ of the Contract Act. The Delhi High Court held that, Sections 73 and 55 of the Contract Act are the very heart, foundation and basis for existence of the Contract Act and therefore, it is a matter of public policy that the sanctity of the contracts and the bindingness thereof should be given precedence over the entitlement to breach the same by virtue of contractual clause with no remedy to the aggrieved party. It was held that, provisions of the contract which sets at naught the legislative intendment of the Contract Act to provide for

¹⁵ Extract from Report No. 199 of Law Commission of India, *Report on Unfair (Procedural and Substantive) Terms in Contract*, (August 2016) at p. 10,11 -

"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."

¹⁶ *Supra* Note 4 (*Exclusion Clauses under the Indian Contract Law: A need to account for unreasonableness*)

¹⁷ ILR (2010) II Delhi 699

¹⁸ In *Ramnath International Construction (P) Limited v. Union of India* (2007) 2 SCC 453, the Supreme Court took a view that even if the employer/Union of India was at fault, yet the clause bars the entitlement of the contractor to damages; while the Supreme Court in *Asian Techs Limited v. Union of India* (2009) 10 SCC 354 held that the said clause only prevents employer from granting damages but does not prevent an arbitrator from awarding damages which were otherwise payable by employer on breach of the contract. In both these judgements, the Supreme Court did not go into the legality and validity of the said clause under the Contract Act per se.

¹⁹ "*Section 23 - 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. 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."*

remedy of claiming damages to an aggrieved party in the event of breach of the contract is void being against public interest and public policy.²⁰

About a year back, the Delhi High Court in the case of *MBL Infrastructures v. Delhi Metro Rail Corporation*²¹, followed the judgement of *Simplex* and observed that clauses which prohibits the right of a party in claiming damages is a restrictive clause which will defeat the purpose of the Contract Act. It was held that under Section 55 and 73 of the Contract Act, the aggrieved party is entitled to claim damages, and there cannot be any prohibition exercised by the other party merely by incorporating a clause in the contract. The Delhi High Court further held that such kind of clauses are also not in public interest since they hinder the smooth operation of commercial transactions and create an environment which is not conducive for the purpose of business transactions. The Court went as far as saying that such clauses which prohibit the right of the party to claim damages are also contrary to the fundamental policy of Indian law.

It is relevant to note that in *Simplex*, the Delhi High Court has held only such clauses as void under Section 23 of the Contract Act, 1872 where there is an absolute prohibition on claiming damages as opposed to a clause (i) which merely limits the liability of the defaulting party upto a specified threshold or (ii) excludes liability towards indirect or consequential losses. Interestingly, the Madras High Court, much prior to the above decision of the Delhi High Court, had invoked public policy doctrine to refuse enforcement of a clause printed at the reverse side of an invoice limiting the liability of the service provider to a fixed amount.²² The Madras High Court held that courts must not enforce clauses which are not in the interests of the public and which are not in accordance with public policy. However, in view of a catena of judicial precedents recognizing and enforcing limitation of liability clauses in a contract, the proposition laid down by the Madras High Court may longer be considered as a good law. Also, more recently, the Delhi High Court in *PLUS 91 Security Solutions v. NEC Corporation India Private Limited*,²³ clarified that where parties have agreed that particular type of damages (such as indirect or consequential or loss of profits) are excluded under a contract, such an exclusion clause is required to be enforced and is not hit by ratio laid down in *Simplex*.

Thus, while courts in India have generally accepted the validity and enforceability of exclusion clauses, the Delhi High Court in *Simplex* has tested the issue from a different perspective by terming the right of a party to claim damages under Section 73 of the Contract Act as the very heart, foundation and basis of the Contract Act. The Delhi High Court, in *Simplex* has given a wide interpretation to the term 'public policy' appearing in Section 23 of the Contract Act and declared contractual clauses which absolutely prohibit a claim for damages under Section 73 of the Contract Act as void. In essence, the Delhi High Court moved from the classical theory of 'procedural unfairness' and independently tested the exclusion clause on the touchstone of public policy and 'substantive unfairness'²⁴.

Since the Delhi High Court declared an exclusionary clause to be void under the 'public policy' exception of Section 23 of the Contract Act, it is relevant to consider whether exclusionary clauses between two contracting parties can be tested on the touchstone of 'public policy'.

²⁰ Supra Note 17 at ¶ 15, 16 (*Simplex*).

²¹ 2023:DHC: 9067.

²² Lilly White v. R. Munuswami, AIR 1966 Mad 13.

²³ 2024 SCC OnLine Del 5114 (Decided on July 29, 2024).

²⁴ Extract from Report No. 199 of Law Commission of India, *Report on Unfair (Procedural and Substantive) Terms in Contract*, (August 2016) at p. 11 –

“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.”

In the landmark case of *Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly*²⁵, the Supreme Court, *inter-alia*, tested the conditions of employment between the employer (Corporation) and its employees on the principles of law of contracts. The Supreme Court examined the development of law in the United States and the United Kingdom with regards to unreasonable contractual clauses against an economically weaker party and held that unconscionable, unfair and unreasonable clauses in a contract entered into by parties who do not enjoy equal bargaining power are void under Section 23 of the Contract Act. The following observations made by the Supreme Court is relevant to be reproduced:

*“It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a 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 may be....”*²⁶

It is clear from the above that the Supreme Court has recognized that unfair or unconscionable clauses can be declared as void under Section 23 of the Contract Act thereby enlarging the scope of the term ‘public policy’ under the Contract Act. While setting out the above principles, the Supreme Court remained mindful of the fact that the said principles cannot be made applicable where the bargaining power of the contracting parties is equal or almost equal and where both parties are businessmen and the contract is a commercial transaction.²⁷ This exception carved out from the principles of unfairness and unconscionability in a contract is extremely crucial for commerce and industry in as much as it gives commercial entities/ parties the freedom to negotiate on commercial terms and apportion the risks associated with a contract by excluding or limiting the liability of a party in the event of a breach of contract. It is important to note that while the ruling in *Central Inland* is not applicable to cases where the bargaining power of the contracting parties is equal or almost equal, it still provides an opportunity to a contracting party to challenge an exclusion clause in a contract as being unconscionable, unfair and unreasonable and thereby void under Section 23 of the Contract Act.

Although in a different context, the Supreme Court in the case of *LIC of India v. Consumer Education and Research Centre*²⁸, held that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look at the relative bargaining power of the contracting parties. In dotted line contracts, there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power and he will have to accept or leave the services or goods in terms of the dotted line contract. In such situations, the courts are well entitled to strike down such offending term/ clause of the contract. Thus, the Supreme Court affirmed the principle that the courts are entitled to declare an unfair or unreasonable or unconscionable contractual provision as void if it is found that the contract was vitiated by ‘substantive unfairness’ by reason of parties not having equal bargaining power.

As evident from the above, it can be argued that an exclusion clause can be tested on the touchstone of ‘public policy’ under Section 23 of the Contract Act. If on an inquiry, the court finds that the parties did not have equal bargaining power at the time of entering into the contract and as a result thereof, one party was in a position to dictate terms to the other party,

²⁵ (1986) 3 SCC 156.

²⁶ *Ibid* at ¶ 89.

²⁷ *Ibid* at ¶ 89.

²⁸ 1995 (5) SCC 482.

the court may strike down an exclusion clause as being unfair, unreasonable and unconscionable under Section 23 of the Contract Act.

While a strong case is made out for invoking the 'public policy' exception where certain terms of a contract, including an exclusion clause, appear to be unfair, unreasonable or unconscionable, an argument can also be made that 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. As held by the Supreme Court in the case of *Gherulal v. Mahadeodas*²⁹, the doctrine of public policy should only be invoked in clear cases in which harm to the public is substantially incontestable and though theoretically it may be permissible to evolve a new head of 'public policy' under exceptional circumstances, it is advisable in the interest of stability of society not to make any attempt to discover new heads.

It can also be argued that where contracting parties incorporate a term in the contract exempting one party from liability in the event of breach of contract, such term in the contract may not be said to be opposed to 'public policy'. The term 'public policy' contemplates grounds which influences public interest at large and therefore invoking 'public policy' exception for voiding exclusion clauses may strike at the very root of freedom of parties to enter into contracts. Further, the courts may not be inclined to invoke 'public policy' exception in cases where State or its instrumentality is not involved since there may not be any public interest involved in purely private contracts. Hence, invoking 'public policy' exception to strike down exclusionary clauses may not be commercially conducive and may hamper free flow of business between contracting parties. This may also give rise to uncertainty regarding enforcement of contracts leading to unnecessary disputes and subsequent litigation.

IV. Way forward and Conclusion

The Contract Act has several provisions dealing with 'procedural unfairness' wherein a contract may be vitiated by undue influence, coercion, fraud, misrepresentation etc. However, there is no express provision in the Contract Act providing for right of a party to challenge unfair or unreasonable or unconscionable contracts which essentially denote 'substantive unfairness'. This is because the parties are expected to be bound by contracts signed by them on their free will and the courts have also generally avoided to interfere in the contractual bargain of the parties. However, in view of the need to protect consumers and to protect small businesses from extensive use of standard terms of contract imposed by large commercial entities, the courts recognized the right of parties to challenge an unfair or unconscionable term or clause of a contract as being violative of 'public policy' doctrine under Section 23 of the Contract Act. With regards to exclusion clauses in a contract, the decisions in *Central Inland (Supra)*, *LIC (Supra)* and *Simplex (Supra)* give enough leeway to a party to challenge such exclusion clauses as void for being against public interest and public policy under Section 23 of the Contract Act. Needless to say, in order to challenge an exclusion clause as being void under Section 23 of the Contract Act, the party shall necessarily have to prove that the clause was clearly unfair, unreasonable or unconscionable and that the contracting parties were having substantially disproportionate bargaining power such that one party was enjoying significant economic dominance over the other at the time of entering into the contract. With regards to the illustrative cases where a party can be held to be at an economically dominant position, the following observation of the Supreme Court in *Central Inland* is relevant:

"...In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate

²⁹ AIR 1959 SC 781

*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.*³⁰

In view of the above preposition of law, it is difficult to comprehensively set out cases which will result in unfair and unreasonable bargains between parties and each case shall have to be decided on its own facts and circumstances. Recently, there has been development of law in so far as 'unfair contracts' are concerned in relation to consumer contracts. The Consumer Protection Act, 2019 now expressly recognizes an "unfair contract"³¹ which includes imposing any unreasonable charge, obligation or condition on the consumer which puts such consumer to disadvantage. The Supreme Court in the case of *Ireo Grace Realtech Private Limited v. Abhishek Khanna*³² has observed that under the Consumer Protection Act, 2019, powers have been conferred upon the consumer courts to declare contractual terms which are unfair as null and void. It can be argued that an exclusion clause may fall within the ambit of an "unfair contract" under the Consumer Protection Act since it imposes an unreasonable condition on the consumer which puts such consumer to a disadvantage. Obviously, the ambit of Consumer Protection Act, 2019 is restricted to 'consumers' and is not applicable to business transactions undertaken by commercial entities and therefore the said Act cannot be invoked in a purely commercial transaction where unfair clauses (including exclusionary clauses) are involved.

In so far as other contracts are concerned, the Law Commission of India in its 199th Report has suggested that a new law be introduced to address general substantive unfairness wherein a contract or a term thereof shall be deemed to be unfair if the contract or terms thereof are by themselves harsh, oppressive or unconscionable along with a set of guidelines to adjudge substantive unfairness.³³ The Law Commission of India further proposed that a contract or term thereof shall be deemed to be substantively unfair and void if it (a) excludes or restricts liability for negligence or (b) excludes or restricts liability for breach of express or implied terms of contract without adequate justification.³⁴ Thus, the Law Commission of India has also identified that an exclusion clause which excludes liability for breach of contract shall be deemed to be substantively unfair unless it is shown that the exclusion clause was inserted with adequate justification.³⁵ In essence, the Law Commission is of the view that an exclusion clause providing for exemption from a claim for damages for breach of contract is substantially unfair unless such clause is inserted with adequate justification.

Given the above discussion and the position in law, the authors are inclined towards suggestions of the Law Commission that substantive unfairness is required to be statutorily recognized with a set of guidelines to adjudge substantive unfairness on a case-to-case basis. The authors believe that 'exclusion clauses' in a contract prohibiting/ excluding right of only

³⁰ Supra Note 25 (*Central Inland*) at ¶ 89

³¹ "Section 2(46) - "unfair contract" means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely:--

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

³² (2021) 3 SCC 241.

³³ Report No. 199 of Law Commission of India, Report on Unfair (Procedural and Substantive) Terms in Contract (August 2016) at p. 4,5.

³⁴ *Ibid* (Law Commission Report) at p. 213.

³⁵ *Ibid* (Law Commission Report) at p. 5.

one party to the contract to claim damages for breach of contract may be an unfair and unreasonable term in a contract and the courts must have a statutory mechanism to strike down such exclusion clause as illegal and void. This will also ensure that courts shall not be required to decide a challenge to the validity of an exclusion clause by invoking vague, uncertain and undefined concepts like 'public policy'.

Till such statutory safeguards are provided, the authors believe that while there is a duty of the courts to uphold the freedom of contracting parties to enter into binding contracts, courts must also be mindful of protecting the rights of contracting parties who, in reality, did not have any equal bargaining power at the time of entering into contracts. This will ensure that while the sanctity of the binding nature of contracts is maintained, a party shall not be in a position to take undue and unfair advantage of its commercial position by incorporating unfair, unreasonable or unconscionable clauses in the contract. Since it is difficult to comprehensively set out cases where an exclusion clause can be struck down, the courts ought to consider the overall economic position, commercial standing and extent of actual negotiating power of parties to decide the legitimacy and validity of exclusion clauses and interfere in legitimate cases where the exclusion clause is inserted solely to absolve only one party from liability for breach of its contractual obligations

It is emphasized that the courts may not strike down 'exclusion clauses' where the benefit of such clauses is available to both parties or where such clauses were inserted after entering into good faith negotiations or where the bargaining power of the contracting parties is equal or almost equal.

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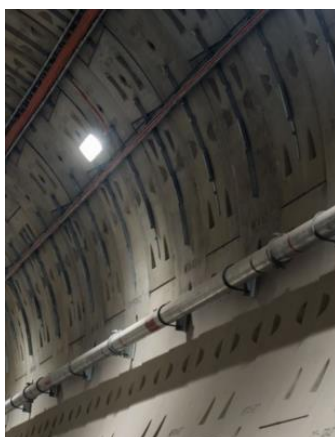
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