CHAPTER – III

STANDARD FORM CONTRACT:
STATUTORY PROVISIONS IN INDIA AND
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The device of a new type of contract i.e. standard form contract is very 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.

1. Statutory provisions in India:

At present, contracts could be declared void or voidable by a Court of law only if it falls under one or the others of the provisions of the Indian Contract Act 1872 which makes 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 or the party in a weaker bargaining position by holding that such terms in the contracts as void on the ground of their being unreasonable or unconscionable or unfair.

The Law Commission of India in its 103rd Report on “Unfair Terms in Contract” pointed that that the existing sections of the Indian Contract Act do not seem to capable of meeting the mischief caused by the unfair terms incorporated in contracts. It was said that “Indian Contract Act” as it stands today cannot come to the protection of a consumer. Further, the ad hoc solutions given by the Courts in response to their innate sense of justice without reference to a proper yardstick in
the form of a specific provision of the statute or known legal principles of law only produce uncertainty and ambiguity.

Justice D.P. Madon when speaking for the Bench of the Supreme Court in central Inland V. Brojo Nath’s case regarding the unreasonable and unfair terms in the contract said that “while the law of contracts in England is mostly judge-made, the law of contracts in India is enacted in a statute, namely, the Indian Contract Act, 1872. In order that such a contract should be void, it must fall under one of the relevant sections of the Indian Contract Act. The only relevant provision in the Indian Contract Act which can apply is section 23 when it states that “The consideration or object of an agreement is lawful, unless ... the Court regards it as ... opposed to public policy.”

A. Indian Contract Act, 1872:

“Unconscionable” contract under Section 16 of the Indian Contract Act 1872 which refers to the inequality of bargaining power between the parties and of unfair advantage of one party over the other, is in Section 16 dealing with “undue influence.” This section has three sub-section which are re-produced as under:

“Section 16(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 uses that position to obtain an unfair advantage over the other.

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

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

The other relevant provision in 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 the Section 16 and the Illustration (c) are reproduced as under

“16 (3) where a person who is in 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 the sub-section shall affect the provisions of section 111 of the Indian Evidence Act 1872 (1 of 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 may be noted that sub-section (3) of section 16 deals with unconscionability which is an aspect of unfairness and is linked with the domination of the will of another in weaker bargaining position. But this sub-section 16(3) does not enable the Court a right to strike down the unconscionable term but only enables raising a presumption.

Now the question is what is the meaning of the term “unconscionable”? The word unconscionable is defined in the Shorter Oxford English Dictionary, Third Edition, Volume II at page-2288, when used with reference to actions etc. as,
"showing no regard for conscience," irreconcilable with what is right or reasonable."

Thus an unconscionable bargain would therefore be one which is irreconcilable with what is right or reasonable. We can also look for the meaning of the term unconscionable in Legal Glossary of Government of India 2001, page number 351 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 here to the 103rd Report of the Law Commission of India on “Unfair Terms in Contract (1984),” where the Commission pointed out that subsection (3) of the section 16 of the Contract Act has been interpreted by the Privy Council in (Possathurai 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. In an early Madras case it was held that unless undue influence was specifically proved, no relief should be granted on the ground of unconscionable nature of a contract.
Section 19:

Under Section 19 of the Contract Act 1872 when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is contract voidable at the option of the party whose consent was so caused. Under Section 19-A, when consent to an agreement is caused by undue influence to agreement is contract voidable at the option of the party whose consent was so caused, and the Court may set aside any such contract either absolutely or if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as the Court may seem just.

Section 23: The another relevant section of the contract Act is section 23 which can invalidable a contract but this section does not refer to 'unconscionability' specifically.

Section 23 of the Contract Act 1872 may be reproduced here as under:

"Section 23: What consideration 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

would defeat the provisions of any law; or

is fraudulent; or

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

the Courts 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."
This section does not speak of unconscionability as one of the grounds. This section provides that the consideration or object of an agreement is lawful, unless it is forbidden by law or unless they are of such a nature that if permitted, they would defeat the provisions 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 one can lawfully do that what 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 opposed to public policy. From the very nature of the 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 and 19 which permits a party to avoid a contract, section 23 enables a Court to hold clauses opposed to any law or public policy to be void ab initio.

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 these are grounds of public policy.⁵
In Richardson V. Mellish, Borrough J said that public policy is a very unruly horse and when once you get astride it, you never know where it will carry you.

**Section 27**: Section 27 of the Contract Act is concerned with a special category of contracts which the law treats as void, namely, an agreement by which any one is restricted from exercising a lawful profession, trade or business of any kind and is to that extent, the agreement is void. However, in India (unlike U.K.), an agreement not to carry on, within 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 which is reproduced as under:

"**Section 27**: Agreement in restraint of trade void – Every agreement by which any one 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, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Thus the words "restrained from exercising a lawful profession, trade or business," do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to same particular place. 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 would be valid if it falls within any of the statutory or judicially created exceptions. Any agreement which is not covered by any of the recognized exceptions would be void.

The Supreme Court of India in the case of *Gujarat Bottling Co. Ltd. V. Coca Cola* 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 of this case may briefly stated as under:

The agreement in question here was for the grant of franchise by Coca Cola company 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 where under 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 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. The Court said the

"The question of reasonableness of restraint is outside the purview of section 27 of the Contract Act and need not to be gone into. Therefore, the present case has to be proceeded on the basis that an enquiry into reasonableness of the restraint is not envisaged by Section 27. On that view instead of being required to consider two questions as in England, the Courts in India have only to consider the question whether the contract is or is not in restraint of trade."

Section 28 of the Indian Contract Act:

Section 28 of the Contract Act states that agreements absolutely in restraint of legal proceedings are void. This section is in two clauses and contains two exceptions. The Section 28 is reproduced as under:

"Section 28, Agreement in restraint of legal proceedings, void –
Every agreement, –
(a) by which any party thereto is restricted absolutely from enforcing his rights under 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 party therefore, or discharges any party thereto, from any liability, under or in respect of any contract
on the expiry of a period so as to restrict any party from enforcing his rights, is void to that extent.

**Exception 1:** Saving of contract to refer to arbitration dispute that may arise – This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

**Exception 2:** Saving of contract to refer questions that have already arisen – Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration."

Thus section saves two types of contracts under the exceptions:

1. Exception 1 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 the only amount awarded in the arbitration shall be recoverable and

2. Exception 2 does not also render void a contract to refer to arbitration questions that have already arisen.

Section 28 of the Indian Contract Act 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, however, be valid as observed by the Hon’ble Supreme Court in *Hakam Singh V. Gammon (India) Ltd.* In this case a clause in the agreement between the parties provided that, “Notwithstanding the place where the work under this
contract is to be executed it is mutually understood and agreed by and
between the parties hereto that this contract shall be deemed to have been
entered into by the parties concerned in the city of Bombay and the Court
of law in the city of Bombay alone shall have jurisdiction to adjudicate
thereon."

The plaintiff filed a suit at Varanasi. The respondent contended that
the civil Court in Bombay alone had jurisdiction, because of the terms
contained in clause 13 of the agreement to entertain the petition.

But the trial Judge rejected that contention observing that the
condition in clause 13 “that the contract shall be deemed to have been
entered into by the parties concerned in the city of Bombay has no
meaning unless the contract is actually entered into the city of Bombay,
and that there was no evidence to establish that it was entered into in the
city of Bombay. The trial Judge concluded that the entire cause of action
had arisen at Varanasi and the parties could not by agreement confer
jurisdiction on the Courts at Bombay, which they did not otherwise
possess.

But the Hon’ble High Court of Allahabad in exercise of its
revisional jurisdiction set aside the order passed by the trial Court and
held that the Court in Bombay had jurisdiction under the general law to
entertain the suit and by virtue of the covenant in the agreement and
clause 13 of the agreement is applicable and binding between the parties.

The Hon’ble Supreme Court while deciding the appeal against the
order of the High Court of Allahabad held that where two Courts or more
have under the 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 an agreement does not contravene section 28 of the Indian Contract Act.

This principle laid down in the case of Hakam Singh was reiterated time and again in several cases. Recently in Harshad Chiman V. D.L.F. Universal Ltd. this view of the Supreme Court was reiterated again in its judgment where the Supreme Court said that, where several civil Courts have territorial jurisdiction in respect of suit, parties may by agreement confine themselves to any one or more of such civil Courts and such an agreement would not be violative of section 28 of the contract Act.

Thus now the legal position is that it is not open to the parties to confer jurisdiction to adjudicate on a Court which it does not possess jurisdiction under the Code of Civil procedure. But where two or more Courts have jurisdiction under the Code to try a suit, an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Parties can restrict their choice of Courts by an agreement freely entered into between them and can agree to any one or two such Courts provided that the selected Court otherwise has jurisdiction to try the suit under the Code of Civil Procedure, and this agreement does not contravene section 28 of the contract Act.

Under Section 28 of the Indian Contract Act 1872 a party has the right to file a suit, in case of any dispute, in a Court which possess the jurisdiction to adjudicate under the code of his choice except in the case of contracts to refer to arbitration disputes which may arise arbitration disputes which may arise or which have already arisen. Section 28 was amended by Indian Contract (Amendment) Act 1996 which came into effect from 8th Jan. 1997. The amendment gave effect to the suggestions

Before the amendment in section 28 of the Contract Act Section 28(b) was as under:

“Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under 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, is void to that extent.”

But after the amendment of 1997 the Section 28(b) is as under:

“Section 28(b) – Every agreement – which extinguishes the rights of any party thereto or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.”

The 1997 Amendment to Section 28 now also prohibits clauses which seek to extinguish the rights of any party thereto, or discharge any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights.

The Law Commission of India in its 13th Report observed that such clauses hinged not on the interpretation of the section but on the construction of the contract; and that “the principle itself is well recognized that an agreement providing for the relinquishment of remedies only falls within the mischief of section 28 of the contract Act 1872 and concluded that no change was necessary in the section 28 as it stood earlier.”

But later the Law Commission took up the matter suo motu and submitted its 97th Report in 1984 on "Prescriptive Clauses in contract, proposed." The proposal to disallow prescriptive clauses (which extinguished rights or provided for forfeiture or rights or discharge of liability on failure to sue within a certain time) rested on the basis of economic justice avoidance of hardship to consumers and certainty of law.

In Shin Satellite Public Co. Ltd. v. M/s Jain Studio Ltd. 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 contended that this objectionable clause was not severable from the clause which enables disputes to be referred to arbitration and that the entire clauses was void.

The Hon'ble Supreme Court held that, it is no doubt true that a Court of law will read the agreement and it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable. The Court held that, that part of the arbitration clause which speaks of reference of dispute to arbitration is severable and is not void.

B. Sale of Goods Act, 1930

The Sale of Goods Act, 1930 creates a large number of rights, duties and liabilities. These include warranties and guarantees implied by
the Sale of Goods Act. Section 62 of the 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. Section 62 of the Sale of Goods Act 1930 is reproduced as under:

"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."

Section 62 enables the parties to a sale to exclude liability for implied terms. The section recognizes three modes by which liability for implied terms may be negatived –

1. **By express contract:** Clauses by which a seller excludes his liability for breach of implied terms are strictly construed against him unless the liability is excluded by very appropriate terms. In a contract of sale of a car "fit for touring purposes", the seller excluded liability for "all guarantees and warranties," the Court held him liable as the unfitness of the car supplied for touring purpose was not a breach of a guarantee or warranty but of a condition.¹⁵

An exclusion clause is construed more forcibly against the party putting it forward this principle is called general contra proferentem rule. An example of exclusion of liability is afforded by *Andrews Bros (Bournemouth) Ltd. V. Singer & Co. Ltd.*¹⁶ In this case the plaintiffs were appointed by the defendants as dealers for 'new Singer cars'. They contracted to buy a number of such cars under an agreement which provided, that all conditions, warrantees and liabilities implied by
statutes, common law or otherwise are excluded. The defendants delivered a car which was not strictly a ‘new’ car, as it had already been driven a considerable mileage to be shown to another customer.

The Court of Appeal held that the defendants – sellers could not rely on the clause which dealt only with implied terms whereas the undertaking to supply “new Singer car” was not an implied condition but was an express term.

An *Pinnock Bros V. Lewis & Peat Ltd.*\(^{17}\) the plaintiff bought from the defendants East African Copra cake, which they resold to B, who resold to dealers, who resold to a farmer who used it for feeding cattle. The cake was so contaminated with castor beans as to be poisonous, and the cattle became ill. Each buyer sued his seller, and in the action by the plaintiffs the defendants relied on an exclusion clause.

Roche J said that where a substance quite different from that contracted for has been delivered, the exclusion clause has not application, as such a difference of substance cannot be said to constitute a ‘defect.’

An illustration of fundamental breach is afforded by *Karsales (Harrow) Ltd. V. Wallis.*\(^{18}\) In this case the contract of sale provided that “No condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owners or implied herein.” The seller brought the car to the buyer’s premises late at night. On inspection the car was found in deplorable state, it had been towed there its cylinder head had been removed, the valves in the engine had been burn out, two of the pistons had been broken, the tyres had been damaged and the radio removed.
Holding that this was a fundamental breach of the contract disentitling the seller to rely on the exemption clause Denning L.J. said,

"It is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respect. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contact.

Similarly a seller is not protected by a clause in a contract of sale of cotton reels where there is shortage in goods supplied. In *Beck & Co. V. Szymanowski & Co.* clause 5 of a contract for the sale of reels of sewing cotton provided that the goods delivered should be deemed to be in all respect in accordance with the contract unless the sellers were notified within 14 days of delivery. After 18 months the buyers complained that on average each reel contained only 188 yards of cotton instead of the stipulated 200 yards.

The House of Lords held that the sellers were not protected by clause 5, which referred to "goods delivered", whereas the buyers complaining that a portion of goods had not been delivered.

**B. Course of dealing:** The implied terms of a contract of sale can also be negatived by a course of dealing between the parties. There should be clear proof of the existence of a course of dealing. A course of dealing may arise with equal force from a written or parole bargain or from the repeated occurrence of similar methods as between the parties. In each case the question is as to the implication to be drawn from the past as applied to a new transaction, but a single transaction is not sufficient to establish a course of dealing.
In *Henry Kendall and Sons V. William Lillico & Sons Ltd.*\(^{20}\) there had been three or four contracts a month between two of the parties Grimsdale and SAPPA. The practice had been that when an oral contract had been made, Grimsdale would send a contract note to SAPPA, either later on the same day or on the following day. On the back of the notes were conditions, including one that "the buyer .... Takes the responsibility for latent defects." The House of Lords held that it was reasonable to hold that when SAPPA placed an order to buy, they did so on the basis and with the knowledge that an acceptance of the order by Grimsdale and their agreement to sell would be on the terms and conditions set out on their contract notes.

In *McCutcheon V. David MacBrayne Ltd.*\(^{21}\) the plaintiff had shipped his car several times on the defendants’ ship between Islay and the mainland of Scotland. The evidence was that sometimes he was asked to sign a risk note, containing exempting conditions, and sometimes not on the relevant voyage, on which the ship sank owing to the defendant’s negligence, the plaintiff’s brother had arranged the shipment and had not been asked to sign a risk note. It was held by the House of Lords that there was no consistent course of dealings.

Similarly in *Hollier V. Rambler Motors (AMC) Ltd.*\(^{22}\) the plaintiff had taken his car for servicing to the defendants’ garage three or four times over a five year period. On previous occasions he had been asked to sign a service ‘invoice’ containing conditions, but on the relevant occasion this step was omitted. The Court of Appeal held that the previous contracts did not amount to a course of dealings incorporating the defendants’ conditions into the oral contract.
**Trade Usage:** The implied terms may also be excluded by trade usage, provided there is cogent and convincing evidence before the Court of law that there exist a particular usage in that type of business or dealings claimed by a party to the contract.

**C. Consumer Protection Act, 1986:**

In early years when welfare legislation like Consumer Protection Act did not exist, the maxim *caveat emptor* (let the buyer beware) governed the market. Now with the opening of global markets 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. In spite of various provisions providing protection to consumers through different enactments like Civil Procedure code 1908, Indian Contract Act 1872, Sale of Good Act, 1930, very little could be achieved in the area of consumer protection. The consumer Protection Act, 1986 was thus framed to protect consumers from unfair trade 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 consumer Protection Act 1986 was enacted 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 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 purpose 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 bargain price having regard to the prices at which the product advertise 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;

(c) 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 of goods or refusal raises or tends to raise or 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 Consumer Protection Act 1986 the method of inquiry into the allegation of unfair trade practice is on three levels by the three authorities having its own original pecuniary jurisdiction. The complaint is filed 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 proceeding 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 or 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.

Section 14 of the Consumer Protection Act deals with the relief which the District Forum is authorized to give to the aggrieved consumer. The District Forum has to record its satisfaction as regard the defects in goods, deficiency in service. 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.

D. The Competition Act, 2002

In the pursuit of globalization, responded to opening up its economy, removing controls and resorting to liberalization. As a natural consequence of this the Indian market has to be geared to face competition from within the country and outside. The Monopolies and Restrictive Trade Practices Act 1969 had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and the need was felt to shift the focus from curbing monopolies to promoting competition. Thus a need arose for a separate competition Act.

A High Level Committee on Competition Policy and Law was constituted by the Central Government which submitted its report on 22nd May 2000 to the Central Government. The Central Government consulted all concerned including the trade and industry association and the general
public. After considering the suggestions of the trade and industry and the general public decided to enact a law on competition. Accordingly the competition Bill was introduced in the Parliament.

The aim and object of the competition Bill was to ensure fair competition in India by prohibiting trade practices which causes appreciable adverse effect on competition in markets within India and for this purpose the provision for the establishment of a quasi judicial body to be called the Competition Commission of India (CCI). The purpose of this Bill was also to curb negative aspects of competition through the medium of competition commission of India. The aim of the Bill was also to repeal the Monopolies and Restrictive Trade Practices Act, 1969 and the dissolution of the Monopolies and Restrictive Trade Practice Commission. The Bill provided that the cases pending before the MRTP commission will be transferred to the Competition Commission of India except those relating to unfair trade practices which were proposed to be transferred to the relevant for a established under the Consumer Protection Act, 1986. The competition Bill after having been passed by both the Houses of Parliament received the assent of the President on 13th January 2003. It came on the Statute Book as The Competition Act 2002 (12 of 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 interest 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 the competition Act 2002, 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 the section 3 shall be void. The competition Act 2002 repealed the Monopolies and Restrictive Trade Practices Act 1969.

Under the Competition Act 2002, it is the duty of the Competition Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest 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 provision of Chapter II of the Act having been committed by such enterprise. The person has to pay a penalty for failure to comply with orders/directions of the Commission.

E. Specific Relief Act 1963

Section 20 of the Specific Relief Act 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.

Section 20 of the Specific Relief Act 1963 may be reproduced as under:
“Section 20: Discretion as to decreeing specific performance:

1. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

2. The following are cases in which the Court may properly exercise discretion not to decree specific performance:

(a) Where the terms of the contract or 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 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;

(c) Where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1: 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 the clause (a) or hardship within the meaning of clause (b).

Explanation 2: 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.

(3) 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 the contract capable of specific performance.

(4) 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.

Section 20 of the Specific Relief Act 1963 provides for certain circumstances in which the Court may at its discretion refuse specific enforcement. The section says that the jurisdiction to decree specific performance is discretionary and the Court is not bound to give such relief merely because it is lawful to do so. The section however adds that such discretion shall not be arbitrarily exercised. It has to be exercised on sound and reasonable basis. Discretion should be exercised in accordance with justice, equity, good conscience and fairness to both the parties.23

Sub-Section (2) of Section 20 provides for situations in which the Court can properly at its discretion refuse to order specific performance.

1. **Unfair Contracts:** The Court may refuse specific performance where a contract gives an unfair advantage to the plaintiff over the defendant. The unfairness of the contract may appear from the terms of the contract, from the conduct of the parties at the time of entering into the contract or other surrounding circumstances. It is not necessary that the contract should be voidable.

2. **Hardship:** The specific performance may also be refused by the Court where it would cause considerable hardship to the defendant which
he did not foresee, whereas non-performance would cause no such hardship to the plaintiff.

3. **Inequitable:** Where the circumstances of a contract are such that, though they do not make the contract voidable, they definitely render specific enforcement inequitable, the contract is one sided, an imposition by one upon the other, the inequitable, the parties are not on equal footing, are some of the circumstances which the Court considers that whether an order of specific performance would give rise to inequitable results.

The Law Commission of India in its 103rd Report opined that the only step that can be taken in our country to remedy the evil is to enact a provision in the Indian Contract Act, 1872 to deal unfair terms in contract. The Commission in its Report recommended the amendment of the Indian Contract Act, 1872, by inserting the new chapter and a Section, namely Chapter IVA and in it a Section 67A. The recommended section 67A by the Commission may be reproduced here as under:

"**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 – the liability for willful breach of the contract, or (b) the consequences of negligence."

The recommended section 67A(1) is general in nature dealing with ‘unconscionability’ while section 67A(2) refers to two particular situations in which the law deems to provisions to be unconscionable. 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. The recommendations of the Law Commission is on unfair terms in contracts 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 in it to be inserted in the Indian Contract Act, 1872. Before making the recommendations the Law Commission invited suggestions from different High Courts of India and the Law Departments of the States. 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 the standard form contracts was to enact a provision in the Indian Contract Act, 1872 which could combine the advantages of English Unfair Terms Act and of the Uniform Commercial Code of the United States and the Commission had not thought of an elaborate enactment on the lines of English Law.

It is submitted that the provisions of the Indian Contract Act, 1872 and the other existing laws of which some have referred to above, are not sufficient to deal with the menace created by excluding and limiting terms in the standard form contracts. The Law Commission of India in its 103rd Report, 1984 on “Unfair Terms in Contract” observed that the existing sections of the Indian Contract Act, 1872 do not seem to be capable of meeting the mischief caused by unfair terms incorporated in the standard form contracts. It was observed the “Indian Contract Act” as it stands today cannot come to the protection of a consumer when dealing 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 principles of law only produce uncertainty and ambiguity.\textsuperscript{25}

2. Statutory Provisions in the United Kingdom:

The Canals and Railways Act, 1854 is regarded as the first Act which had statutory control over the use of exemption clauses but the Act contracted certain types of clauses by allowing them only if they were reasonable. Under the Act it was provided that the limitations of liability had to be reasonable. Under Road Traffic Act, 1960 the clause which purports to exclude liability for death or personal injury of a passenger in a public service vehicle is void. Section 151, provides that:

“A contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or to restrict the liability of a person in respect of a claim which may be made against him in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability be void.”

A similar provision may also be found in the Transport Act, 1962. Section 43(7) of the Act provides that:

“The Boards shall not carry passengers by rail on terms or conditions which (a) purports, whether directly or indirectly, to exclude or limit their liability in respect of the death of, or bodily injury to, any passenger other than a passenger traveling on a free pass, or (b) purport, whether directly or indirectly, to prescribe the time within which or the manner in which any such liability may be enforced.”

Thus any term which exclude the liability either directly or indirectly in case of death or bodily injury or a term which prescribes the
time limit shall be void and shall have no effect at all on the basis of the provision of Transport Act, 1962. The unfair terms have been regulated in the United Kingdom by legislation as far back as 1854 but with a focus on exclusion and limitation of liability clauses. By virtue of the Supply of Goods (Implied Terms) Act, 1973 (SOGITA), all sellers were prevented from excluding or restricting liability:

(i) Generally with respect to the implied obligation as to title.

(ii) In relation to consumers with respect to the implied obligations of merchantability, fitness for purpose, correspondence with sample and

(iii) For non-consumer sales with respect to the implied obligations of merchantability, fitness for purpose, correspondence with sample, only to the degree that it could be shown to be fair and reasonable.

A. The Unfair Contract Term Act, 1977 (UCTA):

The Unfair Contract Terms Act, 1977 (UCTA) in general incorporates the provisions of Supply of Goods (Implied Terms) Act, 1973 (SOGITA). Whilst it applies to both consumer and business to business contracts as well as to terms and notices excluding certain liabilities for negligence irrespective of whether the terms are negotiated or standard, it only covers exclusion and limitation of liability clauses and also indemnity clauses in consumer contracts. It makes certain exclusions or restrictions of no effect at all and subjects other to a test of reasonableness.

"Reasonableness" means .... the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought to have been, known to or in the contemplation of the parties when the contract was made.
The Unfair Contract Term Act 1977 does not deal with all unfair contract terms but only with unfair exemption clauses. It also does not deal with unfair imposition of liability. This Act is divided into three parts. Part I applies to England, Wales and Northern Ireland; Part II applies to Scotland and Part III applies to the whole of United Kingdom. Section 2, 3, 6 and 7 are the main sections in Part I of the Act and are interrelated. Section 6 applies to contracts of sale and Hire purchase. Section 2 and 3 are of general application and are applied to any contract within the scope of the Act, including those covered by section 6 or 7. Section 2 deals with liability for negligence. Negligence is defined in Section 1 of the Act where it means the breach either of a contractual obligation, ‘to take reasonable care or to exercise reasonable skill in the performance of the contract’ or of ‘any common law duty to take reasonable care or to exercise reasonable skill’ or ‘of the common duty of care imposed by the Occupiers Liability Act, 1957.

Section 3 of the Act deals with two types of contract. One is where the contract is between the two parties, one of whom is a consumer, while the other type of contract is where it is between two parties, one of whom deals on the other’s written standard terms of business. Section 3 provides that the person who deals with the consumers or on his own written standard terms of business:

"cannot by reference to any contract term –

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled –

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or
(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as .. the contract term satisfies the requirement of reasonableness.

This Act applies in two ways, either to make a term totally ineffective or to subject it to a test of reasonableness. There are certain terms which are made ineffective for example:

(a) Personal injury or death – under Section 2(1) it is no longer possible to exclude or restrict liability in negligence for personal injury or death by reference to any contract terms.

(b) In contract of sale or hire-purchase, the implied undertakings as to title of the seller or owner cannot be excluded or restricted.

(c) In consumer contracts of sale or hire-purchase, the seller’s or owner’s implied undertakings as to conformity of goods with description or sample or as to their quality or fitness for a particular purpose cannot be excluded or restricted.

(d) Under Section 7 of the Act the same rule applies to contracts when the goods are supplied to a consumer.

The Unfair Contract Term Act, 1977 is primarily concerned with terms that exclude or restrict business liability, that is liability for breach of obligations or duties. Section 2 of the Act places restriction on the power of a party to a contract to secure exemption from business liability for negligence. It is prohibited to exclude or restrict liability for death or personal injury resulting from negligence, by reference to any term of the contract.
Section 5 of the Act prohibits the exclusion or restriction of the negligence liability of a manufacturer or distributor of goods by means of a written guarantee. Section 5(1) is based on guarantee of consumer goods which says,

"In the case of goods of a type ordinarily applied for private use or consumption, where loss or damage,

(a) arises for the goods proving defective while in consumer use; and

(b) results from the negligence of a person concerned in the manufacture or distribution of the goods, liability for the loss or damage cannot be excluded or restricted by reference to any contract or notice contained in or operating by reference to a guarantee of the goods.

Thus in case of goods which are supplied for private use or consumption the liability of the manufacturer and distributor arising out of defective goods or due to negligence, cannot be excluded or restricted by a term in contract or a notice which may be contained in or operating by reference "guarantee of the goods."

By Section 4 of the Act a person who deals as a consumer cannot, by any contract term, be compelled to indemnify another in respect of the latter’s business liability for negligence or breach of contract, except in so far as the term satisfies the requirement of reasonableness.

Section 6 of the Act restricts the ability of sellers of goods to exempt themselves from liability for breach of the stipulations implied in contracts of sale by sections 12-15 of the Sale of Goods Act, 1979. It prohibits absolutely the exclusion or restriction of liability for breach of the provisions of Section 12 of the Sale of Goods Act, 1979 i.e. stipulations as to titles. It also prohibits absolutely the exclusion or
restriction of liability for breach of the provisions of sections 13 to 15 of the Sale of Goods Act 1979 as amended i.e. conditions as to satisfactory quality, fitness for purpose and correspondence with description or sample, where the buyer deals as consumer. If the buyer does not deal as consumer, liability for breaches of sections 13 to 15 can be excluded or restricted but only in so far as the term satisfies the requirement of reasonableness.

Section 7 of the Act is concerned with contract terms excluding or restricting business liability for breach of an implied obligation in a contract where the possession or ownership of goods passes under or in pursuance of the contract (other than a contract of sale of goods or hire-purchase, or on the redemption of trading stamps).

There are certain instances where the Act prohibits absolutely the exclusion or restriction of liability. The contract term which are there to qualify the test of reasonableness of which the guidelines are given the Act under section 11.

The Court will decide whether a term is reasonable or not and while deciding that the term is fair and reasonable, the Court will consider the circumstances which were, or ought reasonably have been known to, or in the contemplation of the parties when the contract was made.

Section 11 and Schedule 2 of the Act, provides following ‘guidelines’ of circumstances to be taken into account by the Court while deciding the question of reasonableness of term in the contract.

1. The strength of the bargaining positions of the relative to each other, taking into account alternative means by which the customer’s requirements could have been met;
2. Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

3. Whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

4. Where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of contract to expect that compliance with that condition would be practicable;

5. Whether the goods were manufactured, processed or adapted to the special order of the customer.

Thus these guidelines provide by the Act will help Court to come to a conclusion regarding the reasonableness of a term only in respect of the exclusion or restriction of liability for breach of the implied obligations as to description and quality in contracts of sale of goods and hire-purchase and supply contracts. The burden of proof, that the term is reasonable or satisfies the requirement of reasonableness lies upon the person who claims that it is reasonable.

Schedule 1 of the Act contains a list of contracts to which the whole or part of section 2, 3, 4 and 7 do not apply. These include:

a. contracts of insurance (including contracts of annuity);

b. contracts relating to the creation, transfer or termination of interests in land;
c. contracts relating to the creation, transfer or termination of rights or interests in intellectual property such as patents, trade marks, copyrights etc.

d. contracts relating to the formation or dissolution of a company or the constitution or rights or obligations of its members;

e. contracts relating to the creation or transfer of securities or of any right or interest therein;

f. contracts of marine salvage or towage; or charter party of ships or hovercraft or of carriage of goods by sea, by ship or hovercraft (except in relation to Section 2(1) or in favour of a person dealing as consumer).

Thus the Unfair Contract Terms Act, 1977 is the most important statute in the English contract law. This Act does not render any of the previous law redundant, and is not simple. Some of its sections which are main sections overlap. The key concept of the Act is the test of reasonableness which are to be decided by the Courts on the basis of guidelines given in the Act itself. This Act considerably improved the status of consumers and put them in a better position in comparison to the position before the enactment of the Act.

B. The Unfair Terms in Consumer Contracts Regulations, 1999 – (UTCCR):

These Regulations came into force with effect from 1st October 1999. Before these Regulations, the Unfair Terms in Consumer Contracts, 1994 was in force in the United Kingdom, and was effective since 1st July 1985 to 1st October 1999. These new Regulations of 1999 replaced the old Regulations of 1994. These Regulations apply only to consumer contracts and only to standard form contracts. The Regulations define a
consumer as ‘a natural person who in making a contract to which these Regulations apply, is acting for purposes which is outside is business.’

The Regulations do not apply to contracts which have been individually negotiated. They are limited to contracts which have been drafted in advance. The Regulations provide that ‘the fact that a specific term or certain aspects of it have been individually negotiated does not exclude the applications of the Regulations if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. Unlike the Unfair Contract Terms Act, 1977, the Unfair Terms in Consumer Contracts Regulations, 1999 are not restricted to exemption and limitations clauses. They cover all the terms of a contract between a seller or supplier of goods or services and a consumer which have not been individually negotiated to a requirement of fairness. The Regulations, 1999 apply to some contracts of insurance that which were excluded from Unfair Contract Terms Act, 1977. The 1994 Regulations applied only to contracts for the supply of goods and services. The provision producing this limitation is not there in the 1999 Regulations.

There are two differences between the UCTA, 1977 and UTCCR, 1999. The UCTA, 1977 does not deal in principle with all unfair contract terms but only with unfair exemption clauses. It does not, in general, deal with unfair imposition of liability. Even the exemption clauses are not being declared as fair or unfair but only declared as ineffective or other subject to a test of reasonableness. Whether a term is unfair or not cannot be tested by the Act of 1977. Some terms are struck down and others are valid if reasonable. Invalidity of a term does not depend on fairness or unfairness.
The other difference is that the Regulations can be used to struck down any term which is successfully alleged to be unfair.

Unfairness is defined by clause 5(1) of the Regulations, 1999, which provides

“Unfair term” means any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer.”

However, there is a limitation provided in clause 6(2) of the Regulations, 1999 which says

“In so far as it is in plain intelligible language of the assessment of fairness of a term shall not relate,

a. to the definition of the main subject matter of the contract or
b. to the adequacy of the price or remuneration as against the goods or services sold or supplied.

Thus by this provision it is not open for a consumer to argue that the contract is unfair because of the reason that he is charged in excess or the price is very exorbitant.

Section 7 of the Regulations, 1999 provides that “A seller or supplier shall ensure that any written term of a contract is expressed in plain intelligible language.” Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

Clause 8(1) of the Regulations provides that an unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer. Clause 8(2) provides that the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.
Section 5(5) provides that Schedule 2 contains "an indicative and non-exhaustive list of the terms which may be regarded as unfair."

Thus the Regulations of 1999 (UTCCR, 1999) of U.K. operate in addition to Unfair Contract Terms Act, 1977. The Regulations covers:

(i) contracts involving consumers – any natural person who is acting for purposes other than his trade business or profession; and

(ii) contractual terms which have not been individually negotiated, particularly pre-formulated standard contracts;

(iii) Oral or written contracts; and provide that

(iv) Written contracts must be in plain intelligible language and

(v) Unfair terms are not binding on the consumer.

The declared purpose of these Regulations is to protect consumers against one-sided contracts favouring business. They provide that:

i. a contractual term which has not been individually negotiated is unfair if contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer;

ii. a consumer is not bound by a term which is unfair. The rest of the contract is binding if it is capable of continuing in existence without the unfair terms;

iii. if a term is individually negotiated, it is not covered by the Regulations but any non-negotiated term within the same contract is covered;
iv. if a consumer believes a term to be unfair, he or she can take the issue to Court or can use it as a defence in Court in Court proceedings against them;

v. where a term has been drawn up for general use, the United Kingdom Office of Fair Trading (UK OFT) (or the main Sectoral Regulators and 200 Local authority trading standards services) can seek an undertaking or apply for an injunction to stop business using unfair terms.

This Regulations, 1999 do not cover:

i. Price setting — provided it is in plain and in intelligible language;

ii. terms defining the product — provided they are in plain and intelligible language;

iii. terms required by law or explicitly allowed by law;

iv. specially negotiated terms;

v. sales by private individuals; or

vi. terms in non-consumer contracts such as employment agreements.

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 amended 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 1 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 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 Courts.

The Law Commission of United Kingdom and the Scottish Law Commission in its joint Reports (No. Law Com No. 292 and Scot Law Com No. 199) on (Unfair Terms in Contracts) – 2004 recommended for a single Unified Act that will set out law on unfair contract terms in a clear and accessible way.

The commission opined in its Report “that at present unfair terms in consumer contracts are governed by both Unfair Contract Terms Act, 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulation, 1999 (UTCCR). The existence of this dual regime has caused considerable confusion and uncertainty because:

1. the statutory control over unfair terms are split between two pieces of legislation and must be located in each text;

2. the UTCCR and UCTA contain inconsistent and overlapping provisions;

3. the scope of application of each piece of legislation is different;

4. UCTA and UTCCR use different language and terminology;

5. UCTA is drafted in a very dense and highly technical style; and
6. the UTCCR are a fairly literal version of the text of the Directive whose language and, in some instances, concepts are not always easily understood by UK lawyers.”

The Commission in its Report\textsuperscript{26} said that our objective is to design a single unified legislative regime for consumer contracts to preserve consumer protections currently afforded by both UCTA-1977 and the UTCCR, 1999.

The issue of unfair terms in standard form contracts is a moot point for any law reform agency. The British Parliament passed the Unfair Contract Terms Act, 1977 and Unfair Terms in Consumer Contracts Regulations, 1999. The Act provides the definition of the term “negligence” which is applicable both to tort and breach of a contract cases. The Act provides that any clause in a contract which excludes or restricts liability for negligence shall be absolutely void. In regard to other types of loss, not being death or physical injury, any restriction or excluding clause shall also be void unless it satisfies the requirement of “reasonableness.” The ‘reasonableness’ would depend upon the unfairness of the terms in the light of the circumstances which ought to have been either known to or in the contemplation of the parties. The Act also provides that a person who deals with the consumer on standard terms will not be allowed to claim the protection of any clause restricting or excluding liability if he himself commits breach. It puts the burden of proof on the party who wants to take the advantage under the excluding clause of the contract. The Unfair Terms in Consumer Contracts Regulations 1999 apply to consumer contracts of all kinds in the whole of the United Kingdom. Though does not contain detailed guidelines as to how the test “fairness” should be applied but contains a list of terms which may be regarded as unfair.
Thus in the United Kingdom these two legislations are very important in the field of commercial transactions. The effect of these two legislation is that most of the suppliers of goods or services are reluctant to incorporate and stipulate harsh and one-sided excluding and limiting terms in contracts, or agreed to withdraw or amend certain types of clauses in contract. These legislations elevated the status and bargaining power of the individuals vis-à-vis supplier of goods or services.

3. Statutory Provisions in U.S.A.:

The notion of unconscionability in contracts is by no means new in United States of America. It is incorporated as a test of enforceability in the Uniform Commercial Code. The general doctrine of unconscionability was developed in U.S.A. largely through judicial decisions.

Unconscionable contract term is defined in section 208 in American Restatement of Law (Second) as promulgated and adopted by the American Law Institute dealing with the law of contracts.

A. Section 208 – Unconscionable Contract Terms:

“If a contract or term thereof is unconscionable at the time 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 Uniform Commercial Code of U.S.A. Though it was applicable only to contracts relating to sales of goods. It has been applied by analogy or as general doctrine to other kinds of contracts.
B. Section 2-302 of the Uniform Commercial Code 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 the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

The comment to this section 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...."

The Section 2-302 of the Uniform Commercial Code 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 of Uniform Commercial Code further says that:
"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 mere inequality of bargaining power is not sufficient to declare a contract term unconscionable. The parties are often required to make their contracts quickly even if there 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.A., there is statutory bar on unconscionable contracts and the interest of the parties prejudiced by inequality of bargaining power.

The Uniform Commercial Code 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 unconscionability in contracts is provided as a test of enforceability in the Uniform Commercial Code of U.S.A. The general doctrine of unconscionability was developed through judicial decisions in the U.S.A. The doctrine of unconscionability has been included in 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
contracts. Section 2-302 of the Uniform Commercial Code gives power to the court to declare a unconscionable clause or a contract to be ineffective, the Court may refuse to enforce the clause or a contract. The Court shall give a reasonable opportunity of being heard to both of the parties and if it finds the contract or any clause unconscionable it will declare it ineffective. The effect of the UCC is that the supplier of goods and services are not inclined to stipulate unconscionable clauses in the contract because if the effected party goes to the court the clause would be declared unenforceable. Thus this UCC is important piece of legislation so far as unconscionable clauses are concerned.

4. Statutory Provisions in Australia:

There is some ability for individual relief in relation to unfair contracts by way of “unconscionable conduct” both at common law and the broader protection afforded by the Commonwealth Trade Practices Act, 1974 (TPA) as mirrored in State and Territory fair trading legislation. There are two contrasting aspects to unconscionable conduct as it relates to contracts:

(i) firstly, procedural unfairness which is concerned with the circumstances leading up to and at the time of the making of the contract; and

(ii) secondly, substantive unfairness which is concerned with the unfairness of the terms of the contract themselves which lead to an injustice.27

A. The Contract Review Act, 1980 (New South Wales):

New South Wales (NSW) has a legislation in relation to unfair or unjust consumer contracts. The Contract Review Act, 1980 (CRA) protects persons from using unjust contracts.
Section 6(2) of the CRA provides that the relief under the Act is not available so far as contracts entered into 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 the Court may give relief to a party seeking it, if it finds that the contract or its some provisions are unjust. 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 is unjust taking into consideration 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. The Court may also make an order varying the provisions of the instrument or terminating or otherwise affecting its operation or effects. In general, the CRA provides that a Court can grant relief in relation to a 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 CRA operates concurrently with the Uniform Consumer Credit Code (UCCC).28

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

Sub-section 9(1) of the CRA set 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 of 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.

The Court, where relevant, under Section 9(2) 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.

The CRA 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) in particular lean towards the substantive. A person’s rights under the Act cannot be excluded or restricted in any way.

Under Section 7 of the CRA where the Court finds a contract or a provision of a contract to have been unjust, it may, if it considers it just to do so, and for the purpose of avoiding as far as practical an unjust consequence or result:

i. refuse to enforce any or all of the provisions of the contract;

ii. declare the contract void, in whole or in part;
iii. vary any provision of the contract, in whole or in part (effective from the time of the making of the contract unless otherwise specified); or

iv. require execution of an instrument that varies or terminates a land instrument.

When making an order under Section 7 of the CRA the Court may also make orders, inter alia, for the disposition of property; the payment of money (whether or not by way of compensation) to a party to the contract; the compensation of a person who is not a party to the contract and whose interest might otherwise be prejudiced by a decision or order under the CRA; and supply or repair of goods or the supply of services.

As well as providing a mechanism for relief by an individual consumer on a case by case basis, systemic relief is possible under Section 10 of the CRA.

“Section 10 – 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 CRA provides the Supreme Court and the District Court with jurisdiction to consider contracts under the CRA (and the local Court and the consumer, Trader and Tenancy Tribunal in more limited circumstances) 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.
B. Uniform Consumer Credit Code (UCCC):

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 came into effect on 1\textsuperscript{st} November 1996. It, therefore, applies across Australia.

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. This applies to real property as well as goods and services and therefore housing loans may be covered. However, investment by a debtor is not for personal, domestic or household purposes. The UCCC also applies to consumer bases, related insurance contracts and related sales contracts.

Unjust contracts can be re-opened under section 70 of the UCCC. The definition of "Unjust" is the same as that in the CRA, that is, it includes unconscionable, harsh or oppressive.

Section 70 of the UCCC is concerned with procedural and substantive injustice. The list of matters which may be taken into account by the Court under sub-section 70(2) are very similar to those which the Court must take into account under sub-section 9(2) of the CRA. Whether or not a term was the subject of negotiation is a matter the Court can 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:

i. re-open an account;
ii. relieve the debtor from payment to the degree it considers reasonable;

iii. set aside wholly or in part or revise or alter an agreement;

iv. make an order for payment of an amount it thinks is justly due to the party under the contract

Under Section 72 of the UCCC the Court may also review unconscionable interest, fees or charges.

C. Trade Practices Act, 1974

At 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.29

Section 51AB of the TPA, together with its mirror provisions in State and 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:

i. the relative bargaining strengths of the parties;

ii. whether undue influence or pressure was exerted or unfair tactics used;

iii. whether the consumer was able to understand the consumer documentation;

iv. whether the consumer was required to comply with conditions which were not reasonably necessary for the protection of legitimate interest of the supplier; and;
v. the amount for which, and the circumstances under which, the consumer could have acquired equivalent goods or services from another party.

Under the TPA the Court can make any order it sees fit including compensation (but not damages);

i. an order avoiding or refusing to enforce the contract in total or in part;

ii. an order varying the contract;

iii. an order directing the return of money or property;

iv. an order for the repair of, or parts for goods or for the supply of services.

Applications for injunctions can be made generally for the purpose of restraining a person from engaging in conduct in contravention of the TPA by both consumers and fair trading agencies on behalf of consumers.

D. Fair Trading (Amendment) Act, 2003 (Victoria):

In May 2003 Victoria amended its Fair Trading Act, 1999 to include provisions to address unfair contract terms. The provisions draw heavily on the United Kingdom Unfair Terms in Consumer Contracts Regulations.

The provisions cover “consumer contracts”: 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.

In brief.\(^30\)
i. a term is unfair if contrary to the requirement of good faith and in all the circumstances it causes a significant imbalance in the parties’ right and obligations under the contract, to the detriment of the consumer;

ii. 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;

iii. in assessing whether a term is unfair, the Court can have regard to whether the term was individually negotiated; whether it is prescribed term; and whether it has an object or effect set out in the Act;

iv. standard form contract terms can be prescribed as unfair by regulation and it is an offence to use or recommend the use of a prescribed term;

v. the Director can apply 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;

vi. an oral contract is covered with respect to consumer contract;

vii. a term relating to price is covered by the provisions;

viii. a contract to which the UCCC applies is not covered; and

ix. 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 systematically 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, 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 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 penalty for failure to with the order.

Although the concept of unconscionability is expressed in wide terms, the Courts exercise an equitable jurisdiction according to recognized principles. They do not set aside bargains simply because, in the eyes of judges, they appear to be unfair, harsh or unconscionable. This equitable jurisdiction exists when one of the parties “suffers from some special disability or is placed in some special situation of disadvantage.”

In the case of Commercial Bank of Australia Ltd. v. Amadio all the five judges of the High Court of Australia confirmed the existence in Australia, of an equitable jurisdiction to set aside contracts on the basis of unconscionable dealings, and three of them decided the case on this principle. In this case two elderly Italian migrants to Australia who were not familiar with the English language at the request of their son, executed 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 and the company had been selectively dishonouring the company’s
cheque, 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 document 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 knowledge of the stronger party of the other party’s weakness was judged in this case by the objective standard.33

The principle of unconscionable dealings applied was summarized by Deane J. as follows34

"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 quality between them; and

ii. the disability was sufficiently evident to the stronger party to make it prima facie unfair or ‘unconscientious’ that he procure, or accept, the weaker party’s assent to the impugned transaction in the circumstances in which he procured or accepted it."
Where such circumstances are shown to have existed, 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 must show that the stronger party acted unconscionably by reference mainly to the manner in which the transaction was concluded. This is the procedural question. 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.'

It is submitted that legislative provisions of different Acts in Australia protect persons from using unjust contracts or provisions in contracts. Though under section 6(2) of the Contract Review Act, 1980 (CRA) relief is not available so far as contracts entered into the course of or for the purpose of trade, business or profession carried on or proposed to be carried on by the persons; other than a farming undertaking, still there are various avenues available to the court on a finding of an unjust contract or contractual provisions. A Court can grant relief in relation to a consumer 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, or make an order varying the provisions of the instrument or terminating or otherwise affecting its operation or effects. The CRA, 1980 operates concurrently with the Uniform Consumer Credit Code (UCCC). These are revolutionary legislations whose evident purpose is to overcome the Common Law's failure to provide a comprehensive doctrinal framework to deal "unjust" contracts. Consumers are provided with a mechanism which allows them to take
action in the situation of an unjust contract. Court’s decisions may also have a deterrent impact on business concerns. This led to decrease in the use of excluding and limiting clauses in contracts and an increase in the consumer confidence in the market.

It is submitted that the provisions of the Indian Contract Act, 1872 and the other existing laws of which some have referred to above, are not sufficient to deal with the menace created by excluding and limiting terms in the standard form contracts. The Law Commission of India in its 103rd Report, 1984 on “Unfair Terms in Contract” observed that the existing sections of the Indian Contract Act, 1872 do not seem to be capable of meeting the mischief caused by unfair terms incorporated in the standard form contracts. It was observed the “Indian Contract Act” as it stands today cannot come to the protection of a consumer when dealing 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 principles of law only produce uncertainty and ambiguity.

Now it is turn for the Government of India to respond and implement the 199th Report of Law Commission of India on Unfair (Procedural and Substantive) Terms in Contract and implement the recommendations given in the Report. It is hoped that the recommendations of the Law Commission of India contained in 199th Report-2006 will soon be implemented by the Central Government.

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