
A CRITICAL ANALYSIS OF UNCONSCIONABLE CONTRACTS

Ananya Sharma, School of Law, Narsee Monjee Institute of Management Studies,
Bengaluru

ABSTRACT

In Common Law and Civil Law both, there exist a residual of contracts that do not seem to suffer from any clear formation defect (misrepresentation, fraud, coercion, etc.), but nevertheless do not look right to the outsider. They give the impression of being very disproportionate, and one-sided which raises questions as to their fairness and, as a consequence, their validity. In almost all jurisdictions this residual category falls under the rubric of “unconscionability”.

This research paper will provide critical analysis of unconscionable contracts which are agreements that are so grossly one-sided, unfair to one of the contracting parties that the law deems them to be unenforceable. Unconscionable contracts are largely distinguished by the fact that one of the parties to the contract signed it under circumstances that included pressure, a lack of information, or because they were deceived about the terms of the agreement. This research paper examines all such circumstances that can render a contract void and unenforceable on the grounds of unconscionability. Further, it will revolve around how the Doctrine of Unconscionability is applied by the Indian Courts as per the Indian Law.

Keywords: one-sided, unconscionability, unenforceable, void, doctrine of unconscionability

Introduction to the Research Paper

In today's growing world of complex monetary and economic relations, contracts play a significant role. This emphasizes the importance of the statute to regulate them. In this way, it ensures the parties to hold them as legal relations at an equal footing, but in practice, one party may be in a stronger position to bargain against the other and gain an unfair advantage. Unconscionable Contracts are one-sided contracts which are formulated in such a way that they leave the party with lower bargaining power holding no choice by imposing unfair, unjust clauses towards them. The Doctrine of Unconscionability is such that explains something as being contrary to conscience for which, it brings the court to intervene and is thus brought into position to get involved in a contract which includes unreasonable conditions which a reasonable and prudent person would never have agreed to follow. For a contract to be termed unconscionable, it has to include either a few clauses or the entire contract which are unreasonable in relation to the general practices at that point of time. I write this research paper to provide a description of such unconscionable contracts and the remedies that the aggrieved party may be rewarded for suffering such abusive contracts or clauses. With the help of including case laws along with citations, books, articles, newspaper articles, reports from the Law Commission and other tools, formulation of a critical analysis of the concept of Unconscionability in the Indian context as well as a comparative study between the aforementioned Doctrine within the UK Laws and the US Laws is made. In this research paper, I intend to make a critical analysis on the Doctrine of Unconscionability by referring to 21st century case laws, reports by Law Committees and various articles, journals and books.

Literature Review

Books

1. Aristides N. Hatzis and Eleni Zervogianni, (2006), Judge-Made Contracts: Reconstructing Unconscionable Contracts¹

- The author argues that the judges must be the only persons deciding between the contract's enforceability or non-enforceability or that of a specific clause. If either of

¹ Hatzis, Aristides & Zervogianni, Eleni. (2006). *Judge-Made Contracts: Reconstructing Unconscionable Contracts*. SSRN Electronic Journal. 10.2139/ssrn.953669.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=953669

the parties want their contract which is void to be enforced, they are given the ability to renegotiate among themselves after the court's decision and modify the same.

- The author discusses the economic theory of applying the court's discretionary powers in order to resolve issues at the same time as examining business practices and the specific context of the particular situation.
- The author mentions the judicial court's only purpose to enforce or expressly declare void a contract and thus facilitate exchanges is to create a "perfect market environment".

2. Professor Nelson Enonchong, (2012), Duress, Undie Influence and Unconscionable Dealing (2nd Ed.)²

- The author remarks unconscionable dealings as those cases in which a party who is suffering from personal issues such as poverty, ignorance or intoxication is unfair and unjustly targeted by the party who has an upper hand in bargaining position by imposing such unconscionable contracts over them.
- The author defines the scope of unconscionable dealings and a comparative study of the approach in jurisdictions of other countries, such as that of Australia and Scotland.

3. Omri Ben-Shahar, (2008), How to Repair Unconscionable Contracts³

- The author suggests three solutions for replacement of the vague term of unconscionable contracts, one of which is explored in-depth is the solution under which the excessively vague term of unconscionable contracts is cut down to only the greatest level that the law in question considers tolerable.
- Research revolves around maintaining the original bargaining terms of a contract, and yet bringing it down withing the tolerable range.

² ENONCHONG, N. (2006). *Duress, undue influence and unconscionable dealing*. London, Sweet & Maxwell. <https://www.sweetandmaxwell.co.uk/Book/Contract-Law/Duress-Undue-Influence-and-Unconscionable-Dealing/Paperback/42809598>

³Omri Ben-Shahar (2008) *How to Repair Unconscionable Contracts*, University of Chicago Law School https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1240&context=law_and_economics

- In three parts of the book, the author provides an analysis of conceptual and practical grounding of maximally tolerable provisions.

4. Garth Wooler, (2018), Unconscionable Conduct in Commercial Transactions: Global Perspectives and Applications⁴

- The author of this book has accused independent trade and finance instruments in terms of unconscionable conduct.
- Unconscionable conduct law and the doctrine of independence were examined in a brief survey by the author. The latter exists to provide relief from abuse in cases where the former exists.

5. Patrisha Reece-Davies, (2006), Unconscionable Contracts in the Music Industry: The Need for New Legal Relationships⁵

- The author provides an analysis of music industry contracts from the legal perspective of unconscionable contracts.
- The author of this book deals with the unequal power relationships between employer and artist in the music industry.
- The central framework of this book is the need to address the key problem of unequal bargaining power leading to harsh unconscionable contracts.

Articles

1. “Unconscionable Enrichment and Right of Restitution – Constitutional and Administrative Law – India”, Khaitan & Co, (November 2021)⁶

⁴ Wooler, Garth. *Unconscionable Conduct in Commercial Transactions: Global Perspectives and Applications*. 2018. <https://searchworks.stanford.edu/view/13945784>

⁵ Reece-Davies, Patrisha. *Unconscionable Contracts in the Music Industry*. 2006, <https://mellenpress.com/book/UNCONSCIONABLE-CONTRACTS-IN-THE-MUSIC-INDUSTRY-The-Need-for-New-Legal-Relationships/6538/>

⁶ Merchant, Ava. “Unconscionable Enrichment And Right Of Restitution - Constitutional & Administrative Law - India.” *Unconscionable Enrichment And Right Of Restitution - Constitutional & Administrative Law - India*, www.mondaq.com, 2 May 2001, <https://www.mondaq.com/india/constitutional-administrative-law/1130320/unconscionable-enrichment-and-right-of-restitution>.

- This article discusses unconscionability in UK Law in accordance to recognition of unavailability of meaningful choice of either side of the parties to escape contractual terms that are unreasonably in favor one party over the other.
 - It examines Indian Law and unjust enrichment and the right of restitution and its practical remedies.
- 2. “The Doctrines of Unconscionability and Abusive Clauses: A Common Point Between Civil and Common Law Legal Traditions”, Oxford University Comparative Law Forum, (2011)⁷**
- This article talks about the Doctrines of Unconscionability and also discusses abusive clauses which arise as a subsequential result of the abuse of right to contract.
 - It describes the unilateral and oppressively one-sided formulating of contract clauses which are formulated by the contracting party with greater power to leverage and the imbalance between the parties' rights and obligations.
- 3. “What do we mean by ‘Unconscionable Contracts?’”, B&B Associates LLP, (2018)⁸**
- This article discusses the Doctrines of Unconscionability, as well as the abusive clauses that arise as a result of contract abuse.
 - In this article, an overview of contract clauses drafted solely by the party with a superior bargaining power is provided, along with an explanation of the significant imbalance between the parties' rights and responsibilities.
- 4. “Unconscionable Bargains: Negating Contracts by Pressure and Influence”, Paul**

⁷ Allen, Steve. “The Doctrines Of Unconscionability And Abusive Clauses: A Common Point Between Civil And Common Law Legal Traditions | Oxford University Comparative Law Forum.” *The Doctrines Of Unconscionability And Abusive Clauses: A Common Point Between Civil And Common Law Legal Traditions | Oxford University Comparative Law Forum*, ouclf.law.ox.ac.uk, 27 July 2017, <https://ouclf.law.ox.ac.uk/the-doctrines-of-unconscionability-and-abusive-clauses-a-common-point-between-civil-and-common-law-legal-traditions/>.

⁸ Anjali. “What Do We Mean by ‘Unconscionable Contracts?’” *B&B Associates LLP*, bnblegal.com, 29 Oct. 2018, <https://bnblegal.com/article/what-do-we-mean-by-unconscionable-contracts/>.

McMohan, McMohan Legal: Solicitors and Legal Consultants⁹

- This article talks about the features of cases that are related to Unconscionable Bargain.
- The article provides us with a detailed description of how a person upholding a higher bargaining power must show that it is fair and reasonable in a case of unconscionable bargain.
- This article also dives into the category of unconscionable bargain cases arising out of vulnerable relationships, that is, when there is a pre-existing relationship of trust by which the stronger party takes an undue advantage of the opposing weaker party.

5. “Unconscionability and Contracts”, Alan Wertheimer, Cambridge University Press, (January 2015)¹⁰

- According to this article, Unconscionability can be more difficult to explain than commonly assumed, especially when the contract is mutually beneficial or Pareto superior.
- In this article, a number of issues are raised, including whether unconscionability is the result of a flaw in the contracting process or a flaw inherent in the contract itself, whether the gains in an unconscionable contract are excessive, whether the use of standard forms has a causal effect on unconscionability, and whether the principle of unequal bargaining power applies.

6. “Unconscionability of E-Contracts; A Comparative Study of India, the United Kingdom and the United States”, Dharmita Prasad and Pallavi Mishra, Liverpool Law Review, (2022)¹¹

- This article discusses the complexity of unconscionable electronic consumer

⁹ McMahon, Paul. “Unconscionable Bargains – McMahon Legal Guide.” *Unconscionable Bargains – McMahon Legal Guide*, mcmahonsolicitors.ie, <https://mcmahonsolicitors.ie/unconscionable-bargains/>.

¹⁰ Wertheimer, A. (1992) “Unconscionability and Contracts,” *Business Ethics Quarterly*. Cambridge University Press, 2(4), pp. 479–496. doi: 10.2307/3857584/ <https://www.cambridge.org/core/journals/business-ethics-quarterly/article/abs/unconscionability-and-contracts/28B0AF293BC63A742A337CAE5303AFD0>

¹¹ Prasad, D., Mishra, P. *Unconscionability of E-contracts: A Comparative Study of India, the United Kingdom, and the United States*. Liverpool Law Rev (2022). <https://doi.org/10.1007/s10991-022-09306-6>

contracts.

- This article comparatively analyzes the practicality of the Doctrine of Unconscionability in the US and UK as compared to India.
- This article offers suggestions for commercial and digital consumers and makes suggestions for the development of legislature of unconscionability in the field of electronic contracts.

Statement of Problem

While formulating a critical analysis of unconscionable contracts, it is important to understand the Doctrine of Unconscionability as an instrument of legislation that the jurisdictions use to escape the establishment and the legal applicability of one-sided, oppressive and unfair contracts or clauses. The intention behind this research paper is to provide a description of such unconscionable contracts and the remedies that the aggrieved party may be rewarded for suffering such abusive contracts or clauses.

Rationale of Study

Unconscionability arises when a specific contracting party holds a higher bargaining power over the other, leading to the drafting of unfair or unjust contracts or abusive clauses against the weaker party. This poses a great problem and difficulty to parties who are of a background which is poor, ignorant, or intoxicated. In this research paper, the Doctrine of Unconscionability is studied in detail. The research paper examines the consequences of validating contracts which are unconscionable in nature and produces the methods that can be used to escape such unjust, one-sided contracts which no reasonable person would have been willing to accept by way of signing and imposing contractual liability.

This paper discusses on legislative rules that formulate the necessary guidelines to avoid unconscionable contracts and lastly, it debates on the possibility of upholding the original terms of an unconscionable contract with while renegotiating certain clauses that specifically fall under the rubric of “unconscionable contracts”.

Research Objectives

The purpose of this research is:

- To understand the meaning and importance of unconscionable contracts.
- To investigate the "Doctrine of Unconscionability" as well as abusive terms that can develop as a result of abusing one's "Right to Contract."
- To acquire an understanding of the idea of unconscionability and to present a contrast between the laws of the United Kingdom as compared to that in India.
- To investigate the existing legislative remedies that can be used to combat involving unconscionable contracts.
- To investigate the various issues and challenges faced by people vulnerable to such harsh unconscionable contracts.
- To determine the desirability of positively impacting laws into the legislation dealing with this category of contracts.

Research Questions

- What is the effect of validating unconscionable contracts?
- What are the means and measures which can be used to combat harsh and unethical unconscionable contracts?
- What are the issues and challenges faced by the individuals at a lower stance in terms of bargaining power?
- Is the legislation formulating necessary guidelines to avoid such contracts?
- Is it possible to maintain the original terms of an unconscionable contract while renegotiating certain clauses?

Research Methodology

The research methodology that would be applied for carrying out this research is Doctrinal, Analytical and Comparative research.

In this research the primary sources of data are the Constitution, Indian Contract Act, 1872, Uniform Commercial Code (UCC), Rules, Government Orders, Judicial Precedents, Case Laws, various Reports of Law Committees.

The secondary sources of data comprise of published books, online articles, newspaper articles, journals, print media, online journals, research reports and others were used.

About Unconscionable Contracts

Unconscionability can be defined as "unequal bargaining power" or, in the context of contracts, "superior bargaining power" of one party in comparison to another. In simpler terms, unconscionability refers to "unequal bargaining power." It deals with contracts that are skewed significantly in favour of one of the parties with higher bargaining power than the other, to the extent that doing so would be unethical and against one's good conscience. Because a reasonable person would not consent to or sign a contract that is so overwhelmingly in favour of the other party and accept considerable injury or loss to himself, the courts rule that such contracts are not enforceable and declare them to be invalid. Consent that is given voluntarily and of one's own free will is essential to the legality of any contract that is to be upheld by the courts. Consent is considered to be free when it is not the result of any form of coercion, undue influence, misrepresentation, fraud, or error in its acquisition.

According to the Uniform Commercial Code, Section 2. 302 – Unconscionable contract or clause¹² says that,

1. If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable

¹² § 2-302. *Unconscionable contract or Clause.* <<https://www.law.cornell.edu/ucc/2/2-302>>

clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

2. When it is claimed or appears to the court that the contractor 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.

Which essentially means that, if the court finds that a clause in a contract was unconscionable when it was made, it may refuse to enforce the contract, enforce the rest of the contract without the unconscionable clause, or limit the application of the clause to avoid an unconscionable result.

Also, it mentions that when it is claimed or appears to the court that a contractor clause may be unconscionable, the parties shall be given a reasonable opportunity to present evidence about its commercial setting, purpose, and effect.

This legislation brought about the necessary clarity in the US in regards with unconscionable contracts as well as acted as a reference to jurisdictions like India which had earlier been puzzled on how to approach this legislation related to unconscionable contracts.

As for the legislation of India towards the notion of unconscionable contracts, it's important to refer to the case of Gujarat High Court, **Indian Petrochemicals Corporation v. Union of India, 2006**¹³. One of the issues that were raised in this case was whether a term of a contract, which compels the petitioner for the payment of transportation charges as applicable from time to time to the consumers, is against the Pricing Orders, Unfair, Unreasonable against the public policy, Unconscionable and violative of Article 14 of the Constitution of India or not.

Older Case Laws

An unconscionable agreement in the Indian context was laid out in the case of **Ranee Annapurni Nachiar v. Swaminatha Chettiar and Ors.**¹⁴ which served as a model for the general principle of unconscionability. To prove that a contract is pursued by undue influence,

¹³ *Indian Petrochemicals Corpn. Ltd. v. Union of India, 2006 SCC OnLine Guj 167*

¹⁴ *Ranee Annapurni Nachiar v. Swaminatha Chettiar (1910) I.L.R. 34 M. 7:20 M.L.J. 785*

it must be shown that the parties were in a dominant position and that the contract itself was unconscionable.

A landmark judgement dealing with the concept of Unconscionability is the case of **Central Inland Water Transport Corporation Ltd. and Anr. Etc. v. Brojo Nath Ganguly and Anr.**¹⁵ In this case, it was given that, “When a contract contains terms so unfair and unreasonable as to shock the conscience of the Court, it falls within the scope of this case's application of the principle set forth in this case. This is a violation of public policy and must be declared null and void.”

However, it's commendable that the concept of public policy was brought into this judgement despite the lack of established precedent or jurisprudence to rely on. When public policy that covers a case doesn't exist, according to the Indian courts, in consonance with public conscience and in keeping with the public good and public interest, declare that such practice is contrary to public policy.

In the case of **Tarun Bhargava v. State of Haryana and Another, (2002)**¹⁶, it was provided by both courts and parliaments of Punjab and Haryana High Court for the protection of the weaker parties from harsh, unconscionable contracts.

This case defines the obligations of an owner of a shop or that of a seller. It is mentioned that the owner/seller has to oblige by the hire-purchase agreement in which he has to provide a hire-purchase copy as soon as the agreement is formed. This has to be done without any monetary charge implied on the buyer of the same.

21st Century Case Laws

Unconscionable agreements with expectant heirs, where a person usually a money lender gave ready cash in return for the property he expects to inherit and thus got such property at an enormous undervalue, were disrupted in the case of **Malti Mehta & 1 v. Education Multimedia Research Centre & 4, (2017)**¹⁷, to set aside harsh or unconscionable contracts

¹⁵ (*Central Inland Water Transport Corporation Ltd. and Anr. Etc. v. Brojo Nath Ganguly and Anr.*, [1986])

¹⁶ (*Tarun Bhargava v. State of Haryana and Another*, [2002] 3 RCR (Cri) 312.

¹⁷ (*MALTI MEHTA & 1....Petitioner(s) Versus EDUCATION MULTIMEDIA RESEARCH CENTRE & 4....Respondent(s)*, [2017])

for salvage services. It also addressed contracts that were harsh or unconscionable for people who had not received independent legal advice.

Another case law relation to unconscionable contracts is **Assistant General Manager State v. Radhey Shyam Pandey, (2020)**¹⁸ in which it was stated that, "A bargain is not unconscionable simply because the parties to it are not equal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. It's possible that a significant disparity in bargaining power between the parties, coupled with terms that favor the stronger party unfairly, confirms that deception or coercion played a role, or that the weaker party had no meaningful option but to agree to the unfair terms".

Law Commission of India - Reports

The Law Commission of India, as one of the primary bodies tasked with examining the legal framework of the country and suggesting changes, made a few suggestions/observations on the concept of contract unconscionability in its 103rd and 199th reports.

- The 103rd report provided little information about the problem. The Contract Act was amended to include unconscionability as the only relevant outcome.
- The 199th report gave the concept of unconscionability the attention it merited since commercialization has become more prevalent in our society.

Conclusion

In conclusion, I think it is appropriate to mention that there has been appreciable and immense development surrounding the idea of unconscionability in India. Several contracts have been deemed unconscionable by the courts because they contain clauses that are unreasonable and unfair to the parties. In contracts of employment and construction, and real estate agreements, various clauses like damages, arbitration, class action waivers, and termination give an unfair advantage to one party due to higher bargaining power of the other party. These clauses violate public policy and give one party an unfair advantage.

¹⁸ *Assistant General Manager, State Bank of India v. Radhey Shyam Pandey, 2020 SCC OnLine SC 253.*

Suggestions

The courts do not have the necessary statutory backing to strictly enforce the concept of unconscionability of agreements due to the fact that the current legislative framework does not provide the necessary statutory backing. I believe that putting into action the recommendations contained within the 103rd and 199th Law Commission Reports is an absolute requirement at this point in time. The legal system in India should consider the provisions of the UCC and enforce a legislation that allows courts to refuse to uphold the validity of an unconscionable contract. The procedural and substantive unfairness guidelines are suggested in the 199th Law Commission report. Furthermore, legislation should be enacted to protect the parties' interests, ensure contract fairness, and ensure that the parties have an equal bargaining position.

Furthermore, I believe that the law pertaining to unconscionability isn't fair to be limited to contracts. It is important to note that we see instances of unconscionability outside the context of contracts as well. A few notable examples of using undue influence outside of contracts are putting pressure on Pardanashin women and forcing a sick person to give their estate to someone else. Because undue influence can be used in a variety of transactions other than commercial contracts, the law enacted in this context should apply to all of them.

The progress that both the United States and the United Kingdom have made, which can be seen as being made in leaps and bounds up to this point, demonstrates that this objective is not only attainable but also very likely to be accomplished.

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