INDIAN LAW ON STANDARD FORM CONTRACTS

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Abstract

A standard form contract is a reality of modern business setup. Its usage has evolved in two forms. First, where equal bargaining powers among parties ensures fairness, and second, where organisations with relatively higher bargaining powers exploit this mechanism to include favorable terms. To check this misuse, this paper argues that the Indian courts have applied special rules of interpretation ascribing higher value to the purpose of the contract, and have even nullified contracts when their material part was affected by unconscionability. Another difficulty that these contracts face is called the battle of forms. The courts in India have failed to employ a uniform rule to unravel this difficulty. This paper develops the doctrine of the 'varied standpoints' and argues that the courts should constantly apply the knock-out rule as it balances the law on consensus *ad idem* and the principle of acceptance of the contract by performance.

I Introduction

A STANDARD form contract is a uniform set of conditions which is fixed in advance by a party to an agreement.[1] It is open to acceptance by anyone and can be used as a template for contracting with innumerable persons, which eliminates the infeasibility of shaping a separate contract on every novel transaction,[2] and reduces the time and

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1 J. Beatson *et. al.*, *Anson's Law of Contract* 187 (Oxford University Press, 30th edn., 2010).

2 Law Commission of India, "103rd Report on Unfair Terms in Contract" 1.1 (1984); *See* Cheshire *et al*, *Law of Contracts* 21 (Oxford University Press, 14th edn., 2001) cited in Law Commission of India, "199th Report on Unfair (Procedural and Substantive) Terms in Contract" Ch. III (2006); George L. Priest, "A Theory of the Consumer Product Warranty" 90 *Yale Law Journal* 1299 (1981); *Bihar State Electricity Board, Patna* v. *Green Rubber Industries* (1990) 1 SCC 731, 23.

money spent on pre-contract transactions.[3] With the growth of the internet and e-commerce, multiple websites could be found using click wrap, browse wrap and shrink wrap contracts, wherein a user agrees to the usage policies through a click as a pre-condition.[4] Unlike other common law countries, a standard form contract is called a 'contract of adhesion' in the United States.[5]

Nowadays, the practice of transacting through a standard form contract has become prevalent and pervasive.[6] Many international organisations, including business corporations, have developed their specific standard form contracts, which are jurisdiction neutral and could be inserted *mutatis mutandis* into private contracts. To name a few, it includes UNCITRAL's InCoTerms provides for internationally recognized standard clauses to be incorporated in international and domestic contracts for sale of goods; International Chamber of Commerce Commission on Commercial Law and Practice's model contracts provide a neutral framework to parties for their contractual relationship;[7] American Bar Association's Model Joint Venture Agreement with Commentary (2006), Model Asset Purchase Agreement with Commentary (2001),[8] *etc.*

The reason for such pervasive acceptance of the standard form contracts lies in the positive economies attached to them such as time saving, cost cutting, utilisation of junior employees for contract finalisation, fewer requirements to negotiate the terms on a recurring basis, constantly plugging the loopholes in contract drafting ensuring that similar mistakes are not repeated, *inter alia*.[9] It has been found that such contracts

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3 George Gluck, "Standard Form Contracts: The Contract Theory Reconsidered" 28 *International and Comparative Law Quarterly* 73 (1979).

4 *See* Ryan J. Casamiquela, "Contractual Assent and Enforceability in Cyberspace" 17(1) *Berkeley Technology Law Review* 475 (2002).

5 *Virendra Pal Kapoor* v. *Union of India*, 2014 (8) ADJ 602, 2014 Indlaw ALL 1895, 46 (High Court of Allahabad); *LIC of India* v. *Consumer Education and Research Centre*, (1995) 5 SCC 482, 38; *United India Insurance Company Limited* v. *Shreedhar Malik Foods Limited*, 2019 Indlaw DEL 2616, 18 (High Court of Delhi).

6 W. David Slawson "Standard Form Contracts and Democratic Control of Lawmaking Power" 84(3) *Harvard Law Review* 529 (1971). Standard form contracts probably account for more than 99% of all the contracts now made. This high percentage was reaffirmed in John J. A. Bruke, "Contract as Commodity: A Nonfiction Approach" 24 *Seton Hall Legislative Journal* 290 (2000); *See* Joanne P. Braithwaite, "Standard Form Contracts as Transactional Law: Evidence from the Derivatives Markets" 75(5) *Modern Law Review* 779 (2012).

7 International Chamber of Commerce, 'Model Contracts & Clauses', *available at*: < iccwbo.org/resources-for-business/model-contracts-clauses/(last visited on Oct. 18, 2020).

8 American Bar Association, 'All Business Law Section Books', *available at*: www.americanbar.org/groups/business_law/publications/all/ (last visited on Aug. 13, 2020).

9 *See Pawan Alloys and Casting (P) Ltd* v. *UP State Electricity Board* (1997) 7 SCC 251, 46; *Slawson*, *supra* note 6.

lead to a reduction in the costs of production and distribution of goods and services, and society ultimately benefits from reduced prices.[10]

Having stated the significance of the standard form contracts, it is clarified that none of the provisions of the Indian Contract Act, 1872 specifically deals with them. The entire jurisprudence of the Indian law on this subject has evolved through the judgments of the courts. The courts have found two styles of standard form contracts prevailing in practice based on the allocation of bargaining powers among the parties. One is the result of continuing discussions among equal players of the industry.[11] Such a contract has received approximately ubiquitous acceptance because it facilitates the conduct of trade[12] and raises a presumption that its terms are fair and reasonable.[13] The second style does not share the same presumption regarding equality in bargaining powers among the parties involved in a transaction. It is of a modern origin[14] and here, business organisations are generally transacting with consumers who have comparatively lesser bargaining power[15] or no negotiable power[16] but to sign across the dotted line,[17] howsoever, unreasonable or unconscionable the terms of the contract be.[18] It enables the seller to say that, '*if you want these goods or services at all, these are the only terms on which they are available. Take it or leave it.*'[19] The resultant contract binds the parties to the terms

10 Friedrich Kessler, "Contracts of Adhesion – Some Thoughts About Freedom of Contract" 43 *Columbia Law Review* 629 (1943); *Bruke*, *supra* note 6; Steven R. Salbu, "Evolving Contracts as a Device for Flexible Coordination and Control" 34 *American Business Law Journal* 376 (1997): '*Standardized language and culture can generate transaction cost efficiencies by facilitating the trading of contractual rights.*'

11 *See Green Rubber Industries*, *supra* note 2 at 23; H.B. Sales, "Standard Form Contracts" 16(3) *Modern Law Review* 319 (1953); *See* Stig Jorgensen, "Contract as Form" 10 *Scandinavian Studies in Law* 97 (1966).

12 *Schroeder Music Co. Ltd.* v. *Macaulay*, [1974] 3 All ER 616 (House of Lords) cited in *Central Inland Water Transport Corporation Ltd.* v. *Brojo Nath Ganguly* (1986) 3 SCC 156, 84; *Savita Samriya* v. *State of Rajasthan*, 2009 (4) RLW 2933, 2009 Indlaw Raj 769, 13.

13 *Ibid*.

14 *Ibid*.

15 *Ganguly*, *supra* note 12 at 84, 91; *Kumari Shrilekha Vidyarthi* v. *State of U.P.*, (1991) 1 SCC 212, 21; *See Law Commission of India (1984)*, *supra* note 2 at 1.2; *Sales*, *supra* note 11; Wayne R. Barnes, "Towards a Fairer Model of Consumer Assent to Standard Form Contracts: In Defence of Restatement Subsection 211(3)" 82 Washington Law Review 248 (2007).

16 *Ansal Lankmark Township Private* v. *State of U.P.*, (2019) SCC OnLine All 3745, 30.

17 *Ganguly*, *supra* note 12 at 89; *E. Mohan* v. *Madras Fertilizers Ltd.*, 2010 (3) MLJ 673, 2010 Indlaw MAD 1873, 20 (High Court of Madras); *See Miss Tshering Diki Bhutia* v. *State of Sikkim*, AIR 1999 SIK 1, 1998 SCC OnLine Sikk 1, 16.

18 *Bank of Baroda* v. *Susmita Saha*, 2019 Indlaw DEL 263, 26.

19 *Schroeder*, *supra* note 12 cited in *Ganguly*, *supra* note 12 at 84; *Savita*, *supra* note 12 at 13; Sales, *supra* note 11; *See* Aubrey L. Diamond, "The Israeli Standard Contracts Law" 14(4) *International and Comparative Law Quarterly* 1410 (1965).

even if they have not read them, or are ignorant of their precise legal effect.[20] Such contracts are normally referred to as 'adhesion contracts' and Black's Law Dictionary defines them as a standard form contract prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms.[21] In the words of the Indian Supreme Court, '[t]he 'standard form' contract is the rule. [One] must either accept the terms of [the] contract or go without. Since, however, it is not feasible to deprive oneself of such necessary services, the individual is compelled to accept on those terms. In view of this fact, it is quite clear that freedom of contract is now largely an illusion.'[22]

This paper is an endeavour to elaborate upon the law regarding standard form contracts and its evolution in India. The following parts shall deliberate on, *first*, how the courts have interpreted standard form contracts, and *second*, the problems attached to such contracts and how the courts have unravelled them. The paper concludes with an analysis of the legal position as it stands today in India.

II Interpretation of standard form contracts

The general rule for the interpretation of a contract is that it has to be holistically interpreted in accordance with the intention of the parties derived from its express language and nothing can be read by implication.[23] This rule applies to standard form contracts in an equal measure.[24] However, owing to the specificity of standard form contracts, the courts have applied special rules of interpretation, which shall be reflected upon in the following section of the paper.

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20 *Green Rubber Industries*, *supra* note 2; *See L'Estrange* v. *F. Graucob Limited*, [1934] 2 KB 394 (Divisional Court): '*When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.*' The court also noted that '*[t]he present case is not a ticket case, and it is distinguishable from the ticket cases. … In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed.*' This observation was made to differentiate the cases involving written agreement from those involving unsigned document. In the former, the signature in itself binds the signing party, wherein in the case of latter, an additional factum of knowledge of the conditions on part of the receiving party must be established. *See Parker* v. *South Eastern Railway*, (1877) 2 CPD 416 (Court of Appeal): '*Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are.*'

21 Bryan A Garner (ed), 'Adhesion Contract', *Black's Law Dictionary* 366 (Thomson West, 9th edn., 2009); *Pawan Alloys*, *supra* note 9 at 46.

22 *Delhi Transport Corporation* v. *DTC Mazdoor Congress* 1991 Supp (1) SCC 600, 280.

23 *Anson*, *supra* note 1 at 183, 184; *Delhi Development Authority* v. *Jitender Pal Bhardwaj* (2010) 1 SCC 146; *Darlington Futures Ltd.* v. *Delco Australia Pty Ltd.*, (1986) 161 CLR 500 at 510 (High Court of Australia).

24 *Pawan Alloys*, *supra* note 9 at 51.

An ideal contract drafting always envisages clarity as one of the essentials. A clear and unambiguous term of the contract would bind both parties. In case of ambiguity, one of the principles applied by the courts in India is the rule of *verba forties accipiuntur contra proferentem*.[25] It states that if the interpretation of any clause of the contract is ambiguous, then the court shall adopt that interpretation which favours the party other than the one who drafted the contract.[26] For instance, when an insurer contracts through a standard form of insurance contract to the insured, then *'in case of real doubt, the policy ought to be construed most strongly against the insurers; [because] they frame the policy and insert the exceptions.*'[27] This rule is significant in a standard form contract as one of the parties is generally forced to accept the terms without any discussion or negotiation. In this regard, a recent January 2020 decision of the Indian Supreme Court is illuminating: [28]

> There is no gainsaying that in a contract, the bargaining power is usually at equal footing. In this regard, the joint intention of the parties is taken into consideration for interpretation of a contract. However, in most standard form contracts, that is not so. In this regard, the Court in such circumstances would consider the application of the rule of contra [proferentem], when ambiguity exists and an interpretation of the contract is preferred which favors the party with lesser bargaining power.

It is to be noted that this rule has no application where there is no ambiguity in the words of the standard form contract.[29] The Supreme Court of India has furthered the view taken by the High Court of Justice for England and Wales that a court must be sensitive to the purpose of the exclusion clause and should not automatically apply a *contra proferentem* approach when the terms are clear and unambiguous.[30]

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25 *Pushpa Agarwal* v. *Insurance Ombudsman U.P.*, 2012 (6) ADJ 287, 2012 Indlaw ALL 4658, 25 (High Court ofAllahabad) cited in *National Insurance Company Limited* v. *Fehmida*, (2018) 126 ALR 433, 2017 SCC OnLine All 2323, 24.

26 *New India Assurance Company Limited* v. *Rajeshwar Sharma* (2019) 2 SCC 671, 9; *National Insurance Co. Ltd.* v. *Ishar Das Madan Lal*, (2007) 4 SCC 105, 8; *V. Madhumohan* v. *Chairman and MD, Fertilisers and Chemicals, Travancore Ltd., Udyogamandal*, 2015 (4) SLR 157, 2014 Indlaw AP 1131, 29 (Andhra Pradesh High Court); *See Superintendence Company of India Pvt. Ltd.* v. *Krishan Murgai* (1981) 2 SCC 246, 63; *See Mills* v. *Dunham, LR* [1891] 1 Ch 576 (Court of Appeal).

27 *Rajeshwar*, *supra* note 26.

28 *Gurshinder Singh* v. *Shriram General Insurance Company Limited*, Civil Appeal No. 653 of 2020, 2020 SCC OnLine SC 80, 11.

29 *Cornish* v. *Accident Insurance Co. Ltd.*, (1889) 23 QBD 453 (CA) cited in *Rajeshwar*, *supra* note 26 at 13; *Central Bank of India* v. *Hartford Fire Insurance Company*, AIR 1965 SC 1288, 13 (SCI); *See Pushpa*, *supra* note 25 at 26; *Transocean Drilling UK Ltd.* v. *Providence Resources Plc*, [2016] EWCA Civ 372 (CA, per Moore-Bick LJ).

30 *Crowden and Crowden* v. *QBE Insurance (Europe) Ltd.*, [2017] EWHC 2597 (Comm), 65 (Queen's Bench Division (QB)) cited in *Rajeshwar, supra* note 26 at 16; *Jitender*, *supra* note 23 at 9.

Another important element for interpretation, which has a recurrent appearance in court proceedings involving standard form contracts, is an *exemption clause*, also referred to as the exclusion, exception, exculpatory or limiting clause.[31] An exemption clause a beneficial contractual arrangement made by either of the parties to a contract in anticipation of future contingencies that might hinder or prevent performance,[32] or certain consequences arising out of non-performance, part performance or negligent performance of a contract. Generally, such clauses take various forms,[33] but mainly have an effect of immunizing[34] or exempting a party from the liability,[35] which she would have borne had it not been for the clause.[36] In other forms, an exclusion clause might contain specific procedures for making claims, allocating liabilities between the parties,[37] limiting the right to terminate the contract on breach,[38] or restricting the amount[39] and time-period[40] to claim damages on breach. Another beneficial employment of the exclusion clauses is to limit[41] the choice of forums a plaintiff enjoys by excluding the jurisdiction of one or more of the multiple fora that have the capacity to hear the matter[42] in order to reduce the hardship while defending the claims (particularly known as the jurisdiction clause[43]). These clauses are binding only if expressed *ex abundanti*

31 Bryan A Garner (ed), 'Exclusion Clause', *Black's Law Dictionary* 653 (Thomson West, 9th edn., 2009).

32 *Anson*, *supra* note 1 at 193; J.W. Carter, *Carter's Breach of Contract* 48 (Hart Publishing 2018).

33 *See* Unfair Contract Terms Act, 1977, s. 13.

34 'Exculpatory Clause', 15 A *Words and Phrases* 324 (Thomson West, 2004).

35 H.K. Saharay (ed.), *Dutt on Contract* 36 (Eastern Law House 2013).

36 P.S. Atiyah, *An Introduction to the Law of Contract* 167 (Oxford University Press, 1981); 'Exclusion Clause', in 15A *Words and Phrases* 262 (Thomson West, 2004) citing *Maimone* v. *Liberty Mutual Insurance Company*, 695 A.2d 341 (Supreme Court of New Jersey), 'Exclusion clause in insurance policy serves purpose of delimiting and restricting coverage'; *See* 9(1) *Halsbury's Laws of England* 552 (Lexis Nexis, 1998); *See* A.W. Baker Welford, *The Law Relating to Accidental Insurance* 126 (Butterworths, 1923) cited in *Rajeshwar*, *supra* note 26 at 17.

37 *Anson*, *supra* note 1 at 186; Leslie Kelleher, "Exclusion Clauses in Contract" 14(1) *Manitoba Law Journal* 135 (1984); See Hugh Collins, "Good Faith in European Contract Law" 14(2) *Oxford Journal of Legal Studies* 241 (1994).

38 *Smeaton Hanscomb and Co. Ltd.* v. *Sassoon I Setty Son and Co.*, [1953] 2 All ER 1471 (QB); *Carter*, *supra* note 32 at 446.

39 *Scruttons Ltd.* v. *Midland Silicones Ltd.*, [1962] AC 446 (HL); *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus and Co.*, [1922] 2 AC 250 (HL).

40 *Kenyon, Son and Craven* v. *Baxter Hoare and Co.*, [1971] 2 All ER 708 (QB); *Photo Production* v. *Securicor Transport*, [1980] 1 All ER 556 (HL).

41 *Patel Roadways Ltd.* v. *Prasad Trading Company* (1991) 4 SCC 270 (SCI); *New Moga Transport Co.* v. *United India Insurance Co. Ltd.*, (2004) 4 SCC 677, 9, 19 (SCI).

42 Saharay, *supra* note 35 at 37. *Union of India* v. *Alok Kumar* (2010) 5 SCC 349, 43; *New Moga*, *supra* note 41 at 19; *A.V.M. Sales Corporation* v. *Anuradha Chemicals Private Limited* (2012) 2 SCC 315; *A.B.C. Laminar (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163, 16 (SCI); *Swatik Gas Private Limited* v. *Indian Oil Corporation Limited*, (2013) 9 SCC 32 ; *See Patel Roadways*, *supra* note 41 at 13.

43 *Inter Globe Aviation Limited* v. *N Satchidanand* (2011) 7 SCC 463, 21.

cautela[44] by using clear, explicit, specific and unambiguous terms[45] and is brought sufficiently to the notice of the other parties;[46] otherwise, the courts may restrictively interpret it.[47]

An exemption clause deserves a special rule of construction because it is often ungenerous, very wide in its coverage[48] and unfair in its application.[49] It may absolve the liability of the parties absolutely and therefore, the Supreme Court of India has ruled that a wide exemption clause can be read down if found inconsistent with the main purpose, or the object of the contract.[50] Also, the Law Commission of India has opined that if the aforementioned general rule of interpretation is applied and the courts give full effect to an unconscionable exemption, then the freedom of the contract would be diluted to remain a mere illusion.[51]

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44 Bryan A Garner, 'Ex abundanti cautela', *Black's Law Dictionary* 641 (Thomson West, 9th edn., 2009): '*out of abundant caution; to be on the safe side*.'

45 *Gillespie Bros & Co. Ltd.* v. *Roy Bowles Transport Ltd.*, [1973] 1 All ER 193 (CA); *Gross* v. *Sweet*, 49 NY (2d) 102 (1979) (New York Court of Appeals); *AIG Europe Insurance Ltd.* v. *Impact Funding Solutions Ltd.*, [2016] UKSC 57 (United Kingdom Supreme Court); *Welford, supra* note 36 at 126; *A.B.C.*, *supra* note 42 at 21; *Alok Kumar*, *supra* note 42 at 43; *New Moga*, *supra* note 41 at 19.

46 *Road Transport Corporation* v. *Kirloskar Brothers Ltd.*, AIR 1981 Bom 299 (Bombay High Court); *Singhal Transport* v. *Jesaram Jamumal*, AIR 1968 Raj 89 (Raj HC); *Lacey's Footwear (Wholesale) Ltd.* v. *Bowler Insurance Ltd.*, [1997] 2 Lloyd's Rep 369 (CA); *Parker*, *supra* note 20; Richard Lawson, *Exclusion Clauses and Unfair Contract Terms* 1 (Sweet and Maxwell, 2010). To understand the consequences of non-fulfilment of the notice requirements, consider *Modern Insulators* v. *Oriental Insurance Co. Ltd.*, (2000) 2 SCC 734. In this case, the insurer had failed to communicate certain terms and conditions including the exclusion clause while forwarding the schedule of insurance policy to the insured. The exclusion clause intended to cease the liability of the insurer if the insured used second-hand property in a particular mechanical test. When the structure collapsed due to the use of second-hand property, the Supreme Court held the insurer bound to bear the costs.

47 *Frans Maas (UK) Ltd.* v. *Samsung Electronics (UK) Ltd.*, [2004] EWHC 1502 (Comm) (QB); *See Transocean*, *supra* note 29; *See* Edwin Peel, "Contra Proferentem Revisited" 133 *Law Quarterly Review* 6 (2017).

48 *See Elgin Brown and Hamer (Pty) Ltd.* v. *Industrial Machinery Suppliers (Pty) Ltd.*, Case No. 272/93 (Supreme Court of South Africa); *Onego Shipping & Chartering BV* v. *JSC Arcadia Shipping M/V 'SOCOL 3'*, [2010] EWHC 777 (Comm) (QB); SJ Leacock, "Fundamental Breach of Contract and Exemption Clauses in the Commonwealth Caribbean" 4(2) *Anglo-American Law Review* 181 (1975).

49 Pollock and Mulla, *The Indian Contract Act,* 1872 223 (Lexis Nexis, 14th edn., 2016).

50 *Carter*, *supra* note 32 cited in *Skandia Insurance Co. Ltd.* v. *Kokilaben Chandravadan* (1987) 2 SCC 654, 14; *B.V. Nagaraju* v. *Oriental Insurance Company Limited* (1996) 4 SCC 647, 7, 8; *See UGS Finance Ltd.* v. *National Mortgage Bank of Greece*, [1964] 1 Lloyd's Rep 446 (CA); *Suisse Atlantique Societe d'Armament Maritime SA* v. *NV Rottersamsche Kolen Centrale*, [1967] 1 AC 361 (HL); *Photo Production*, *supra* note 40; *Kandimallan Bharti Devi* v. *The General Insurance*, AIR 1988 AP 361; *United India Insurance Company Ltd., Dharmapuri* v. *A Govindan*, (2000) 1 Mad LJ 721 (High Court of Madras); *See* V. Ramaseshan, "Fundamental Obligation and the Indian Law of Contract" 10(2) *Journal of Indian Law Institute* 331 (1968).

51 Law Commission of India (2006), *supra* note 2 at Ch. III.

Additionally, in case of conflict between a standard form contract providing for an exemption clause and another clause included by the parties in the contract through negotiations, the latter shall prevail.[52] The reason being, greater weight is attributed to the negotiated part of the contract than the standard terms.[53] For instance, in *Mumbai Metropolitan Region Development Authority*, clause 44.2 of the contract was part of a 'World Bank Standard Form Contract' and the parties added a contradictory clause 44.3 during negotiation. Clause 44.2 stated that if a compensation event prevents the timely completion of the contract, then the contract price shall not be increased but only the completion date shall be extended, whilst clause 44.3 stated that the contract price could be adjusted by the engineer on the assessment of the effect of such a compensation event. The High Court of Bombay held that clause 44.3 would prevail over clause 44.2.[54]

Further, a reference to a corresponding clause of a standard form contract 'B' while interpreting another contrct 'A' has been held as irrelevant by the Supreme Court.[55] The court reasoned that unlike in the cases involving statutes enacted by the legislature, it cannot be presumed in contractual matters that any alteration in a subsequent contract is deliberate and intended to convey a different meaning.[56]

However, if any clause is amended or deleted from a standard form contract, then a preceding/succeeding contract of the party concerned, entered with the same counterpart or a third party,[57] or the prevalent practice of the party concerned,[58] can be used as *corroborative* material to ascertain the intention for such amendment or deletion.[59] For instance, in *S. Harcharan Singh*[60] the question before the Supreme Court was regarding the determination of rate of payment to the contractor for the additional work undertaken. Though the contract provided for payment at the same rate for additional work as that of the actual contractual work, the Supreme Court considered a clause in the subsequently amended standard form contract of the respondent, *besides*

52 *Mumbai Metropolitan Region Development Authority* v. *Unity Infraproject Limited*, 2008 (5) Bom CR 196, 2008 Indlaw MUM 412 (High Court of Bombay).

53 *Ibid.*

54 *Ibid.*

55 *Union of India* v. *Raman Iron Foundry* (1974) 2 SCC 231,10; *See Central Coalfields Limited, Darbhanga House, Ranchi* v. *Chanani* Transport, 2015 Indlaw Jhkd 446, 33 (High Court of Jharkhand); *See H.M. Kamaluddin Ansari and Company* v. *Union of India* (1983) 4 SCC 417, 26, 29.

56 *Raman Iron*, *supra* note 55.

57 *Ibid.*

58 *S. Harcharan Singh* v. *Union of India* (1990) 4 SCC 647, 16.

59 *Atlanta Limited* v. *National Highways and Infrastructure Development Co-operation Limited*, 2018 IndLaw Del 1689, 10-12 (Delhi HC): '… *it would be plainly erroneous to assume existence of an arbitration agreement where the parties have consciously adopted a standard form of contract, albeit, by deleting the arbitration clause.*'; *See Louis Dreyfus & Cie* v. *Parnaso Cia Naviera SA*, (1959) 1 QB 498 (QB).

60 *Harcharan*, *supra* note 58.

certain letters exchanged between the parties, to hold that the payment had to be made at a similar rate only for the additional work, to the extent of 20% of the actual contractual work.

Lastly, the interpretative tools are employed by the courts while adjudging on the applicability of a clause of a mutually referred standard form contract in a new contract. For example, to refer a matter for arbitration, the contracting parties generally provide an arbitration clause in their contract or enter into an arbitration agreement.[61] However, the situation becomes complex when the contract between the parties does not provide for arbitration, but it makes a consensual *general* reference to a standard form contract that provides an arbitration clause.

In *MR Engineers and Contractors Private Limited* v. *Som Datt Builders Ltd.,*[62] the parties had stated the following in the work order: 'This sub-contract shall be carried out on the terms and conditions applicable to the main contract.' Failing to find any clear and *specific* indication that the main contract including the arbitration agreement was to be made applicable in the sub-contract, the Supreme Court disallowed the plea for arbitration of the dispute. Therefore, a *special* reference indicating a mutual intention to incorporate the arbitration clause from a standard form contract to the contract, and not *general* reference to the entire standard form contract, was the requirement of the law. A *general* reference was allowed only where the referred document is a standard form contract of trade associations or regulatory institutions that publish such standard contracts for the benefit of members or others who want to adopt the same because such documents are crafted by experience gained from trade practices and are well known in the industry.[63]

In 2018, the Supreme Court dropped the requirement of a *specific* reference entirely and thus expanded the principle of incorporation by reference.[64] In *Inox Wind Ltd.* v. *Thermocables Ltd.,*[65] the appellant issued a couple of purchase orders stating the supply of the goods shall be made according to the said order and the attached standard terms, which included a clause pertaining to dispute resolution. When the appellant moved to the high court for the appointment of an arbitrator, it was disallowed owing to the absence of an arbitration agreement. The Supreme Court held otherwise, referring

61 Arbitration and Conciliation Act, 1996, s 7.

62 (2009) 7 SCC 696, 20, 23.

63 *Ibid.*

64 *BSCPL Infrastructure Ltd.* v. *National Highways and Infrastructure Development Corporation Ltd.*, 2018 SCC OnLine Del 12143, 34; *Anik Industries Limited* v. *DCM Shriram Consolidated Limited*, 2018 Indlaw MP 1539, 12 (High Court Madhya Pradesh): '*It has been further clarified that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause.*'

65 (2018) 2 SCC 519.

to a judgment of the High Court of England and Wales,[66] that a *general* reference to a standard form contract signed between the parties would be enough for the incorporation of an arbitration clause into a new contract, though a general reference to any other earlier contract shall not suffice.[67] Therefore, if the parties merely refer to contract 'A' stating that contract 'A's terms shall apply *mutatis mutandis* in contract 'B', it shall be sufficient for binding the parties to all the terms of contract 'A'.[68] However, if the parties state they accept the terms of the earlier contract while entering into a new contract, but a new and different arbitration clause is drafted in the latter contract, then such reference to the earlier contract shall not affect the operation of the new clause.[69]

One common thread observed among all the scenarios discussed in this section is the reliance of the courts on the aspect of '*consent*' and ascribing higher value and enforceability to negotiated terms over standard terms. However the case might be, while interpreting the application, extent of operation and meaning of the standard terms, the court have opted for interpretations that seems to be in consonance with the *main object or intent* of the parties involved and if such intentions are unavailable, than interpretations which favours the weaker party by a strict construction of the contract.

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66 *Habas Sinai Ve Tibbi Gazlar isthisal Endustri AS* v. *Sometal SAL*, [2010] EWHC 29 (Comm) (QB) cited in *Inox Wind*, *supra* note 65 at para18.

67 *Inox Wind*, *supra* note 65 at 18; *Board of Trustees of Jawaharlal Nehru Port Trust, Mumbai* v. *PSA Mumbai Investments Private Limited,* Singapore, 2018 SCC OnLine Bom 292, 54; *See* David Sutton *et al*, *Russell on Arbitration* 52-54 (Sweet & Maxwell, 24th edn., 2015).

68 *Campos Brothers Farms* v. *Matru Bhumi Supply Chain Pvt.* Limited, 2019 SCC OnLine Del 8350 (High Court of Delhi); *See Giriraj Garg* v. *Coal India Limited* (2019) 5 SCC 192, In this case, the sale orders issued by the respondent stated that the parties shall 'be governed by the guidelines, circulars, office orders, notices, instructions, relevant law etc. issued from time to time' by certain governmental bodies. Coal India had released a scheme for coal distribution by e-auction in 2007, which contained an arbitration clause. Though an argument was raised that the sale orders did not make any specific reference to the 2007 Scheme, the Indian Supreme Court held that a general reference to the schemes of Coal India shall suffice the incorporation of the arbitration clause in the contract. *D.K. Construction Company* v. *Nagar Panchayat*, 2019 Indlaw Utt 461 (High Court of Uttarakhand): In this case, the construction company entered into an agreement with the Public Work Department, Cl. 15 of which stated that the contract shall be governed by applicable government orders. Therefore, it was argued that as the relevant government order contained an arbitration clause, such clause shall thereby be deemed to be included in the contract by reference under Cl. 15. The court upheld the argument in the following words: '*On a conjoint reading of Rule 1(3), Rule 44(ii) of the 2008 Rules, with Clause 15 of the agreement between the parties dated 29.06.2015, it is evident that there exists an arbitration agreement albeit by reference. The mere fact that an arbitration clause has not been specifically incorporated in the agreement itself is of no consequence.*' (emphasis supplied.)

69 *Glencore International Ag* v. *Shree Ganesh* Metals, 2019 SCC OnLine Del 11105.

III Problems attached to standard form contracts

Historically and predominantly, there have been two problems emanating from the practice of standard form contracting. One is the presence of unequal bargaining power among the contracting parties and the other is called the battle of forms. The Law Commission of India specifies them as problems concerning freedom of contract and consensus *ad idem*, respectively.[70]

Unequal bargaining power between parties to the contract

"If the law is to be seriously concerned with substantive justice, there will be occasions in which it will be necessary to override the actual terms of a contract."[71]

A standard form contract is drafted, generally by large organisations, from a position of strength by means of introducing favourable terms,[72] whilst the other party possesses minimal or no effective freedom to negotiate on the terms.[73]The contract law places considerable significance on the idea of freedom to contract[74] because it is a reasonable social ideal[75] that aims to ensure that no injury is done to the economic interests of the community.[76] The Indian Supreme Court has stated that the true freedom of contract must be founded only on the equality of bargaining power between the contracting parties.[77]

To remedy any probable injustice emanating from standard form contracts, the courts have employed multiple solutions, which are discussed in the following section under two heads: (i) remedies available in a contract among private parties, and (ii) remedies available in a contract with the state. This is followed by an analysis of the recommendations by the Law Commission of India for insertion of a new provision in the Contract Act specifically dealing with substantive unconscionability.

Remedies available in a contract among private parties.

The Indian Contract Act, 1872 does not envisage any specific provision dealing with unconscionable terms. Nevertheless, the court have traced remedies against

70 *See* Law Commission of India (2006), *supra* note 2 at Ch. III.

71 *Atiyah*, *supra* note 36 at 297.

72 Law Commission of India (1984), *supra* note 2 at 2.1; *Kessler*, *supra* note 10; *See Slawson*, *supra* note 6.

73 Law Commission of India (1984), *supra* note 2 at 3.3; *Anson*, *supra* note 1 at 4-7 cited in *D.T.C.*, *supra* note 22 at 280.

74 Indian Contract Act, 1872, s 10 specifically states that: '*All agreements are contracts if they are made by the free consent of parties…'*. Further, s 14 defines free consent as the one which is not caused by coercion, undue influence, fraud, misrepresentation or mistake.

75 *Anson*, *supra* note 1 at 4; AG Guest (ed), (I)*Chitty on Contracts* 4 (25th edn., Sweet and Maxwell, 1983) cited in *Ganguly*, *supra* note 12 at 79; *See State of Kerala* v. *State of Tamil Nadu*, 2018 Indlaw SC 71, 111-114.

76 Ibid.

77 *LIC*, *supra* note 5 at 32, 37; *Bank of Baroda* v. *Susmita Saha*, 2019 Indlaw DEL 263, 26.

unconscionable contracts to section 16 read with section 19A of the Act, which render a contract made under undue influence voidable at the instance of the party so influenced.[78] To rightfully claim a remedy, the law requires not mere influence, but one that is so exerted in a wise and judicial manner to overpower the volition of a party[79] in order to obtain unfair advantage.[80] The provision deems a person to be in a position to dominate the will of another if s/he holds a real or apparent authority, stands in a fiduciary relation to the other, or makes a contract with a person whose mental capacity has been affected.[81] However, this list is not exhaustive and the provision applies to all varieties of relations where the possibility of exercising undue influence exists.[82]

Such law on undue influence has been utilised by the English Courts to grant relief in cases of unconscionable contracts. In *Lloyd's Bank Ltd.* v. *Bundy,* Lord Denning states:[83]

> There are cases in our books in which the courts will set aside a contract, … where the parties have not met on equal terms – when one is so strong in the bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.

At the same time, the Privy Council and certain high courts in India have also cautioned that inequality of bargaining power cannot be accepted as a general doctrine for setting aside a contract unless it falls within the recognised categories of victimisation such as undue influence.[84] The Indian law has developed on similar lines and it has been

78 Indian Contract Act, 1872, ss. 16, 19A.

79 *Lingo Bhimrao Naik* v. *Dattatraya Shripad Jamadagani*, AIR 1938 Bom 97; *Alok Kumar Aich* v. *Asoke Kumar Aich*, AIR 1982 Cal 599 (High Court of Calcutta); *Raja Shiba Prasad Singh* v. *Tincouri Banerji*, AIR 1939 Pat 477 (High Court of Patna); *P. Saraswathi Ammal* v. *Lakshmi Ammal*, AIR 1978 Mad 361.

80 *Poosathurai* v. *Kappanna Chettiar*, AIR 1920 PC 65 (Privy Council); *Subhas Chandra Das Mushib* v. *Ganga Prosad Das Mushib*, [1967] 1 SCR 331; *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.*, [1964] 1 SCR 270 (SCI); *Sathi Sattema* v. *Sathi Subbi Reddy*, AIR 1963 AP 72; Similarly, Atiyah notes that in order to strike down unconscionable contracts based on the equitable power of the courts, '*some very serious unfairness must be shown, some real use of bargaining power to take advantage of another person*'; *See Boustang* v. *Pigott*, [1993] NPC 75 (Privy Council): The Privy Council held that if it were to set aside an unconscionable contract, the defendant must be guilty of some moral culpability, impropriety, actual or constructive fraud. Merely proving the existence of unfair terms would not suffice.

81 *Supra* note 78, s. 16(2).

82 *Mehboob Khan* v. *Hakim Abdul Rahim*, AIR 1964 Raj 250 (High Court of Rajasthan); *See Johnson* v. *Buttress*, (1936) 56 CLR 113 (High Court of Australia).

83 *Lloyd's Bank Ltd.* v. *Bundy*, [1975] QB 326 (CA); *Schroeder Music*, *supra* note 12; *Clifford Davis Management Ltd.* v. *WEA Records Ltd.*, [1975] 1 All ER 237 (CA).

84 *Poosathurai*, *supra* note 80; *U Kesavulu Naidu* v. *Arithulai Ammal*, (1912) ILR 36 Mad 533 (Madras HC); *Bundy* (n 83); *Syed Noor* v. *Qutubddin*, AIR 1956 Hyd 114; *National Westminster Bank Plc* v. *Morgan*, [1985] 1 All ER 821 (HL); H.G. Beale (ed), vol. 1 *Chitty on Contracts* 457, 7-088 (Sweet and Maxwell, 28th edn., 1999); *See* Law Commission of India, "13th Report (Contract Act, 1872)" Part II (1958).

repeatedly clarified by the courts that unless unequal bargaining power is the result of undue influence, no plea can be made to set aside the unconscionable transaction.[85] The Supreme Court of India has noted that if the parties wilfully enter into an unconscionable bargain, law cannot come to their rescue subsequently.[86] A statutory illustration in section 16 of the Act clarifies this situation beyond doubt:[87]

> … (d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Therefore, procedural unconscionability attracts the prime focus under the Indian law and substantive unconscionability is placed on a secondary pedestal.[88]

It is noteworthy to observe the Supreme Court's judgment in *SK Jain* v. *State of Haryana.*[89] Here, the parties had subsequently inserted an additional clause in their contract providing for mandatory deposition of 7% of the total amount claimed by any party before the arbitral tribunal before proceeding with arbitration. Though the appellant claimed that it was an unconscionable clause, the court stated that the doctrine of unequal bargaining powers cannot be appropriately applied in commercial contracts,[90] the reason being that if people with their eyes open wilfully and knowingly enter into unconscionable bargains, they cannot seek the protection of law subsequently.[91]

This case deals with a government contract; nonetheless, it becomes a vital point of analysis because it might guide the courts in cases involving private contracts. If the Supreme Court authorises as lawful any conduct of the government in a contractual transaction, it is a reasonable expectation that such a conduct shall also be lawful in

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85 *Ibid.*

86 *S.K. Jain* v. *State of Haryana*, (2009) 4 SCC 357, 8; *See Sundarambal Ammal* v. *Yogavanagurukkal*, AIR 1915 Mad 561; *Mackintosh* v. *Wingrove*, (1878) 4 Cal 137; *Satish Chunder Giri* v. *Hem Chunder Mookhopadhya*, (1902) 29 Cal 823; *See also Karnal Distillery Co. Ltd.* v. *Ladli Parsad Jaiswal*, AIR 1958 Punj 190 (High Court of Punjab and Haryana); *Raghunath Altia* v. *Arjuno Altia*, AIR 1973 Ori 76 (High Court of Orissa).

87 *Supra* note 78, s 16, Illus. (d).

88 *See* Law Commission of India (2006), *supra* note 2 at 16-53.

89 *Jain*, *supra* note 86.

90 *See Ganguly*, *supra* note 12: '*This principle is that the courts will not enforce and will … strike down an unfair and unreasonable contract, or an unfair and unreasonable clause of a contract, entered into between parties who are not equal in bargaining power. … This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction.*' (emphasis supplied); *Canara Bank* v. *Muraj Enterprises*, 2018 Indlaw Kar 9869,12 (High Court of Karnataka).

91 *Sundarambal*, *supra* note 86; *Mackintosh*, *supra* note 86; *Mookhopadhya*, *supra* note 86; *Karnal Distillery*, *supra* note 86; *Raghunath*, *supra* note 86.

private contracts because the scope of judicial review in private contracts is lesser than it is in government contracts. [92]

One might here argue, taking inspiration from the Canadian law, that a *presumption of undue influence or procedural unconscionability* be made whenever the contractual terms are found to be substantively unconscionable. To elaborate, in *Harry* v. *Kreutziger,* the Court of Appeal for British Columbia summarized the standard for proving unconscionability in the following words: [93]

> [14] From these authorities, this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.

However, as stated above, a universal presumption of undue influence is not statutorily permitted as section 16 and such a presumption can be raised only when the one party already stands certain relations that it can adversely influence the independent volition of the other party. In all the other cases, the proofs for the abuse of unequal bargaining power between the parties have to be submitted.[94]

Apart from section 16, an unconscionable contract is also vitiated under Section 23 of the Act. It states that a contract shall be void, *inter alia*, if the court regards its consideration or object as opposed to public policy.[95] Section 23 of the Act was used to avoid an unconscionable contract as early as in 1909 by the High Court of Madras in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co. Ltd.*[96] In this case, the servants of the defendant company were found negligent in handling the landing of the cargo. The question facing the court was whether the defendant company can be held liable even though the bill of lading contained an exemption clause for the negligence of their servants. The court held in favour of the defendant company. However, Shankaran Nair, J., in his dissent, stated that section 23 of the Act hits the

92 There is a presumption of inherent dominant character of the government and the mandatory constitutional requirements of art. 299 of the Constitution of India, applicable on government contracts. However, if we study the Indian Contract Act, 1872 in isolation, the law treats both, the government and the private parties, in similar fashion.

93 *Harry* v. *Kreutziger*, (1978) 9 BCLR 166; 1978 CanLII 393 (British Columbia CA).

94 *Canara Bank*, *supra* note 90.

95 *Supra* note 78, s. 23; *See Ganguly*, *supra* note 12 at 91-92.

96 ILR (1909) 32 Mad 95.

exemption clause as it is opposed to the public policy.[97] Though this pronouncement did not get much support in the years immediately following the judgment, the development of the law during the latter decades of the 20th Century aligned with Nair, J.'s dissent.[98]

Remedies available in a contract with the government.

The law governing contracts between the state and a private party vary drastically from the foregoing discussion. While the Indian Supreme Court has held that once the state or the authorities under article 12 of the Constitution[99] enter into a contract with a private entity, their conduct shall be governed by the terms of the contract and not strictly by the constitutional provisions.[100] Such flexibility, however, finds an exception under article 14 of the Constitution,[101] in addition to sections 16, 19A and 23 of the Contract Act.

Article 14[102] empowers the courts to strike down an unfair or unreasonable clause or the entire contract[103] in situations of an unconscionable bargain.[104] It reflects the need to ensure distributive justice,[105] protect the weaker contracting party against the abuses

97 For an elaboration on the phrase '*public policy*', *see Ganguly*, *supra* note 12 at 92; *See Gherulal Prakash* v. *Mahadeodas Maiya*, 1959 Supp (2) SCR 406, 23; Law Commission of India (2006), *supra* note 2 at Chapter II.

98 *See Ganguly*, *supra* note 12 at 112; *Lilly White* v. *Mannu Swami*, AIR 1966 Mad 13; *International Oil Company* v. *Indian Oil Corporation Ltd., Madras*, AIR 1969 Mad 423.

99 The Constitution of India 1950, art .12: '*In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and the local or other authorities within the territory of India or under the control of the Government of India.*'

100 *Bareilly Development Authority* v. *Ajay Pal Singh*, AIR 1989 SC 1076; *Chief Administrator, PUDA* v. *Shabnam Virk* (2006) 4 SCC 74.

101 *Vidyarthi*, *supra* note 15 at para 29; *Mahabir Auto Stores* v. *Indian Oil Corporation* (1990) 3 SCC 752, 12 (SCI).

102 The Constitution of India 1950, art. 14: '*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*'

103 Significant here, for academic reasons, is to highlight the attitude of the Supreme Court as prevailing during the late 20th century. In *Sterling Computers Ltd.* v. *M and N Publications Ltd.*, (1993) 1 SCC 445 *and Tata Cellular* v. *Union of India*, (1994) 6 SCC 651*,* the court had held that while performing judicial review, the court shall concern itself only with the manner of awarding or entering into the contract and check whether any element of arbitrariness, *mala fides,* or unreasonableness is present in the decision making process. Once this scrutiny is concluded, the court shall not extend its review jurisdiction to the detailed terms and conditions of the contract. *See* Umakanth Varottil, "Government Contracts" in Pratap Bhanu Mehta *et. al.* (eds.), *The Oxford Handbook of the Indian Constitution* 977-979 (Oxford University Press, 2016).

104 *Balmer Lawrie & Company Ltd.* v. *Partha Sarathi Sen Roy* (2013) 8 SCC 345, 30 (SCI); *LIC*, *supra* note 5 at 32, 37 and 47; *Ganguly*, *supra* note 12 at 89; *See Gillespie Brothers*, *supra* note 45.

105 *Ganguly*, *supra* note 12 at 82.

of freedom of contract[106] and to ensure that unreasonable terms of a standard contract are not sustainable in public interest:[107]

> The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with character the contracts made by the State or its instrumentalities. … The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited… However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14.[108]

Therefore, for instance, in *Brojo Nath Ganguly*,[109] a provision providing that the services of a permanent employee employed by the State can be terminated by merely giving him three months' notice or three months' pay in lieu of such notice without specifying any reason or holding an inquiry, was held to be unconscionable.[110]

Article 14 plays such a prominent role that the Supreme Court has held that it would be alien to the constitutional scheme to accept an argument of exclusion of article 14 in contractual matters.[111] If the courts permit the parties to enforce the unreasonable clauses of a standard form contract, it would be unconscionable for its failure to uphold the true freedom of contract.[112] Thus, at present, the remedies against unconscionable contracts are found under sections 16 read with 19-A and 23 of the Contract Act, and article 14 of the Constitution of India if one of the parties is the state.

Law Commission of India on unconscionable contracts.

The Law Commission of India, in its 103rd Report, has discussed multiple cases involving the use of unconscionable exclusion clauses by transport carriers against their consumers to exclude or limit their liability.[113] The courts, in those cases, had decided

106 *Murgai*, *supra* note 26 at 61; *Sukhdev Singh* v. *Bagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421, 117; K.K. Mathew, *Democracy, Equality and Freedom* (1978) cited in *Bhuvnesh Kumar Dwivedi* v. *Hindalco Industries Limited* (2014) 11 SCC 85, 41 (SCI).

107 *Lilly White*, *supra* note 98 cited in *Gurudayal Singh* v. *Union of India*, 2012 Indlaw ALL 4538, 8 (High Court of Allahabad); *See LIC* supra note 5, 27; *D.T.C.*, *supra* note 22 at 11.

108 *Vidyarthi*, *supra* note 15 at 22.

109 *Ganguly*, *supra* note 12.

110 *See D.T.C.*, *supra* note 22; *Uptron India Ltd.* v. *Shammi Bhan* (1998) 6 SCC 538.

111 *Vidyarthi*, *supra* note 15 at 21.

112 *Gillespie Brothers*, *supra* note 45 cited in *L.I.C.*, *supra* note 5 at 32, 37.

113 Law Commission of India (1984), *supra* note 2 at Ch. 2.

in favour of the carriers by stating that as the conditions were already presented to the consumers in printed form on the tickets, they are deemed to know those terms irrespective of whether they read them or not.[114] However, the Law Commission raised a concern, stating: [115]

> Assuming that he knows the conditions, if he wanted to change them, could he negotiate and do so? If he cannot, what does it matter, and how are the courts to come to his rescue?

Based on such an understanding of the situation, the Law Commission of India recommended the insertion of section 67A in the Contract Act, 1872 which is similar to the corresponding provision in the United States' Uniform Commercial Code,[116] that would read as follows: [117]

> (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 wilful breach of the contract, or (b) the consequence of negligence.

The Parliament has not yet accepted the recommendation of the Law Commission. Nevertheless, this attempt of the Law Commission ought to be appreciated for its multi-fold significance. *First*, if this provision is inserted in the statutes, it shall empower the courts with the discretion to declare unconscionability and allow the affected party to refrain from the performance of the contract. It shall bring the concerns of substantive unconscionability on the forefront by investing the court with the power

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114 *Indian Airlines Corporation* v. *Jothaji Maniram*, AIR 1959 Mad 285; *Rukmanand Ajitsaria* v. *Airways (India) Ltd.*, AIR 1960 Assam 71 (High Court of Guwahati); *Indian Airlines Corporation* v. *Madhuri Chowdhuri*, AIR 1962 Cal 544 (High Court of Calcutta); *Singhal Transport*, *supra* note 46.

115 *Law Commission of India (1984)*, *supra* note 2 at 2.6.

116 Uniform Commercial Code (US), s. 2-302:

'(1) 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 the unconscionable 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 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.'

117 Law Commission of India (1984), *supra* note 2 at 2.6.

to scrutinize unconscionable clauses independent of the argument on 'freedom of contract' or absence of 'undue influence'.

Second, it shall ease the affected party from the heavy burden of proof of undue influence required under Section 16 of the Act and act as a preferable remedy against unconscionable contracts.

Third, it will make the remedy against unconscionable contracts more sound and specific. Currently, the Contract Act,1872 provides a single remedy for contracts infected by undue influence and unconscionable bargain. However, it has been clarified in the foreign jurisdictions[118] that while the doctrines of undue influence and unconscionable bargain might seem to be closely related,[119] they are separate and distinct. A plea of undue influence attacks the sufficiency of consent, whilst a plea of unconscionable bargain invokes relief against an unfair advantage gained by an unconscientious use of power.[120] To be more precise, in the latter case, the will of the innocent party is not independent and voluntary because it is overborne; however, in the former case, the will of the innocent party, even if independent, is the result of the disadvantageous position in which s/he is placed.[121] Therefore, insertion of Section 67A will make the remedy against unconscionable bargain more appropriate and sound in law.

Battle of forms

So much for the first problem – unequal bargaining power between the parties to the contract. Another contested issue that emanates from a standard form contract is the *battle of forms*. This situation arises where each of the parties involved in the negotiation may purport to introduce its own set of standard terms.[122] For instance, a party sends its contract stating that price escalation shall have no effect on the contract price of the goods, which is accepted by the other party but is attached with its own standard terms stating that price escalation shall be studied and adequate adjustments shall be made accordingly by the parties mutually. This gives rise to a battle of forms situation. Here, it becomes difficult for the court to determine which set of terms must prevail.[123]

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118 *Morrison* v. *Coast Finance Ltd.*, (1965) 55 DLR, 2(d) 710 at 713 (British Columbia CA); *Commercial Bank of Australia Ltd.* v. *Amadio*, (1983) 151 CLR 447 (High Court of Australia).

119 *See* David Capper, "Undue Influence and Unconscionability: A Rationalisation" 114 *Law Quarterly Review* 479 (1998).

120 *Morrison*, *supra* note 118; *Amadio*, *supra* note 118.

121 *Amadio*, *supra* note 118.

122 *See* Edward J. Jacobs, "The Battle of the Forms: Standard Term Contracts in Comparative Perspective" 34(2) *International and Comparative Law Quarterly* 297 (1985); *See* Arthur Taylor von Mehren, "The 'Battle of the Forms': A Comparative View" 38(2) *American Journal of Comparative Law* 265 (1990).

123 A.G. Guest (ed.), *Benjamin's Sale of Goods* 104, 2-013 (Sweet and Maxwell, 6th edn., 2002); *Pollock & Mulla*, *supra* note 49 at 164.

Though the Act provides that a contract shall come into force only when the parties mutually agree on the terms,[124] this determination becomes significant when one of the parties has already rendered substantial performance of the contract.[125] The reason for attaching importance to the performance of the contract is that one of the ways in which a contract is effectuated is by rendering performance.[126] Conduct shall amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer.[127]

In India, none of the courts has defined 'battle of forms' as a term or concept. However, the attitude of the Indian courts towards it could be deciphered through an analysis of how the courts have treated cases pertaining to counter-offers.

Deciphering battle of forms through an understanding of counter-offer.

Section 7 of the Contract Act states that a contract arises when an offer is accepted *in toto* by the offeree or the offeror accepts the offer as modified by the offeree.[128] Thus, an unconditional acceptance of the offer is a must to conclude a contract.[129] However, if the acceptance were qualified,[130] it would form a counter-offer and no concluded contract would result.[131]

The Contract Act does not define the term 'counter-offer', but the courts have extensively expounded on the term. A counter-offer is a rejection of the original offer by stipulating further conditions.[132] It also envisages an acceptance that refers to future

124 *Supra* note 78, s 10 read with s. 13.

125 *Benjamin*, *supra* note 123 at 105, 2-014; *See also* Ewan McKendrick, "The Battle of the Forms and the Law of Restitution" 8(2) *Oxford Journal of Legal Studies* 197 (1988).

126 *Supra* note 78, s. 8; *Indian Tourism Development Corporation Ltd.* v. *Integrated Digital Solution (Private) Ltd.*, 2014 SCC OnLine Del 2524, 9 (High Court of Delhi).

127 *Bhagwati Prasad Pawan Kumar* v. *Union of India* (2006) 5 SCC 311, 19; *See Skanska Cementation India Limited* v. *Bajranglal Agarwal*, (2003) 4 Bom CR 653; *See Rambaksh Lacmandas* v. *Bombay Cotton Company*, AIR 1931 Bom 81.

128 *Muralidhar Jalan* v. *Paresh Chandra Chatterjee*, AIR 1947 Cal 14; (8) *Halsbury's Law of England* 75, 129 (3rd edn.) cited in *U.P. State Electricity Board* v. *Goel Electric Stores, Chandigarh*, AIR 1977 All 494, 1977 Indlaw ALL 190, 7 (High Court of Allahabad).

129 *Supra* note 78, s. 7; *Claridges Infotech Private Limited* v. *Surendra Kapur*, AIR 2009 Bom 1; *Punjab Motor Workshop* v. *Delhi Development Authority* (2006) 92 DRJ 321, 2013 Indlaw DEL 1184, 20 (High Court Delhi).

130 An acceptance is termed as qualified if it is subject of certain conditions or the offeree introduces new terms in the agreement while signing it.

131 *Zodic Electricals Private Limited* v. *Union of India* (1986) 3 SCC 522 (SCI); *Raja Kamala Ranjan Roy* v. *Baijnath Bajoria*, AIR 1951 SC 1, 1950 Indlaw SC 2, 6; *See Badri Prasad* v. *State of Madhya Pradesh* (1971) 3 SCC 23, 12.

132 *Jayaprakash Nanda* v. *General Manager, Orissa State Warehousing Corporation*, AIR 2002 Ori 199, 2002 Indlaw ORI 102, 8 (High Court of Orissa); *Punjab Motor Workshop*, *supra* note 129.

negotiations[133] or requires compliance with further requirements.[134] Once a party to the contract accepts the counter-offer, it becomes an obligation upon the parties to honour the contractual obligations.[135]

However, if the new term in the letter of acceptance is trivial or it contains a statement that does not intend to vary the terms of the original offer, then such acceptance shall be final and cannot be termed as a counter-offer.[136] This rule comes with an exception. It has been held by the High Court of Delhi that the least variation of any *material term,* such as price, payment or performance clauses, has the effect of rejecting the proposal.[137]

To put it in a standard form contract-oriented crux, a situation of the battle of forms arises when the parties present their specific standard form contracts having contradictory clauses related to the material terms of the contract.

Unravelling the battle of forms: Exploring possible solutions

Courts across the world have come up with three different solutions to solve the complexities of battle of forms, viz., the traditional rule, the last shot rule and the knock-out rule. Indian courts have failed to adopt a consistent approach and have oscillated between the three based on their discretion and the specifics of the case. The following discussion shall provide different instances where courts have applied these rules and the allied reasoning.

(a) The traditional rule.

The traditional rule, interchangeably called as the mirror image rule, emerges from a strict reading of the Act and it emphasises the concept of *consensus ad idem.* It provides that no contractual relationship between the parties would come into existence if the offeree does not accept the offer in the same sense as it was offered by the offeror, especially the material terms of the contract.[138] Where the contract is in a number of

133 *Satya Prakash Goel* v. *Ram Krishna Mission*, AIR 1991 All 343 (High Court of Allahabad)*; Motilal Manshi Shah* v. *Suryakant K. Sheth*, AIR 2006 Bom 246.

134 *The Sindhu Resettlement Corporation Ltd.* v. *Om Commercial Co-op Society Ltd.*, 2013 SCC OnLine Guj 693.

135 *Kalimata Ispat Industries Pvt. Ltd.* v. *Union of India*, 2018 Indlaw Cal 77, 14 (High Court of Calcutta); *Mahanagar Telephone Nigam Limited* v. *Gaurav Enterprises*, 2018 Indlaw Del 1201, 20-21.

136 *See Goel Electric Stores*, *supra* note 128 at 8; *Abhay Construction* v. *State of Maharashtra*, (2014) 4 Mah LJ 829, 2014 Indlaw Mum 705, 10-11; Previously, a counter view was prevalent that if the proposal on even a minor term is not accepted, the parties cannot be said to be *ad idem* and there cannot be a concluded contract as held by the High Court of Allahabad in *Deep Chandra* v. *Ruknuddaula Shamsher Jang Nawab Mohammad Sajjad Khan*, AIR 1951 All 93, 1949 Indlaw All 17, 77 (High Court of Allahabad).

137 *Himachal Pradesh State Electricity Board* v. *Sumer Chand and Sons*, 2011 Indlaw DEL 2897.

138 *Supra* note 78, ss. 7, 10 and 13; *ITC Limited* v. *George Joseph Fernandes*, (1989) 2 SCC 1, 22; *Rickmers Verwaltung Gmb H* v. *The Indian Oil Corporation Ltd.*, (1999) 1 SCC 1,13.

parts, it is essential that the parties are in a state of *consensus ad idem* on all the parts of the contract.[139]

For instance, in *Life Insurance Corporation of India* v. *Raja Vasireddy Komallavalli Kamba*,[140] the Supreme Court had held that '*the mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not deemed as acceptance. Acceptance must be signified by some act or acts agreed on by the parties or from which the law raises a presumption of acceptance.*'[141]

The emphasis on 'material terms' is necessary because when the offeree accepts the offer but intends to insert certain immaterial conditions in the agreement, then it would be unjust to allow the offeree to contend that there is no contract at all.[142]

The viability of the traditional rule cannot be challenged in the cases where the performance of the contract has yet not been initiated because it is an inalienable rule of contracts that the contractual terms should be consensual. At the same time, the paper argues, analysing a 2018 decision of the High Court of Delhi in *Mahanagar Telephone Nigam Limited* v. *Carrycon India Limited*[143] that the application of the traditional rule is not apropos when the performance of the contract has already initiated.

This case involved a dispute relating to the price payable by Mahanagar Telephone Nigam Limited (MTNL) for the work of laying of cables through trenchless technology by Carrycon India Limited (Carrycon). On January 27, 2003, the parties entered into an agreement for the said work at the rate of Rs. 412 per meter. However, in a meeting held between the parties on May 13, 2003, MTNL insisted that Carrycon work at a reduced rate of Rs. 230 per meter, which was accepted by Carrycon through a letter sent on May 17, 2003. This letter provided that the new rate shall be applicable from the date of acceptance of the new rate by the Material Management Cell of MTNL. In reply, MTNL informed about the approval of new rates by the material management cell and that the new rates would be applicable from the date of the original agreement. After some time, Carrycon issued certain payment bills at the rate of Rs. 412 per meter. On non-payment of the dues, Carrycon approached an arbitral tribunal. It was held therein, later affirmed by the High Court of Delhi, that there was no *consensus ad*

139 *UP Rajkiya Nirman Nigam Ltd.* v. *Indure Private Ltd.*, (1996) 2 SCC 667, 17; *Ramji Dayawala and Sons Private Limited* v. *Invest Import* (1981) 1 SCC 80, 17.

140 (1984) 2 SCC 719,14.

141 *See Benara Bearing and Pistons Limited* v. *Mahle Engine Components India Pvt. Ltd.*, 2018 Indlaw Del 1462; *Ratnagiri Gas Power Pvt. Ltd.* v. *National Insurance Company Ltd.*, 2017 (3) CPJ(NC) 623, 2017 Indlaw NCDRC 594, 25-28 (National Consumer Disputes Redressal Commission (NCDRC)).

142 *Reliance Broadcast Network Limited* v. *Raj Oil Mills Limited*, 2014(3) All MR 797, 2014 Indlaw Mum 136, 21.

143 2018 Indlaw Del 1202.

idem between the parties with regard to the date from which the new rate was applicable and, therefore, no contract came into existence to provide services at the reduced rate of Rs. 230 per meter.[144]

This case is not peculiar. There have been a catena of cases decided through the traditional approach wherein the courts have refused to uphold the enforceability of a counter-offer that was not explicitly accepted by the parties to the contract, irrespective of the fact that the parties were performing their part of the contract with 'varied standpoints.'[145] *'Varied standpoints'* signify a situation where one party thinks that as it has not accepted the counter-offer, no term of the counter-offer binds it; whilst the other party thinks that as the first party is accepting the performance of the contract, it has accepted the counter-offer. Such a situation is problematic because the contract law supports both the mental constructions. The former is supported by the law that unless a counter-offer is accepted, it is not binding[146] and the latter is supported by the law that offers can be accepted through performance.[147] Therefore, under the traditional rule, *consensus ad idem* is over-emphasised instead of balancing the rule of *consensus ad idem* with the rule regarding acceptance by conduct.

(b) The Last Shot Rule.

The last shot rule provides that where conflicting communications are exchanged, each being a counter-offer, even if a contract results at all, it must be on the terms of the party which fired the last shot,[148] *i.e.,* on the terms contained in the final document exchanged.[149] The last shot rule originally evolved in the United Kingdom[150] and it finds its genesis in the failure of the traditional rule to capture the importance of the performance of the contract.[151] It emphasises the conduct captured from the documents exchanged between the parties rather than explicit *consensus ad idem*.[152] The rule was

144 *Ibid.*

145 *See India Tourism Development Corporation Limited* v. *Integrated Digital Solution (Private) Limited*, 2014 Indlaw Del 1782; *See Food Corporation of India* v. *Garg Rice Mills*, 2007 Indlaw Del 1649; *See GSRTC, Ahmedabad* v. *B Arunchandra and Company*, 2001 Indlaw Guj156 (High Court of Gujarat); *See Raipur Alloys and Steel Limited* v. *Union of India*, 1993 Indlaw Del 143 (High Court of Delhi).

146 *Supra* note 78, ss 7, 10 and 13.

147 *Supra* note 78, s 8; *Alok Garg* v. *Ghaziabad Development Authority*, 2014 (4) CPJ(NC) 26; 2014 Indlaw NCDRC 297, 13 (NCDRC); *See also Surat People's Co-operative Bank Limited* v. *Ambika Medical Stores Gujarat*, 2015 Indlaw NCDRC 383 (NCDRC).

148 *Pollock and Mulla*, *supra* note 49 at 165; *British Road Service Ltd.* v. *Arthur V Crutcley and Co. Ltd.*, [1968] 1 All ER 81 (CA).

149 Hugh Beale (ed.), (1)*Chitty on Contracts* 163, 2-037 (Sweet and& Maxwell, 30th edn., 2008); *Zambia Steel & Building Supplies* v. *James Clark & Eaton Ltd.*, [1986] 2 Lloyd's Rep 225 (CA); *Butler Machine Tool Co. Ltd.* v. *Ex-Cell-O Corp (England) Ltd.*, [1979] 1 WLR 401 (CA).

150 *Butler*, *supra* note 149.

151 *Ibid.*

152 *Ibid.*

qualified in *Takdata Interconnections* v. *Amphenol Ltd.*, wherein the Court of Appeal held that the traditional rule must be adopted unless the documents passing between the parties and their conduct show that some other terms were intended to prevail.[153]

This paper presents certain reservations against the viability of the last shot rule. Though the last shot rule was developed to counter the mischief resulting from the traditional rule, it has failed to bring out a just approach and has created another mischief. Under this rule, merely sending the last counter-offer binds the other party if the performance of the contract has been initiated, irrespective of the fact that the other party was performing the contract keeping the original conditions in mind and not the conditions of the last correspondence.

For instance, in *Maharia Resurfacing and Constructions Private Limited* v. *Greater Noida Industrial Development,* the petitioner had applied for a tender on Aril 24, 1997 that was accepted conditionally by the respondents on May 12, 1998. This correspondence thus became a counter-offer. Instead of accepting, rejecting or negotiating the counter-offer, the petitioner initiated performance of the contract. The High Court of Allahabad, drifting away from the traditional rule, held that: [154]

> Since the petitioner started the work on the basis of the contract after receiving the letter dated May 12, 1998, it means that it has accepted the letter dated May 12, 1998 in its entirety.

Perhaps the petitioner might have started the performance of the contract keeping the terms of the original contract in mind, as the new terms were not yet accepted. Therefore, a couple of things are evident here:

i. The Indian courts, which were following the practice of applying the traditional rule, have drifted away while applying the last shot rule where they put the conduct of the parties on a higher pedestal than pure *consensus ad idem*.

ii. The last shot doctrine comes with some of its own lacunae:

1. It encourages the parties to continuously send standard form contracts with a hope to fire the last shot. Therefore, the operation of the doctrine depends on chance.[155]

2. Where delivery of goods has been done, the acceptance of the same may be considered as a new contract based on implied terms.[156]

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153 *Takdata Interconnections* v. *Amphenol Ltd.*, [2010] 1 Lloyd's Rep 357, 11 (CA).

154 *Maharia Resurfacing and Constructions Private Limited* v. *Greater Noida Industrial Development*, 1999 (2) ARBLR 11, 1998 Indlaw All.

155 Rick Rawlings, "The Battle of Forms" 42 *Modern Law Review* 715 (1979) cited in *Pollock and Mulla*, *supra* note 49 at 165.

156 *Atiyah*, *supra* note 36.

3. The application of this rule may result in a contract that is contradictory to the true intentions of the parties.[157]

Against such shortcomings of the last shot rule, the knock-out rule provides a just alternative.

(c) The Knock-out Rule.

The knock-out rule intends to provide a balanced solution to the problem by securing due credence to both tranches of the contract law, the law on *consensus ad idem* and the law on implied acceptance by conduct.[158] It governs that where the standard form contracts between the parties contain agreed as well disagreed/contradictory terms, then the contract is concluded on the agreed conditions, whilst the contradictory conditions are excluded or knocked out,[159] thereby ensuring that only the mutual intentions of the parties find legal force.

One of the important benefits of this principle is its dynamicity and its inherent inclusion of the traditional rule. The application of this rule would warrant the operation of only those terms that have been mutually agreed upon between the parties. If the standard form contracts of both the parties contradict each other or there is no traceable common term, then all the terms shall be knocked out and no contract takes place.[160] Similarly, if the material terms of the contract are knocked out, the performance of the contract would be an impossibility and therefore, no contract would take place. For an illustration, in *Vinod Kumar Gandhi* v. *Puri Construction Private Limited*, the petitioner had paid earnest money of Rs. 5 lakhs for the booking of a residential flat to the respondent. Thereafter, the respondent replied to the consumer with a provisional allotment letter specifying allotment of a flat located on the 9th floor along with certain indicative terms and conditions. Against this, the petitioner requested the refund of the earnest money, as he was not interested in the allotted plot. However, the respondent returned the earnest money with a deduction of 10% alleging that it is the penalty for the consumer backing out of the contract. When the petitioner challenged such a deduction, the National Consumer Disputes Redressal Commission, the apex forum for consumer disputes held that the provisional allotment letter was a mere counter-

157 Ulrich Magnus, "Last Shot v. Knock out – Still Battle over the Battle of Forms under the CISG" *Stockholm Centre for Commercial Law Juridiska Institutionen* 192 (2007).

158 *See* Sieg Eiselen and Sebastian K Bergenthal, "The Battle of Forms: A Comparative Analysis" 39(2) *Comparative and International Journal of South Africa* 214 (2006).

159 *See* UNIDROIT Principles of International Commercial Contracts, 2016 (UPICC), art. 2.1.22 – Battle of Forms; Peter Huber & Alastair Mullis, *The CISG: A New Textbook for Students and Practitioner*s 94 (Sellier European Law Publishers, 2007); *See also* Omri Ben-Shahar, "How to repair Unconscionable Contracts" John M. Olin Program in Law and Economics (Working Paper No. 417, 2008).

160 *See India Meters Limited* v. *Punjab State Electricity Board* (1993) 1 SCC 230.

offer in reply to the petitioner's offer to buy a flat, which was not accepted by the petitioner. When this counter-offer was rejected, it signified that no contract had concluded. Thus, the petitioner was entitled to the entire earnest money without any deduction.[161]

Despite such benefits of the knock-out rule, the Indian courts cannot be seen applying the rule while handling the cases of counter-offer or battle of forms. However, for academic liabilities and the international acceptance of the knock-out rule,[162] the paper shall briefly delve into a study, using the *MTNL* v. *Carrycon* case, to prove the appropriateness of applying the knock-out rule over the other two. In this case, if the High Court of Delhi had applied the knock-out rule, possibly MTNL would have had to pay Carrycon the reduced rates for the work undertaken by Carrycon after the acceptance of the reduced rated by the MTNL Material Management Cell because both, MTNL and Carrycon, were agreeable to this.

IV Conclusion

This paper has attempted to state the Indian law on standard form contracts as expounded through the judgments of the courts. The courts have accepted that the necessity of a standard form contract cannot be challenged because it has brought pace and uniformity in the formation of contractual relationships. At the same time, its peculiar nature has made the courts transform the rules of interpretation employed while construing a contract. The intrinsic nature of this kind of contract contains a possibility of exploitation, generally manifested when two parties having unequal bargaining power enter into a contract. The Supreme Court has very accurately clarified that courts would *normally* look at contracts more broadly and would not interfere in the merits of such actions by examining the details.[163] At the same time, the law has been settled on the character of unconscionability, *i.e.,* having no *meaningful freedom of contract,* and the courts have held that there are constitutional as well as statutory sanctions against an unconscionable standard form contract.

With respect to the battle of forms, the situation remains unclear. In some instances, the courts have tilted in favor of the requirement of explicit *consensus ad idem* and sometimes they acknowledge the creation of contractual obligations through an implicit consent by the performance of the contract. Perhaps the isolated application of the rule regarding the conclusion of a contract through explicit *consensus ad idem* or implicit consent in the matters of the battle of forms, when performance has been initiated, leads to absurdities and uncertainties and thus the paper argues that a ubiquitous

161 *Vinod Kumar Gandhi* v. *Puri Construction Private Limited*, 2016 SCC OnLine NCDRC 376 (NCDRC); *See Ralli Estate Private Limited* v. *NDMC* 2006 (126) DLT 703; *Ram Phal* v. *State of Haryana*, AIR 2001 P and H 99 (High Court of Punjab and Haryana).

162 *See UPICC, supra* note 159 at art. 2.1.22.

163 *Special Reference No. 1* of 2012, (2012) 10 SCC 1 (SCI).

application of the knock out rule is warranted. The knock-out rule shall ensure dynamicity while construing the extent of binding part of a contract and strikes a fair balance between the requirement of explicit *consensus ad idem* and the rule prescribing the formation of the contract through performance.