CHAPTER IV

RECOMMENDATIONS OF THE LAW COMMISSION OF INDIA
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Recommendations of the Law Commission of India:

The Law Commission of India prepared and submitted 103rd Report to the Government of India on Unfair Terms in Contract in 1984. The Report of the Commission which was concerned with standard form contracts imposing unfair and unreasonable terms upon unwilling consumers or persons who had no bargaining power was forwarded to the then Minister of Law, Justice and Company Affairs, Government of India on 28th July 1984. In 2006 the Commission forwarded 199th Report which was, on unfair (Procedural and Substantive) Terms in Contract, to the Government of India. This 199th Report was forwarded to the Minister of Law and Justice on 31st August 2006.

A. One Hundred and Third Report:

The One Hundred and Third Report of the Commission focused on Unfair Terms in Contract. Although the recommendations made by the Commission in 103rd Report was concerned with standard form contracts imposing unfair and unreasonable terms on the individuals who are in a weaker bargaining position or have no bargaining power at all, the recommendations was wide, and did not restrict itself to any particular type of contract.

The Commission in chapter 1 of the Report noted that in an industrial society, the individual craftsman slowly fades out, giving place to mass production of standardized products. Such standardization
ultimately leads to standardized contracts with customers, as in the case of large scale organization, which enter into innumerable contracts with individuals, it is very difficult to draw up a separate contract with each individual. The Commission observed that there are advantages of such contracts as economy and certainty. However, these standardized contracts are not real contracts as the characteristics, usually and traditionally associated with a contract, such as freedom to contract and consensus, are absent from these contracts. The standard terms and conditions prepared by one party are offered to the other on a "take it or leave it" basis. The main terms are put in large print, but the qualifications are buried in small print. As a result, these contracts turn out to be a case of big business enterprises legislating in a substantially authoritarian manner as they contain many wide exclusions and exemption clauses favourable to themselves.

The law Commission discussed the true nature and the origin of standard form contracts and observed that these standardized contracts are really pretended contracts and have only name of contract. These contracts are produced by the printing press and the pen of the individual signing the dotted lines does not really represent his substantial agreement with the terms in it, but creates a fiction that he has agreed to such terms and the characteristics, usually and traditionally associated with a contract, such as freedom to contract and consensus, are absent from these so called contracts.

The Law Commission in Chapter 2 of the Report observed that large business concerns get expert advice and introduce terms in the printed forms, which are most favourable to themselves. They contain many wide exclusion and exemption clauses favourable to the large enterprise. The Commission discussed the problem arising from such
contracts in standard form and the possibility of its misuse, and said the clauses are introduced, not always with the idea of imposing harsh terms as a result of superior bargaining power.

The Law Commission further tried to explain the problem by way of citing some decided cases of different High Courts relating to carriers. The Commission cited the case of *Indian Airlines Corporation V. Jothaji Maniram*¹ in which the Madras High Court observed that a common carrier is a person who professes himself ready to carry goods for everybody. He is considered to be in position of an insurer with regard to the goods entrusted to him and so his liability his higher but when it is expressly stipulated between the parties that a carrier is not a common carrier that conclusively shows that the carrier is not liable as a common carrier and even assuming that the carrier would be deemed to be a common carrier or held liable as such, it was open to such a carrier to contract himself out of the liability as common carrier or fix the limit of liability.

The law Commission also cited the case of *Rukmanand V. Airway (India) Ltd.*² in which the Assam High Court held that the liability of the internal carrier by air, which is not governed by the Indian Carriage by Air Act, 1934, or by the Carriers Act, 1865, is governed by the English Common Law and not by the Indian Contract Act, 1872. Under the English Common Law, the carrier’s liability is not that of a bailee only but that of an insurer of goods, so that the carrier is bound to account for loss or damage caused to the goods delivered to it for carriage, provided the loss or damage was not due to an act of God or King’s enemies or to some inherent vice in the thing itself. The Common Law, however, allows the carrier almost an equal freedom to limit its liability by any contract or the conditions under which the carrier accepted delivery of the
gods for carriage. The terms could be far reaching and indeed the party could claim exemption even if the loss was caused on account of negligence or misconduct of its servants or even if the loss or damage was caused by any other circumstances whatsoever, in consideration of a higher or lower amount of freight charged. The Law Commission observed that, howsoever amazing a contract of this kind may appear to be yet that seems to be the state of law as recognized by the Common Law of England and adopted by Courts in India. The clause in a contract of carriage by air giving complete immunity to the carrier from liability could not be impugned on the ground that it was hit by section 23 of the Indian Contract Act, 1872 because according to the High Court the Indian Contract Act had no application to the case nor could it be said to be opposed to public policy.

The Law Commission also cited the case of Indian Airlines Corporation V. Madhuri Chaudhury in which the Calcutta High Court dealt a case of a passenger travelling by air inside India. The plane crashed causing death of the passenger and his widow sued for damages. The air ticket exempted the carrier from liability on account negligence of the carrier or of the pilot or of other staff. There was evidence that the conditions exempting the carrier were duly brought to the notice of the passenger and that he had every opportunity to know them. It was held by the Calcutta High Court that the obligation imposed by law on common carriers in India is not founded upon contract, but on the exercise of public employment for reward. The liability of common carriers in India is not affected by the Contract Act, 1872. Therefore, no question of testing the validity of this exemption clause with reference to section 23 of the Contract Act would at all arise. The Contract Act does not profess to be a complete code dealing with the law relating to contracts. An
exemption clause of this kind was not hit by any section of the Contract Act, be it section 23 or any other section, because the Contract Act itself had no application. No Act applies to internal carriage by air. The Warsaw Convention did not apply, nor was there any Statute which prevented or limited the scope or content of such an exemption clause. Both in respect of Contract Act and tort the present exemption clause set out was good and valid and it legally excluded all liability for negligence. It could not be held bad under Section 23 of the Contract Act, 1872.

The Commission again cited a case of *Singhal Transport V. Jasaram* in which the Rajasthan High Court held that whenever on the face of the goods, ticket, words to the effect “For conditions see back” are printed, the person concerned as a matter of law, held to be bound buy the conditions subject to which the ticket is issued, whether he takes care to read the conditions if printed on the back or to ascertain them if it is stated on the back of the ticket where they are to be found. Where on the other hand, the words printed on the face of the ticket do not indicate that the ticket is issued subject to certain conditions but there are merely words to the effect “see back” then it is a question of fact whether or not the carrier did that, which was reasonably sufficient to give notice of the conditions to the person concerned. From the Law Commission’s point of view the crucial question was that assuming that the individual person knew the conditions, if he wanted to change them could he negotiate and do so? If he cannot get the conditions changed or cannot negotiate in that condition how the Courts can come to his rescue?

The Law Commission in chapter third of the Report cited the view of Shankaran Nair J of Madras High Court where the learned Judge in his dissenting judgment as early as 1909 expressed the opinion that section
23 of the Indian Contract Act hits such exemption clauses, but this view has been rejected by the High Courts in later decisions.

The Law Commission also cited some cases in which the Courts valiantly tried to come to rescue the weaker party. In the case of Maddala. Thathaih V. Union of India\textsuperscript{6} the Madras High Court held that a clause in a contract for the supply of jaggery by the appellant to the Railway administration of the respondent, which empowered the administration to cancel the contract at any stage was void and unconscionable. This judgment of the Madras High Court was confirmed by the Supreme Court but on a different ground. The Supreme Court did not pronounce on the validity of the clause in the contract. The Commission also cited another case of Lily White V. Munuswamy\textsuperscript{7} in which the Madras High Court came across the matter of the laundry receipt of the appellant which contained the condition that in the event of loss or damage to the article given for washing, the customer would be entitled to claim only 50 per cent of the market price or the value of the article. The respondent’s new saree was lost. The Court gave relief to the customer, holding that the condition would place a premium upon dishonesty inasmuch as it would enable the cleaner to purchase new garments at 50 per cent of the price and that would be not in public interest.

The Commission was of the view that the Indian Contract Act, 1872 in which position it is today is not adequate to meet the situation created by the frequent use of standard form contract in which there are exclusion and exemption clauses. The Commission said that the entire basis of a contract, that it was freely and voluntarily entered into by the parties with equal bargaining power, completely falls to the ground when it is practically impossible for one of the parties not to accept offered terms. In order to render freedom of contract a reality and particularly of
one whose bargaining power is less than that of the other party to the contract, various measures like labour legislation, money-lending laws and rent Acts have been enacted, but there is no general provision in the Contract Act itself under which Courts can give relief to the weaker party. The existing sections in the Contract Act in the opinion of the Commission seem to be incapable of meeting the mischief.

The Law Commission analysed Section 16, 23, 28 and 74 of the Indian Contract Act, 1872 and was of the view that the net result is that the Indian Contract Act, as it stands today, cannot come to the protection of the 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 proper yardstick in the form of a specific provision of statute law or known legal principle of law only produce uncertainty and ambiguity.

The Law Commission in Chapter 4 of the Report considered the experience in other countries especially in United Kingdom and the United States of America. The Commission referred the observation of Denning L.J. in John Lee Son V. Railway Executive where the learned Judge said that, “there is the vigilance of the Common Law which while allowing freedom of contract watches to see that it is not abused.”

Various principles based upon the fundamental concept enunciated by Denning L.J. have been utilized. The Commission cited the principles developed by the Common Law as:

a. that there should be reasonable notice to the other party of the conditions;

b. that the notice should be contemporaneous with the contract;

c. that there should be no fundamental breach of contract;
d. that the contract would be strictly construed as against the bigger organization and in favour of the weaker party; and

e. that the terms of a contract should not be unreasonable on the face of it.

The Commission said that the Courts at Common Law resorted to what are known as “contra proferentem rule” and the important stratagem of the doctrine of fundamental breach which was propounded by Denning L.J. in *Karsales V. Wallis* where the learned Judge stated that, “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 contract.”

The Commission said this view has received a severe blow in the House of Lords in Suisse Atlantique’s case when Lord Reid observed that there is no indication that the Courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer … it appears to me that its solution should be left to Parliament.” Lord Wilberforce also said that if fundamental or total breach means a departure from the contract, the question will arise how great a departure and if it means supply of a different thing, the question will be how different.

The Law Commission also discussed some relevant provisions of the Unfair Contract Terms Act, 1977 of the U.K. The Commission considered that how the problem was dealt in the U.S.A. The
Commission cited section 575 of the Restatement of Law of Contract in the United States which provides:

"Section 575 – 1. A bargain for exemption from liability for the consequences of a willful breach of duty is illegal and a bargain for exemption from liability or the consequences of negligence is illegal if:

a. the parties are employer and employee and the bargain relates to negligent injury of the employee in the course of employment, or

b. one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.

2. A bargain by a common carrier or the other person charged with a duty of public service limiting to a reasonable agreed valuation of the amount of damages recoverable for injury to property by a non-willful breach of duty is lawful.

The Commission also considered and cited section 2.302 of Uniform Commercial Code of the United States of America which provides:

"Section 2.302 –

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

The Law Commission recommended the addition of a new Chapter IV-A with a single section into the Indian Contract Act, 1872. Before making the recommendations, the Commission had invited public comments on its proposal to insert a new section 67-A into the Indian Contract Act, 1872. The Commission received replies from the Registrars of High Courts, Judges of High Courts and the legal Remembrancer and Secretary Law Departments of State Governments. The Registrar of Bombay High Court (Appellate side), the Legal Remembrancer and Secretary, Government of Haryana and the Law Department, Government of Orissa have agreed with the proposal. One Judge of a High Court has stated that the word “unconscionable” has acquired a definite meaning in the law of Contracts. The Law and Judiciary Department, Government of Maharashtra has, while agreeing with the proposal, suggested a more elaborate provision on the lines of the English law.

The Commission took the note of the suggestions and was thankful for the response. However, the Commission felt it is better to go step by step and so had not thought of an elaborate enactment on the lines of English law in that Report. The Commission’s view was that the only step that could be taken in our country to remedy the evils of unfair terms in standard form of contracts was to enact a provision into the Indian Contract Act, 1872 which would combine the advantages of English Law of Unfair Contract Terms Act, 1977 and Section 2.302 of Uniform
Commercial Code of U.S.A. The Commission did not think it appropriate and proper to enact a separate law as in U.K.

Recommendation of the Commission:

The Law Commission recommended the amendment of the Indian Contract Act, 1872 by inserting the following new Chapter having a single section. That Section reads as follows;

"Chapter IV A

Section 67A:(1) where the Court, on the terms of the contract or on the evidence adduced by the parties, comes to the conclusion that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that it holds to be unconscionable.

(2) Without prejudice to the generality of the provisions of this section, a contract or part of it is deemed to be unconscionable if it exempts any party thereto from

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

Thus the Law Commission in its 103rd Report of 1984 opined 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 contracts. It was stated that Indian Contract Act, 1872 as it stands today cannot come to the protection of a consumer who is dealing with big business. 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 statute law or known legal principle of law only produce uncertainty and ambiguity. This subject of unfair terms in standard form contracts, in view of its importance was taken up by the
Commission on its own. It recommended, after a study of the problem, the enactment of a provision in the Indian Contract Act, 1872 combining the advantages of the English law and the law of the U.S.A. on the subject.

B. One Hundred and Ninety Ninth Report:

The subject of “Unfair Terms in Contract” has attained grave importance in recent times not only in relation to consumer contracts but also in regard to the other contracts. In 1984 the Law Commission of India in its 103rd Report on “Unfair Terms in Contract” submitted to the Ministry of Law and Justice, suggested that a single section 67A be inserted after the amendment in the Indian Contract Act, 1872 with two sub-sections invalidating exclusion of liability for negligence and for breach of contract. That section 67A, however, did not contain any general provision to deal with unfairness.

The Law Commission noted that there have been significant developments since 1984. Detailed Statutes have been enacted or proposed and there are voluminous Reports of Law Commissions such as the Report of the Law Commission of England and Scotland (2004), the Report of the South African Law Commission, 1998, the interim Report of the British Columbia Law Institute, 2005, the Discussion Paper of the Standing Committee of Officers of Consumer Affairs, Victoria (Australia), 2004, Report of the New Zealand Law Commission, 1990 and Ontario Law Reform Commission, 1987 etc.

In view of these developments in other countries, the Law Commission of India has taken up a detailed study of the subject suo motu. The Law Commission has referred to the Statutes and Law Commission Reports of various countries in relation to unfair terms and
prepared its 199th Report and a draft of the proposed Bill annexed to the Report and submitted it to the Ministry of Law and Justice Government of India 31st August 2006. In the 199th Report and the proposed Bill the Law Commission has defined “procedural unfairness” and “substantive unfairness” separately and have also provided separate guidelines for each of them.

The Law Commission observed that the subject of “Unfair (Procedural and Substantive) Terms of Contract” has assumed great importance currently in the context of tremendous expansion in trade, business and consumer rights. In the last two decades, several countries have gone in for new laws on the subject in order to protect consumers and even smaller businessmen from bigger commercial entities. Several Law Commissions across the world have taken up the subject for study and recommended new legislations. The Law Commission of India in its 103rd Report (1984) on “Unfair Terms in Contract”, had dealt with the subject and proposed insertion of section 67A into the Indian Contract Act, 1872. In as much as new concepts have been built into the subject in the last two decades, the Law Commission of India has taken up the subject afresh for further study in its 199th Report which was submitted to the Government of India in 2006.

The main highlight of this Report is the consideration of Unfair Terms of Contract by separating the “procedural unfairness” and the “substantive unfairness” in the matter of contracts or their terms. In the statutes in force or Bills prepared by other Law Commissions, while it is recognized that contracts or their terms may be unfair either on account of “procedural unfairness” or on account of “substantive unfairness”, the discussion as well as the provisions of the Statutes/Bills does not treat these aspects separately. In fact, in some countries, while the distinction
is realized, there is no consideration of the concepts separately and in the opinion of the Law Commission of India, the result is that several sections combine “procedural unfairness” and “substantive unfairness.” In this 199th Report the Law Commission tried to segregate the procedural and substantive unfair provisions of other countries in separate chapters. The Law Commission also kept the concepts separately in the proposed Bill annexed to this Report.

**Procedural Unfairness:**

In the opinion of the Law Commission “procedural unfairness” is found where there is unfairness in the manner in which the terms of the contract are arrived at or are actually entered into by the parties, or in the circumstances relating to the events immediately before the entering into the contract, or in the conduct of the parties, their relative position, or literary knowledge, or whether one party had imposed standard terms on the other hand or whether the terms were not negotiated. These and other circumstances relate to procedural unfairness.

**Substantive Unfairness:**

Substantive unfairness, in the opinion of the Law Commission is found where a term by itself may be either one-sided, harsh or oppressive or unconscionable and therefore unfair. One party may have excluded liability for negligence or for breach of contract or might have imposed terms on the other which are strictly not necessary or might have given to himself power to vary the terms of the contract unilaterally etc. Such terms could be unfair by themselves.

The Law Commission observed that the Indian Contract Act, 1872 has several provisions relating to voidable contracts. These provisions deal with undue influence, coercion, fraud, mistake and misrepresentation
etc. These provisions are indeed "procedural" provisions already contained in the Act. Likewise, the Contract Act deals with "void" contracts or "void" terms. These are "substantive" provisions already contained in the Act. Similarly, the Specific Relief Act, 1963 contains provisions for granting relief where there is procedural or substantive unfairness.

The Law Commission in its 199th Report of 2006 and the Bill annexed to this Report proposed to provide additional provisions of "procedural unfairness" and "substantive unfairness and remedies for removing such types of unfairness. These new remedies can be granted by the civil Courts, arbitral tribunals and the consumer fora under the Consumer Protection Act, 1986.

The Law Commission of India referred the Joint Report of British and Scottish Law Commissions (2004) where it was stated that both "substantive unfairness" (the substance and effect of the term) and "procedural unfairness" (the circumstances existing at that time) must be taken into account. The Law Commission of India also referred that Goldring and others have complained that the Australian Unfair Terms Statutes have failed to distinguish between procedural and substantive unconscionability. The Discussion Paper, 2004 from Victorian (Australia) refers to the above statutes and stated that "the current regimes in Australia have created some confusion in practice because of their failure to distinguish between procedural and substantive unfairness.

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

The Law Commission stated that in the light of above criticism in several countries it has felt that it is necessary.

(1) to segregate the existing provisions of the Indian Contract Act, 1872 and the provisions of the Specific Relief Act, 1963 in so far as they relate to voidable contracts and void contracts, respectively into "procedural provisions" and "substantive provisions", and

(2) to add to these

(a) a specific definition of "procedural unfairness" and provide specific guidelines for judging if there is procedural unfairness, and

(b) a specific definition of "substantive unfairness" and provide specific guidelines for judging if there is substantive unfairness.

(3) to list remedies which can be granted to relieve parties from procedural and substantive unfairness.

In Chapter two of this Report the Law Commission considered the present state of law regarding unfair and unconscionable terms in India and said that at present, contracts could be declared void or voidable in a Court of law if it falls under one or other of the provisions of the Indian Contract Act, 1872 which make such terms void or voidable. There is, as of today, no general statutory provision in the Indian Contract, 1872, or the Sale of Goods Act, 1930 whereby the Courts can give relief to the
The Law Commission considered and analysed some sections of the Indian Contract Act, 1872 such as Sections 16, 23, 27 and 28. It was observed by the Commission that one of the relevant provisions 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 contained in section 16 dealing with "undue influence." The situation is a mix up of procedural and substantive unfairness. The Commission said that Section 16(3) of the Contract Act, 1872 refers to the aspect of burden of proof in "unconscionable transactions" induced by undue influence. It deals with unconscionability which is an aspect of "substantive" unfairness but links it up with "procedural" unfairness of domination of will. It must be noted that Section 16(3) does not enable the Court, to strike down the unconscionable terms, but only enables raising a presumption.

The Law Commission then discussed illegality and public policy under Section 23 of the Indian Contract Act, 1872. The Commission said this section deals with "substantive" matters which invalidable a contract but does not refer to "unconscionability" specifically. The section does not speak of "unconscionability" as one of the grounds. In each of these cases, the consideration or object of an agreement is said to be unlawful provided in Section 23 of the Contract Act, 1872. Every agreement of which the object or consideration is unlawful is void. This Section provides that the consideration or object of an agreement is lawful, unless it is forbidden by law or unless they are such a nature that if permitted would defeat the provision of any law; or are fraudulent or imply, injury to the person or property of another, or the Court regard it
as immoral or opposed to public policy. The last clause in the section 23 thus declares that no man can lawfully do that which is opposed to public policy. It comprehends the protection and promotion of public welfare. It is a principle of law under which freedom of contract or private dealings are restricted by the law for the good of the community.

The Commission said that Indian Contract Act, 1872 does not define the expression “public policy” or what is meant by being “opposed to public policy”. From the very nature of things the expression “public policy”, “opposed to public policy” or “contrary to public policy” are incapable of precise definition.

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

The Law Commission cited the case of Gherulal V. Mahadeo Das (AIR 1959 S.C. 781). The Commission said that orthodox view on public policy in India was explained nearly fifty years ago by Subba Rao J (as he then was). In this case the Supreme Court cautioned against expansion of grounds in practice though in theory, they could be expanded. The Supreme Court had observed that, “Public policy or the policy of law is an elusive concept. It has been described as an “untrustworthy guide,” “variable quality,” “unruly horse” etc., the primary duty of the Court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society; but in certain cases the Court may relieve them of their duty on a rule founded on what is called the public policy.... Though it is permissible for the Courts to expand public policy and apply them to different situations, it should be invoked in clear and incontestable cases of harm to the public; though the
heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of changing world, it is advisable in the interest of stability of society not to make any attempt to discover new head in these days.

The Commission further observed that, however, a more flexible and liberal approach was advocated by the Apex Court in the case of Central Inland Water Transport (AIR 1986 SC. 1571) where the Court observed that, "public policy is not the policy of a particular Government, it connotes some matter which concerns the public good and public interest. The concept of what is for the public good or in the public interest or what would be injurious or lawful to the public good or the public interest has varied from time to time.

The Law Commission in its 103\textsuperscript{rd} Report (1984) had considered the question, whether there was a possibility of striking down an "unconscionable bargain" by resorting to "public policy" under section 23 of the Indian Contract Act, 1872. The Commission was, however, of the view that Section 23 was not of help in meeting the situation. It also observed that Courts have held (as he law in 1984 was) that the heads of public policy cannot be extended to a new ground in general, with certain exceptions, and that the terms of a contract exempting one party from all liability was not opposed to public policy.

The Law Commission in its 199\textsuperscript{th} Report (2006) also analysed Section 27 of the Indian Contract Act, 1872 and said that Section 27 concerns a special category of contracts which the law treats as void, namely, an agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind and is to that extent, the agreement is void. However, in India (unlike 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. The Commission observed that an agreement which unnecessarily curtails the freedom of a person to carry on a trade is against public policy. Restraining a person from carrying on a trade generally aims at avoiding competition and has a monopolistic tendency and this is both against an individual’s interest as well as the interest of the society and thus such restraints are discouraged by law. The agreement is void whether it imposes total restraint or partial restraint. However, in U.K., all agreements in restraints of trade are void unless there is some justification for the restraint which could make it reasonable. If the restraint was reasonable in the interest of the contracting parties and also in the interest of the public, the agreement would be valid. The Indian law however, is stricter. The agreement would be valid if it fell within any of the statutory or judicially created exceptions. An agreement which is not covered by any one of the recognized exceptions would be void.

The Commission also cited the case of Gujarat Bottling Ltd. V. Coca Cola (1995) 5 SCC 545, where the Hon’ble Supreme Court of India 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, 1872. The Courts have only to consider the question whether the “Contract” itself is or is not of restraint of trade.
The Commission also analysed the Section 28 of the Indian Contract Act, 1872 and discussed the ouster of jurisdiction of Courts to adjudicate. It said that Section 28 of the Contract Act states that the agreements absolutely in restraint of legal proceedings is void. Section 28 will come into play when the restriction imposed upon the right to sue is "absolute" in the sense that the parties are wholly precluded from pursuing their legal remedies in the ordinary tribunals.

The Commission cited the case of Hakam Singh V. Gammon (India) Ltd. (AIR 1971 S.C. 740) and said that a partial restriction will be valid as observed by the Apex Court. In this case a clause in the agreement between the parties provided that "the Court of law in the city of Bombay alone shall have jurisdiction to the adjudicate thereupon." The plaintiff filed a suit at Varanasi (U.P.) but the same was dismissed in view of the above stated agreement. The Court held that the agreement was not opposed to public policy and it did not contravene section 28 of the Indian Contract Act, 1872 and therefore the suit filed at Varanasi was rightly dismissed.

The Commission observed that under section 28 of the Indian Contract Act, 1872, the citizen has the right to have his legal position determined by the ordinary tribunals, except in the case of contacts to refer to arbitration disputes which may arise or which have already arisen. Section 28 affirms the Common Law and its provisions appear to embody a general rule recognized in the English Courts which prohibits all agreements purporting to oust jurisdiction of the Courts. Section 28 was amended by Indian Contract (Amendment) Act 1996 which came into effect in 1997. The amendment gave effect to suggestions made in the 97th Report of the Law Commission of India on "Section 28, Indian Contract Act: Prescriptive Clauses in Contract (1984)."
The Commission said that the Supreme Court laid down that it is not open to the parties by agreement to confer jurisdiction on a Court which it does not possess under the code. But where two Courts or more have jurisdiction under the Code of Civil Procedure to try a suit or proceedings, an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such agreement does not contravene Section 28 of the Indian Contract Act, 1872.

The Law Commission also analysed Sale of Goods Act, 1930 and observed that this Act creates a large number of rights duties and liabilities. These include the warranties and guarantees implied by the law, i.e. the Sale of Goods Act. But Section 62 of that Act permits exclusion of these rights, duties or liabilities by express clause or on account of the course of dealings between the parties, or by usage, if the usage is such as to bind both parties to the contract. The Law Commission said “in our view, it becomes necessary to examine Section 62 of the Sale of Goods Act, 1930 and consider whether, in the present context of substantive unfairness, such exclusion should be deemed to be unfair.”

The Law Commission discussed about the judicial review of contracts entered by an authority which is a “State” within the meaning of Article 12 of the Constitution of India and the application of Article 14 of the Constitution. The Commission observed that apart from sections 16, 23, 27 and 28 of the Indian Contract Act, 1872 the High Courts and the Apex Court have invoked Article 14 of the Constitution of India to strike down certain unreasonable terms of contract entered into by the Government or Public Sector Undertakings or Statutory bodies which fall within the meaning of the word a “State” in Article 12 of the Constitution.
of India. The Courts exercised the power of judicial review under Articles 226 and 32 of the Constitution of India. The Courts have confined the exercise of such power to strike down clauses in public service employment contracts. However, the Courts have declared that they would not extend this principle to strike down clauses in commercial contracts.

The Law Commission observed that it has to be noted that the above stated method of invoking Article 14 of the Constitution of India in the last two decades by the Supreme Court was not available when the 103rd Law Commission Report was submitted in 1984. The question naturally arises as to why a similar wider beneficial statutory provision should not be treated as necessary to protect parties those who enter into commercial contracts with “non-state” entities though Article 14 is not applicable. The Commission pointed out that, however, there are certain legislation apart from the Indian Contract Act, 1872, which prevent one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are the Usurious Loans Act, 1918, Industrial Disputes Act, 1947, the Consumer (Protection) Act, 1986, the Competition Act, 2002 and the Specific Relief Act, 1963 but these Acts deals with specific situation or special types of contracts whereas, in this Report the Commission pointed out that it has considered the need for general provisions covering all types of contracts relating to unfairness.

The Law Commission then analysed and considered the above Acts in detail and it was of the view that the provisions of the Indian Contract Act, 1872 and other existing laws, which the Commission considered in detail, are not sufficient to meet the problems of today. The Law Commission was in agreement with its earlier 103rd Report (1984) where it was observed that the provision of the Indian Contract Act, 1872 and
other laws are not sufficient to meet the problems of today. In this 199\textsuperscript{th} Report it further said, "not only that, we feel further that we have to introduce more provisions than were contemplated in the 103\textsuperscript{rd} Report (1984).

The Law Commission in Chapter III of the 199\textsuperscript{th} Report considered the use and misuse of the standard form contracts and their nature. It observed that, 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 not confined only to contracts in commercial transactions, but contracts with public authorities multinationals corporations or in banking business etc. The Commission observed that there are also dangers inherent in standard form contracts. The parties to the contract are not on equal terms and the one party to the contract signs on the dotted line having no opportunity to negotiate over the terms and is also unfamiliar with the terms or language employed by the other party to the contract and also freedom of contract and \textit{consensus ad idem} are significantly absent in these standard form contracts.

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

The Commission further said that apart from contracts in standard form, there may be individual contracts of an ad hoc nature, entered into between individual parties, which are not like multi-national companies or big commercial houses within India where one-sided or unreasonable conditions may be imposed in situations where the bargaining power is unequal. Even in such cases, some power must be given to the Courts to remedy the situation. Therefore, the 'unfairness', if any, in such standard form contracts falls for consideration.

The Law Commission in Chapter IV of its 199th Report analysed and considered the judicial pronouncements in India on unfair terms. It observed that the Courts in India has, in several cases come to the rescue of the parties but in majority of cases arising out of inequality of bargaining the weaker party enters into contracts which are not on equal terms, the Courts may not be able to help because all such cases do not fall within the four corners of sections 16, 23 or 27 of the Indian Contract Act, 1872.
The Commission analysed the decision of the Supreme Court in Central Inland Water Transport’s case (AIR 1986 SC 1571) and said that the unfairness of contractual terms by “authorities” which fall within the meaning of the word “State” in Article 12 of the Constitution of India figured in several service matters before the Supreme Court. The irrationality or arbitrariness of clauses in such contracts was considered in the context of Article 14. The Apex Court for the first time in 1986 made an attempt in this case to broaden the applicability of unconscionability outside the boundaries laid down by Section 16 of the Indian Contract Act, 1872. The Court emphasized on the requirement of “reasonableness” in the terms of the contract by discussing three principles namely – “unconscionability,” “distributive justice and unreasonableness” and “inequality of bargaining power” and considered the issue under three headings. In this case Justice Madon considered the development of law and held that an instrumentality of the state cannot impose unconstitutional conditions in service rules vis-à-vis its employer to terminate the services of a permanent employee without reasons merely on a three months notice and found the clause to be unconscionable, unfair, unreasonable and against public policy and public interest and thus violative of Article 14 of the Constitution of India.

The Law Commission referred the decision of the Supreme Court in the case of Uptron India Ltd. v. Shammi Bhan (AIR 1998 SC 1681) where it was said that is now well settled that the services of a permanent employee whether employed by the Government or Government Company or Government Instrumentality or Statutory Corporation or any other Authority within the meaning of Article 12 of the Constitution of India cannot be terminated abruptly and arbitrarily either by giving him a month or three month’s notice or pay in lieu thereof or even without
notice, notwithstanding, that there may be a stipulation to that effect either in the contract of service or in the certified standing orders.

The Law Commission also cited the decisions in the cases of Delhi Transport Corporation (AIR 1991 SC 101), West Bengal State Electricity Board V. Desh Bandhu Ghosh (1985(3) SCC 116), L.I.C. of India V. Consumer Education and Research Centre (1995(5) SCC 482) and Pawan Alloys Pvt. Ltd. V. U.P.S.E.B. (AIR 1997 SC 3910), and concluded, “it will be seen that the Apex Court either applied Article 14 of the Constitution of India in cases where unreasonable term were imposed by any entity which was a “State” within the meaning of Article 12 or applied Section 23 of the Indian Contract Act, 1872. The only substantive development was that the Court was not confined to existing heads of public policy. Though in certain cases it was observed that Article 14 could not be applied to commercial contracts entered by entities which were a “State” within the meaning of Article 12 of the Constitution of India, in some cases Section 23 was invoked against such entities to grant relief. The various decisions rendered by the Court would reveal that the above procedures were adopted because the Court was otherwise handicapped in giving relief because of the absence of a general power given by a Statute to strike down “unreasonable clauses.”

The Law Commission in Chapter V of its 199th Report took a comparative study of the laws, on unfair terms in Contract, of a few countries including U.K., U.S.A. and Australia. The Commission observed that the law relating to unfairness, arising from inequality of bargaining power was developed around the globe, as a separate ground on which contracts can be set aside. Classical legal theory viewed standard form contracts no differently than individually negotiated contracts, and enforced them according to their terms, no matter how
harsh or unjust the term were. Under the classical theory, Courts created a conclusive presumption that the signing party understood the terms. This result was based on the “duty to read” doctrine, which was also developed out of the paradigm of individually negotiated contracts. However, legal scholars and Courts recognized the fundamental differences between standard form contracts and the classical models of individually negotiated contracts. The Commission cited the observation of Professor Karl Llewellyn (Book Review, 52 Harvard Law Review 700, 704 (1939) where the learned author noted the importance of protecting the weaker party’s reasonable expectations when interpreting standard form contracts.

The Law Commission then discussed the unconscionability and equity jurisdiction of the Courts in the United Kingdom. The Commission observed that there is long established jurisdiction to set aside harsh and unconscionable bargains. Courts of equity, in the eighteenth century often set aside express contractual provisions on grounds of unconscionability. However, nearly all these cases fell into certain special classes, that is mortgages and bonds and the sale of mortgage of revisionary interest. The equity jurisdiction was used to be unduly exercised to reopen all bargains. The equity jurisdiction was invoked to setting aside grossly unfair contracts entered into by poor and ignorant persons. Towards the end of nineteenth century, the equitable jurisdiction fell into disuse partly because conditions changed and partly because the Moneylenders Act of 1900. The Law Commission discussed the unconscionability at Common Law in the United Kingdom and also cited the cases of Lloyds Bank Ltd. V. Bundy (1974 3 All ER 757, A Schroeder Music Publishing Co. Ltd. V. Macaulay (1974 3 All ER 616), and Levison V. Patent Steam Carpet cleaning Co. Ltd. (1977 3 All ER 490). The Law Commission analysed
the legislations of the United Kingdom. The Commission discussed the basic features of Unfair Contract Terms Act, 1977 (UCTA) and the basic features of Unfair Terms in Consumer Contracts Regulations, 1999 (UTCCR). The Commission also discussed the joint Report of the Law Commission and the Scottish Law Commission (2004) on unfair terms in contract where the Law Commission took up the task to consider as how to replace these above two legislation i.e. UCTA, 1977 and UTCCR, 1999 with a single unified Act that will set out the law on unfair contract terms in clear and accessible way. The Commission set out recommendations for a unified to apply to consumer contracts, for business contracts in general, and extending the wider controls of the Unfair Terms in Consumer Contracts Regulations to Contracts with small business.

The Law Commission in its 199th Report also discussed unfairness in regard to specific performance of contract terms at Common Law, in chapter VI. The Law Commission said that under Common Law, if a term is unfair, the Court may exercise discretion not to enforce the terms or the contract but the Court cannot declare the terms or contract as void. Under Common Law “fairness” was always a necessary condition for specific performance of contracts. The Commission cited the observation of Lord Hardwicke in the case of Buston V. Lista (3 Atk 386) where the learned Judge said that, “Nothing is more established in this Court than that every agreement of this kind ought to be certain, fair and just in all its parts. If any of those ingredients are wanting in the case, this Court will not decree specific performance.”

The Law Commission referred the celebrated commentary of Fry on “Specific Performance” (6th Ed. 1921) (Indian Reprint 1997) which deals exclusive (para 387) with want of Fairness in the contract in
Chapter V. The learned author says that there are many instances in which, “though there is nothing that actually amounts to fraud, there is nevertheless a want of that equality and fairness in the contract which, as we have seen, are essential in order that the Court may exercise its extraordinary jurisdiction in specific performance.

In Chapter VII of the 199th Report the Law Commission considered the need to have procedural and substantive divide. The Commission said that several authors have criticized existing statutes as not having met the challenge of dealing with “procedural unfairness” and “substantive unfairness” separately and in not defining these words nor in providing separate guidelines for judging each of them. Most statutes do refer in the same sections to substantive and unfairness aspect of the contract, though there is no independent treatment. Courts are, therefore, unable to focus upon these issues in depth or lay down clear-cut principles. In this VII Chapter the Law Commission dealt with the criticism in regard to the absence of separate statutory focus on these two concepts.

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

The Law Commission in Chapter VIII of its 199th Report had a closer focus on the procedural unfairness in various countries, though they have not been expressly segregated in any particular statute. The Commission referred Unfair Contract Terms Act, 1977 of U.K. and observed that this Act came forward with a test of “reasonableness” in Section 11. Section 11(1) stated that the term must be “fair and reasonable” having regard to the circumstances which were or ought reasonably to have been, known to or in contemplation of the parties when the contract was made. This related obviously to “procedural” unfairness. The Commission further said that Schedule 2 of the UCTA, 1977 also contain provisions which deal partly with procedural and partly with substantive unfairness though they are mixed up. Those that refer to “procedural” unfairness are clauses (a), (b) and (c). Clause (a) refers to the strength of the bargaining position, clause (b) as to whether the customer received inducement to agree to a term, and clause (c) to whether the customer knew or ought to have known of the existence of the term.

The Commission also analysed the Unfair Terms Consumer Contracts Regulations 1999 (UTCCR) of U.K. and observed that Regulation 5 and 6 deals with procedural unfairness while schedule 2 of the Regulation refers to several guidelines to be considered while judging unfairness but they all deal with substantive unfairness.
The Law Commission cited the new Draft Bill 2004 of U.K. and Scottish Law Commission annexed to the Law Commission Report which deals with several matters concerning procedural unfairness. The Commission said that sub-section (2) to (4) of Section 4 of the Bill required that in respect of “consumer” contracts, the subject matter and the price are unfair if they are not transparent and as reasonably expected by the consumer. These are procedural safeguards. Section 14 of the Bill refers to the “fair and reasonable test” and contains the manner in which both “procedural” and “substantive” aspects of unfairness have to be tested. Section 14(4)(1) refers to procedural aspects. As far as the time at which fairness or reasonableness is to be reckoned, para 3.96 of the Report reiterates that it is the time of the contract that is relevant and one has to take into account the substance and effect of the terms in all the circumstances of the contract.

A. INDIAN CONTRACT ACT, 1872 (Procedural Unfairness):
The Law Commission said that the Indian Contract Act, 1872 refers to several aspects of procedural unfairness. Section 13 requires consent of all the parties to a contract for its formation.

   Section 14 deals with “free consent” and states that a “consent” is free where it is not caused by

1. Coercion, as defined in Section 15, or
2. Undue influence, as defined in Section 16, or
3. Fraud, as defined in Section 17, or
4. Misrepresentation, as defined in Section 18, or
5. Mistake, subject to Section 20, 21 and 22, or
6. Undue influence as defined in Section 19-A.
Section 19 states that contracts vitiated by coercion, fraud or misrepresentation are voidable. In this Section, "undue influence was initially there but was deleted by Section 3 of Act 6 of 1889 and under the same Act of 1889, Section 19A was inserted to say that any contract vitiated by "undue influence" may be set aside either wholly or subject to conditions. Section 20 states that a contract is "void" if both parties are under a mistake as a matter of fact.

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

B. INDIAN CONTRACT ACT, 1872 (Substantive Unfairness): The Law Commission said that there are several provisions of the Indian Contract Act, 1872 which deal with substantive unfairness of the terms of a contract. There are terms which are by themselves unfair.

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

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

The Law Commission also referred to Section 24, 25, 26, 27, 28, 29, 30 and 56 of the Indian Contract Act, 1872 and said that these are the provisions in the Indian Contract Act, 1872 which can be said to deal with substantive unfairness.
C. **SPECIFIC RELIEF ACT, 1963 (Procedural Unfairness):** The Law Commission said that principles of "fairness" are the basis of Section 20 of the Specific Relief Act, 1963 which deals with the "Discretion as to decreeing specific performance." Discretion, says subsection 1 is not to be arbitrary but sound and reasonably guided by judicial principles. Subsection (2) enumerates certain guidelines in which the Court may properly exercise not to decree specific performance. Clauses (a) and (c) of sub-section (2) of section 20 deal with procedural unfairness.

D. **Specific Relief Act, 1963 (Substantive Unfairness):** Law Commission said that there are two provisions in section 20 of the Specific Relief Act, 1963 in part of clause (a) and in clause (b) which relate to substantive unfairness and they are:

Under clause (a) of sub-section (2) of section 20.

(a) where the terms of the contract are such that the contract though not voidable, gives the plaintiff an unfair advantage over the defendant: or under clause (b) of sub-section (2) of section 20

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

The Law Commission observed that provisions of Indian law as to procedural and substantive unfairness are not sufficient and it is, therefore, proposed to deal with certain new provisions regarding unfairness, both procedural and substantive, which require to be incorporated into the statute law, in addition to what are contained in the Contract Act, 1872 and the Specific Relief Act, 1963.
The Law Commission in chapter XI of its 199th Report discussed and justified the need to define “General Procedural Unfairness” and General Substantive Unfairness under the Indian law. It said that no country in its legislation has so far enacted procedural and substantive aspects of unfairness distinctively in its statutes. Several writers have stated that legislations have to focus on these aspects separately than to make a “mish mash” of both in each section.

The Law Commission gave a brief sketch of how it wants to go about such segregation in the proposed Bill. The Commission referred to existing “procedural” provisions of the Indian Contract Act, 1872 and of Specific Relief Act, 1963 to be “listed” in the Bill. The Commission said that there are several sections of the Indian Contract Act, 1872 which deal with “voidable contracts” (procedural unfairness) that are:

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

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

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

The Law Commission deliberately used the word “listed” because it proposed just to highlight the “procedural” or “substantive” nature of the provisions of these two statutes. The Law Commission did not
propose to interfere with them or involve them in the "unfairness" principle. It merely proposed to refer to these as "procedural provisions."

The Law Commission is of the view that the existing provisions of the Indian Contract Act, 1872 and the Specific Relief Act, 1963 are not exhaustive. The Commission said that there can be other situations than those in these Acts where, due to the conduct of the parties or the circumstances under which the terms of the contract are arrived at or the other contract is entered into which may have resulted in some unfair advantage or unfair advantage to one of the parties. The Commission proposed to describe as "general procedural unfairness" in the Bill.

The Law Commission said, "the provisions of the Specific Relief Act, 1963 are again not exhaustive. In fact dealing with section 20 of that Act, the Supreme Court in Sardar Singh V. Krishna Devi, AIR 19095 SC 491, it stated that the circumstances specified in section 20 are only illustrative and not exhaustive. The Court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the Contract Act." It further said if the provision of the Contract Act 1872 are not exhaustive on "procedurally unfairness", it follows that the provisions of the Specific Relief Act, 1963 are equally not exhaustive.

The Law Commission proposed that the law relating to voidable contracts under the Contract Act, 1872 and the Specific Relief Act, 1963 need not be disturbed, it will be necessary and will be permissible to add new provisions for purpose of "general procedural unfairness."

The Law Commission referred to the Black's Law Dictionary, 7th Ed. (1999) where "procedural unconscionability" is defined as under:
"Procedural unconscionability" as unconscionability by resulting from improprieties in contract formation (such as oral misrepresentation or disparities in bargaining position) rather than from the terms of the contract itself. This type of unconscionability suggests that there was no meeting of the minds.

The Law Commission said that existing “substantive” provisions of the Indian Contract Act, 1872 and the Specific Relief Act, 1963 are not exhaustive and several sections of the Contract Act that are substantive in nature and they refer to “void” contracts are sections 10, 20, 23, 24, 25, 26, 27, 28, 29, 30 and 56. These are to be listed in the proposed Bill. The Law Commission proposed, without modifying these provisions, to just “list” them as examples of the class of contracts which are substantive. Likewise, in the Specific Relief Act, 1963, there is again need without disturbing the provisions, to classify certain provisions as relating to the class of contracts which are “substantive” that are contained in Sections 18 and 20 of the Specific Relief Act, 1963.

The Law Commission again referred to Black’s Law Dictionary where the “substantive unconscionability” is defined as:

“Unconscionability resulting from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances.”

The Law Commission proposed to list existing substantive provisions of the two Acts, Indian Contract Act 1872 and Specific Relief Act, 1963 merely as “substantive provisions.” The Commission also proposed to have a new and separate provision—which deals with “general substantive unfairness.” To supplement the same the Commission
proposed another section which will give guidelines which have to be considered for deciding if a contract or term is “substantively unfair.”

The Law Commission proposed to define “general substantive unfairness” (without prejudice to the specific provisions of the Indian Contract Act 1872 and the Specific Relief Act, 1963) in the following words:

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

In the XII and last chapter of its 199th Report (2006) the Law Commission discussed the recommendations for the Draft Bill 2006 on unfair (Procedural and Substantive) Terms in Contract. The Law Commission proposed to bring in new provisions to deal with “procedural” and “substantive” unfairness, and that at the same time the Commission did not want to disturb the existing provisions of the Indian Contract Act, 1872 and the provisions of the Specific Relief Act, 1963. The Law Commission in fact proposed to merely list existing procedural and substantive provisions of these Acts for the purpose of mere classification and did not want to disturb them.

Initially, the Law Commission proposed to give certain general definitions of “procedural unfairness” and “substantive unfairness” but so far as the existing procedural provisions of the Indian Contract Act, 1872, and the Specific Relief Act, 1963 are concerned the Commission did not use the word “unfairness” lest it may be wrongly understood that the existing provisions are subject to new definitions. Instead the Law Commission proposed just to describe the respective provisions as merely
"procedural" and "substantive" and avoided the word "unfairness" while referring to these sections.

In view of the development in other countries the Law Commission of India has taken up a detailed study of the subject *suo motu*. The Commission referred to the Statutes and Law Commission Reports of various countries in relation to unfair terms.

The Law Commission is of the view that the law on unfair terms will not affect foreign investment. It observed that our business and commerce will be put to serious disadvantage if we do not have a law regulating unfair terms of contract.

The Law Commission in its 199th Report (2006) discussed in detail the existing provisions as regards voidable and void contracts under the Indian Contract Act, 1872, as well as non-enforcement of contracts where there is unfairness or hardship, as contained in the Specific Relief Act, 1963. The Law Commission proposed that the provisions of these two statutes need not be disturbed. The Commission proposed, in addition, separate set of general provisions to deal with unfair terms of contracts. It said that in view of the need to protect consumers and particularly to grant protection from the disadvantages of extensive introduction of standard terms of contracts which are one-sided, it has become necessary to evolve general principles regulating unfairness in contracts. It is in this area that there are new legislations in other countries. These new laws on unfairness elsewhere contain several important provisions intended to protect the weaker party against the stronger. Further, those statutes also contain a long list of guidelines to adjudge unfairness.

The Law Commission observed that it has become necessary to provide additional provisions in India for redressal against unfair terms of
contracts, apart from the existing provisions contained in the Indian Contract Act, 1872 and Specific Relief Act, 1963. While a law to deal with unfairness in contracts is necessary, the more important aspect is the division of unfairness into "procedural" and "substantive" unfairness. Such a division has not been done in any country so far, but there are several articles by jurists that such a division is necessary.

General "procedural" unfairness and guidelines thereto:

The Law Commission in Section 5 of the proposed Draft Bill 2006 defined the procedural unfairness as a contract or a term thereof is procedurally unfair if it has resulted in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party or the manner in which or the circumstances under which the contract has been entered into or the term thereof has been arrived at by the parties.

In Section 6 of the Draft Bill 2006 the Law Commission provided separate statutory guidelines to enable the Court to decide on procedural unfairness.

General "substantive" unfairness and guidelines thereto:

Likewise the Law Commission introduced a provision in Section 12 of the Draft Bill 2006, relating to "general substantive unfairness" which says that a contract or a term thereof shall be treated as unfair if the contract or terms thereof are by themselves harsh, oppressive or unconscionable.

Section 13 of the proposed Draft Bill contains guidelines to adjudge substantive unfairness.
In addition to this, the Law Commission referred to three specific situation in sections 9, 10 and 11 of the proposed Bill where "substantive" unfairness has to be presumed.

(i) Section 9 of the Bill corresponds to section 67A as proposed in the 103rd Report of the Law Commission of India (1984) and it invalidates.

(a) exclusion or restriction of liability for negligence; and

(b) exclusion or restriction of liability for breach of contract.

So far as exclusion of liability for breach of contract is concerned, the Commission added the words "without adequate justification" in the light of similar provisions abroad.

(ii) The Law Commission also proposed in Section 10 that exclusion or restriction of the rights, duties or liabilities referred to in section 62 of the sale of Goods Act 1930 shall be deemed to be substantively unfair unless there is adequate justification therefore.

(iii) The Law Commission also proposed section 11 in the Bill and if deals with the unfair practice of incorporating choice of law clauses in contracts needlessly requiring the application of foreign law, despite the fact that the contract has no foreign element at all.

These are three sections 9, 10 and 11 which deal with specific type of "substantive" unfairness in addition to the general provision of substantive unfairness in section 12 of the proposed Bill of 2006.

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

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

Another provision which is similar to the one which is found abroad is no relating to the Court's power to raise an issue of unfairness or a term thereof on its own, even if the parties have not raised such a plea.

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

The Law Commission said that the proposed Bill will not apply to service contracts between employer and workmen under the labour laws in force, nor to public employment under the Central Government or State Governments or their instrumentalities or employment under public sector undertakings of the Central or State Governments, or to employments under Corporations or bodies established by or under any
statutes made by Parliament or State legislatures or to international treaties or agreements.

The Law Commission also listed the existing "procedural" provisions of the Indian Contract Act, 1872 and Specific Relief Act, 1963 which are procedural in nature in sections 3 and 4 and the existing "substantive" provisions of those Acts in sections 7 and 8 of the proposed Draft of the Bill. The Commission did not disturb the existing provision of these Acts.

The Law Commission proposed that the new provisions of the Act will be applicable to Civil Courts, consumer fora under the Consumer Protection Act, 1986 and to the Arbitral Tribunals under the Arbitration and Conciliation Act, 1996. There is also proposal to make the proposed Act to be applicable to contracts entered into after the commencement of the proposed Act. The Law Commission hoped that the proposed Bill which for the first time divides unfair terms into "procedural" and "substantive" terms will meet an urgent need of persons who are parties to contracts in the markets today as well as to other contractual transactions.

The proposed Bill on Unfair (Procedural and Substantive) Terms in Contract, 2006 is annexed herewith as annexure).
C. ANNEXURE

Unfair (Procedural and Substantive) Terms in Contract Bill, 2006

A Bill to declare certain provisions of the laws relating to contracts and specific performance, as procedural and substantive, to further define unfairness in contracts, as procedural and substantive, to determine impact of unfairness on contracts, to provide guidelines for such determination and to enable Courts to grant certain reliefs to relieve parties from the effect of unfairness in contracts.

Be it enacted by Parliament in the Fifty Seventh Year of the Republic of India as follows:-

Chapter I

Preliminary

Short title, extent and commencement

1. (1) This Act may be called the Unfair (Procedural and Substantive) Terms of Contracts Act, 2006.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may [by notification in the Official Gazette] appoint.

Definitions

2. In this Act, unless the context otherwise requires.-

(a) 'contract' means a contract as defined in clause (h) of section 2 of the Indian Contract Act 1872 (9 of 1872) and includes an agreement as defined in clause (e) of section 2 of that Act.

(b) 'Court' means a Civil Court of competent jurisdiction and includes every Consumer Dispute Redressal Agency referred to
in section 9 of the Consumer Protection Act, 1986 (68 of 1986) and an Arbitral Tribunal referred to in clause (d) of sub-section (1) of section 2 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

(c) words and expressions not defined in this Act and defined in the Indian Contract Act, 1872 (9 of 1872) shall have the meanings assigned to them respectively in that Act.

Chapter II

Procedural Provisions and Procedural Unfairness

Procedural provisions of the Indian Contract Act, 1872 (9 of 1872)

3. The following provisions of the Indian Contract Act, 1872 (9 of 1872) are procedural, namely:

(a) Section 15 which deals with coercion,
(b) Sections 16 and 19A which deal with undue influence,
(c) Section 17 which deals with fraud,
(d) Section 18 which deals with misrepresentation,
(e) Section 19 which deals with agreements without free consent.

Procedural provisions of the Specific Relief Act, 1963 (47 of 1963)

4. The following provisions of the Specific Relief Act, 1963 (47 of 1963) are procedural, namely:

(a) clause (a) of sub-section (2) of section 20 in so far as it deals with the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant.
(b) clause (c) of sub-section (2) of section 20 which deals with a defendant who entered into the contract under circumstances
which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

(c) clause (a) of sub-section (1) of section 27 which deals with a contract voidable or terminable by the plaintiff and where any person interested in the contract sues to have it rescinded and such rescission is adjudged.

**General procedural unfairness**

5. Without prejudice to the provisions of sections 3 and 4, a contract or a term thereof is procedurally unfair if it has resulted in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party or the manner in which or circumstances under which the contract has been entered into or the term thereof has been arrived at by the parties.

**Guidelines for purposes of determining general procedural unfairness under section 5**

6. For the purposes of section 5, the Court may take into account the following circumstances, namely:-

   (l) the knowledge and understanding of the promisee in relation to the meaning of the terms thereof or their effect;

   (m) the bargaining strength of the parties to the contract relative to each other;

   (n) reasonable standards of fair dealing or commonly accepted standards of dealing;

   (o) whether, or not, prior to or at the time of entering into the contract, the terms were subject to negotiation or were part of a standard terms contract;
(p) whether or not it was reasonably practicable for the party seeking relief to negotiate for the alteration of the contract or a term thereof or to reject the contract or a term thereof;

(q) whether expressions contained in the contract are in fine print or are difficult to read or understand;

(r) whether or not, even if he or she had the competency to enter into the contract based on his or her capacity and soundness of mind, he or she

(i) was not reasonably able to protect his or her own interests or of those whom he or she represented at the time the contract was entered;

(ii) suffered serious disadvantages in relation to other parties because he or she was unable to appreciate adequately the contract or a term thereof or their implications by reason of age, sickness, physical, mental, educational or linguistic disability, emotional distress or ignorance of business affairs.

(s) whether or not independent legal or other expert advice was obtained by the party seeking relief under this Act;

(t) the extent (if any) to which the provisions of the contract or a term thereof or their legal or practical effect were accurately explained by any person, to the party seeking relief under this Act;

(u) the conduct of the parties to the contract in relation to similar contracts or courses of dealing to which any of them had been party; or

(v) whether a party relied on the skill, care or advice of the other party or a person connected with the other party in entering into the contract.
Chapter III  
Substantive provisions and substantive unfairness  
Substantive provisions of the Indian Contract Act, 1872 (9 of 1872)  
7. The following provisions of the Indian Contract Act, 1872 (9 of 1872) are substantive, namely:-
   (a) Section 10 which deals with agreements which are contracts if made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, not otherwise expressly declared to be void,
   (b) Section 20 which deals with both the parties to an agreement who are under a mistake,
   (c) Sections 23 and 24 which deal with consideration or objects of an agreement which are not unlawful,
   (d) Section 25 which deals with an agreement without consideration,
   (e) Section 26 which deals with an agreement in restraint of marriage of any person, other than a minor,
   (f) Section 27 which deals with an agreement in restraint of trade,
   (g) Section 28 which deals with an agreement in restraint of legal proceedings,
   (h) Section 29 which deals with an agreement which is uncertain,
   (i) Section 30 which deals with an agreement by way of wager, and
   (j) Section 56 which deals with an agreement to do an act impossible in itself  
Substantive provisions of the Specific Relief Act, 1963 (47 of 1963)  
8. The following provisions of the Specific Relief Act, 1963 (47 of
1963) are substantive, namely:

(a) Clause (a) of section 18 where on account of fraud, mistake of fact or misrepresentation, the written contract of which performance is sought, is in terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract,

(b) Clause (a) of subsection (2) of section 20 in so far as it deals with the terms of a contract which gives the plaintiff an unfair advantage over the defendant,

(c) Clause (b) of subsection (2) of section 20 which deals with the performance of a contract which would involve some hardship on the defendant which he had not foreseen, where its non-performance would involve no such hardship on the plaintiff.

Exclusion or restriction of certain liabilities to be substantively unfair

9. A contract or a term thereof shall be deemed to be substantively unfair if it

   (a) excludes or restricts liability for negligence;

   (b) excludes or restricts liability for breach of express or implied terms of a contract without adequate justification therefor.

Exclusion or restriction of rights, duties or liabilities referred to in section 62 of the Sale of Goods Act, 1930 (3 of 1930) to be substantively unfair unless there is adequate justification

10. In contracts to which this Act applies as stated in sub-section (1) of section 18, any exclusion or restriction of the rights, duties or liabilities referred to in section 62 of the Sale of Goods Act, 1930 (3 of 1930) shall be deemed to be substantively unfair unless there is adequate justification
therefore.

**Choice of law clauses**

11. Where a contract contains terms applying or purporting to apply the law of a foreign country despite the contract being in every respect wholly unconnected with the foreign country, such terms shall be deemed to be substantively unfair.

**General substantive unfairness**

12. Without prejudice to the provisions of sections 7 and 8, a contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties.

**Guidelines for purposes of determining general substantive unfairness under sections 9 to 12**

13. For the purposes of sections 9 to 12, the Court may take into account the following circumstances, namely:-

(i) whether or not the contract or a term thereof imposed conditions which are,-

(i) unreasonably difficult to comply with, or

(ii) are not reasonably necessary for the protection of the legitimate interests of any party to the contract;

(j) whether the contract is oral or wholly or partly in writing;

(k) whether the contract is in standard form;

(l) whether the contract or a term thereof is contrary to reasonable standards of fair dealing or commonly accepted standards of dealing;

(m) whether the contract, agreement or a term thereof has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties;
(n) whether the benefits to be received by the disadvantaged party are manifestly disproportionate or inappropriate to his or her circumstances;

(o) whether the disadvantaged party was in a fiduciary relationship with the other party; or

(p) whether the contract or a term thereof

(i) requires manifestly excessive security for the performance of contractual obligations; or

(ii) imposes penalties which are disproportionate to the consequences of a breach of contract; or

(iii) denies or penalises the early repayment of debts; or

(iv) entitles a party to terminate the contract unilaterally without good reason or without paying reasonable compensation; or

(v) entitles a party to modify the terms of a contract unilaterally.

**Burden of proof**

14. If a contract or a term thereof excludes or restricts liability as stated in clause (b) of section 9 or excludes rights, duties and liabilities referred to in section 62 of the Sale of Goods Act, 1930 (3 of 1930) as stated in section 10, it is for the person relying on such exclusion or restriction to prove that it is not without adequate justification.

**Provisions of the Act to apply for executed contracts**

15. The Court may grant relief on the basis of sections 5, 6, 9 to 14 of this Act in relation to a contract notwithstanding that the contract has been wholly or partly executed and for that purpose it may consider whether and to what extent restitution is possible in the facts and circumstances of the case and where such restitution is not, either wholly
or partly possible, whether any compensation is payable.

**Court's power to raise an issue of unfairness of contract or a term thereof**

16. A Court may, in proceedings before it, raise an issue as to whether a contract or its terms are unfair under sections 5, 9 to 12, even if none of the parties has raised the issue in its pleadings.

**Relief that may be granted by Court**

17(1) Without prejudice to the provisions in the Indian Contract Act, 1872 (9 of 1872), Specific Relief Act, 1963 (47 of 1963), Sale of Goods Act (3 of 1930) or to the provisions of any other law for the time being in force, where the Court comes to the conclusion having regard to sections 5, 6, 9 to 14 that a contract or a term thereof is either procedurally or substantively unfair or both, the Court may grant anyone or more of the following reliefs:

- (b) refusing to enforce the contract or the term thereof;
- (b) declaring the contract or the term is unenforceable or void;
- (c) varying the terms of contract so as to remove the unfairness;
- (d) refund of the consideration or price paid;
- (e) compensation or damages:
- (f) permanent injunction:
- (g) mandatory injunction: or
- (h) any other relief which the interests of justice require as a consequence of the non-enforcement of the contract or the term thereof which is unfair provided that where the contract or its term is procedurally unfair as stated in section 5, the person who suffers the disadvantage may, at his option, insist that the contract or term shall be performed, and that he shall be put in the position in which he would have been if the conduct, manner
or circumstances referred to in that section did not permit the disadvantageous term to form part of the contract.

(2) For the purpose of granting the reliefs under subsection (1), the Court may determine if any of the terms of the contract which are unfair are severable and thereafter whether and to what extent and in what manner, the remaining terms of the contract can be enforced or given effect to.

Applicability of the Act and exemptions

18. The provisions of this Act (other than sections 3, 4, 7 and 8)

(1) shall apply to all contracts entered into after the commencement of this Act; and

(2) shall not apply to

(f) contracts and relations between employers and workmen under the labour laws in force;

(g) public employment under the Central Government or a State Government or their instrumentalities or under local authorities;

(h) employment under public sector undertakings of the Central Government or a State Government;

(i) employment under corporations or bodies established by or under statutes made by Parliament or State Legislatures;

(j) contractual terms in respect of which measures are provided in international treaties or agreements with foreign countries to which the Central Government is a signatory.
## REFERENCES

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2. AIR 1860 Assam 71
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4. AIR 1968 Raj. 89
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6. AIR 1957 Mad. 82
7. AIR 1966 Mad. 13
8. (1949) 2 All ER 581
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