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Unconscionability of E-contracts: A Comparative Study of India, the United Kingdom, and the United States

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Abstract
Adhesion contracts have a strong likelihood of being unconscionable. The laws and principles are further complicated by the introduction of electronic contracts, specifically electronic consumer contracts. The paper touches upon the duty to read doctrine in contracts and electronic contracts. While the doctrine of unconscionability has evolved it has been playing catch up with the demands of consumers. This paper compares the application of this doctrine in the United States (US), the United Kingdom (UK), and India. The paper also proposes recommendations for consumers and the development of laws.

Keywords Electronic contracts · Consumer contracts · Duty to read · Adhesion · Unconscionability

Introduction

The doctrine of unconscionability is a common law doctrine that has migrated across jurisdictions and is becoming increasingly salient due to the proliferation of the internet and the consequent contracts entered by everyone. Indeed, the internet has touched all aspects of an individual's personal and professional life in our contemporary times. Electronic contracts have raised questions about data, informational privacy as well as the presence of an unequal bargain between the consumers and businesses. The practical convenience of online transactions is offset by the dangers presented by the long, drawn-out terms and conditions (T&C). This paper focuses on consumer electronic contracts (e-contracts) that online marketplaces often use

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to set their T&C and evaluates them within the framework of unconscionability as developed in three jurisdictions—India, the US, and the UK. For the purposes of this paper e-contracts refer to contracts formed over the internet where formation and acceptance takes place electronically.

E-contracts are often placed into two categories, click-wrap, and browse-wrap agreements, based on the type of procedural assent. Click-wrap terms call for an explicit manifestation of assent, usually by clicking on an 'I agree' icon or in a small box next to the statement 'I agree to the Terms and Conditions' (Moringiello and Reynolds 2010: 176). Browse-wrap terms do not call for an explicit manifestation of assent, and those terms are usually accessible through a hyperlink (Moringiello and Reynolds 2010: 176). This paper does not differentiate between the two categories and refers to both as consumer e-contracts.

T&C on a website is a typical example of a 'standard form of contract'. They are usually used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not able to negotiate for better terms. The contractual intention of a consumer is the non-voluntary acceptance of terms dictated by the stronger party. Thus, standardised contracts are frequently contracts of adhesion (Kessler 1943: 632). Hence, due to the nature of consumer e-contracts where the consumer is often the weaker party, this paper uses the 'standard form of contract' and 'adhesion contract' interchangeably.

Within the context of consumer e-contracts, businesses can use their knowledge and experience to exploit consumers, particularly as consumers often fail to read the T&C contained in adhesion contracts. Generally, businesses do not want the consumer to read these adhesion contracts (Meyerson 1993: 1270) and know that their T&C will not be read (Barnett 2002: 632). Businesses have integrated marketing and contracting as website designers work closely with lawyers, tinkering with their websites in ways that deter consumers from reading adhesion terms. For example being able to use a user's search history, location, to target them with appropriate advertisement, then such a configuration might increase sales (Hillman 2002: 53). And such strategies have been successful. Businesses also seek uniformity through adhesion contracts and individually negotiated contracts will hamper it. Further, businesses like consumers, are short of time and prefer not to have their turnover slowed by hordes of consumers pausing to peruse pages of legalese (Meyerson 1993: 1270). These issues are aggravated in an online eco-system.

Dale Clapperton cites the example of the Kazanon website[1] which made contradictory claims. They advertised anonymity in downloading online material but the T&C stated otherwise. The remainder of the T&C gave the user's purported consent to a variety of malicious behaviours usually associated with so-called 'spyware' or 'malware' applications (Clapperton 2009: 105). And yet, people overwhelmingly

[1] 'You can FINALLY—ANONYMOUSLY—safely and securely download, swap and trade music, movies, software, everything … KAZANON makes you TOTALLY ANONYMOUS and INVISIBLE—NO ONE WILL EVER KNOW YOUR REAL IDENTITY, LOCATION or IP ADDRESS … NO MORE FEAR of a lawsuit or prosecution just for downloading your favourite music!' (Odysseus Marketing 2003).

agreed to these T&C, demonstrating that in such instances of users being asked to simply click 'I agree', thoughtful and deliberate decision-making after weighing costs and benefits is absent.

A 2017 research study conducted by Jonathan A. Obar and Anne Oeldorf-Hirsch shows that when it comes to joining a fictitious social network, NameDrop, the majority of users spend less than a minute perusing the terms[2] and ended up assigning their first-born child to sign in and gain access to the network (Obar and Oeldorf-Hirsch 2020: 134). The privacy policy also said that their data would be given to the US National Security Agency, employers and any third party (Obar and Oeldorf-Hirsch 2020: 134). The research highlights how consumers hardly pay any attention before acknowledging any T&C. Indeed, 'I agree to the terms and conditions' is referred to anecdotally as 'The Biggest Lie on the Internet' (Obar and Oeldorf-Hirsch 2020: 130).

The question here is this: Can a person who has not read the contract be bound by its T&C? The answer is yes since most common-law jurisdictions rely heavily on the 'duty to read' (Becher 2008: 729). However, does the duty to read apply to e-contracts, especially to e-consumer contracts?

The paper proposes that the burden to read and abide by T&C in e-contracts should be different from contracts. The first part of the paper shows that judging contracts and e-contracts by the same yardstick is inapposite because the latter are adhesion contracts which throw up concerns about unconscionability because of the lack of negotiation and inequity between the bargaining powers of both parties. Then, this paper engages with the duty to read doctrine and shows why the duty to read for e-contracts is different from regular commercial contracts. Finally, the paper compares unconscionability in consumer e-contracts in different jurisdictions—the US, the UK and India—and makes suggestions for what India should do.

Electronic Contracts of Adhesion and Unconscionability

Adhesion contracts (also known as boilerplate contracts and standard form contracts) are drafted by one party, usually, a business, and the other party, usually a consumer who has no bargaining power. Adhesion contracts operate on the basis of take-it-or-leave-it policy and the role of the weaker party is merely confined to the adherence of the given T&C (Zhang 2008: 3).

Although adhesion contracts are not objectionable as such. However, due to their one-sided nature it may exonerate one-party from any liability and give them extremely far-reaching powers. In certain cases, it can be so decisively prejudiced in favour of the stronger party that it becomes oppressive (Angelo and Ellinger 1979: 302). A common factor found in such contracts is the 'unconscionability' of the bargain (Angelo and Ellinger 1979: 302).

[2] The survey found that 543 participants who joined the fictitious social network spent fifty-one seconds on average reading the Terms of Service policies, with a ninety-three percent acceptance rate.

The doctrine of unconscionability may be broadly described in terms of contracts or clauses that courts refuse to enforce because enforcement would abuse the judicial enforcement mechanism as applied to consensual agreements (Fort 1978: 770). In English law, which is the oldest among the three and the historical source of jurisprudence for the US and India, contracts being set aside on the grounds of equity which manifested itself as the doctrine of unconscionable bargain can be traced to early England between the seventeenth and nineteenth centuries, when agreements were set aside for protecting the interests of heirs[3] due to their age and vulnerability (Liew and Yu 2021: 208).Originally, the doctrine of unconscionability arose for the protection of the weaker parties.

Though adhesion and unconscionability are traditional concepts, they can be applied to e-contracts. Given the judicial developments across jurisdictions, the paper argues that despite the inherent weakness of the unconscionable doctrine, it should be made applicable in e-contracts unequivocally and unconditionally.

Consent in Adhesion Contracts

The legal position that adhesion contracts are presumptively valid in both the paper and electronic worlds assumes that individuals are acting rationally when they provide blanket assent (Nehf 2005: 52). However, it is much more common for consumers to not read their agreements.

While all jurisdictions, to an extent, recognise the primacy of informed consent even in the online sphere, this framework of notice and consent is broken due to unequal bargaining power as well as the technical drafting (Katz 1990: 4) used in such e-contracts. Informed consent in physical contracts is relatively easier to ascertain, since the parties are generally present, along with witnesses and documents, which are then physically executed (Gluck 1979: 73–74).[4] Clicks, which are the main method of interacting with websites, can produce the same legal effect as handshakes, nods, or signatures (Mik 2016: 76). However, consent in e-contracts is more difficult to establish as these features are lacking in electronic form.

The UK courts have recognised that two specific problems arise in adhesion contracts that challenge the theories that underpin the contract—lack of choice and lack of knowledge of the contents of the contract due to unwillingness to read or inability to understand harsher terms (Tofaris 2020: 115). Thus, not only the contractual terms but also the conduct of the parties bears salience to the doctrine of unconscionability in English law.

The validity of the agreement is assessed by examining whether consent was ‘free’ (Tofaris 2020: 113). And if such consent was found, the agreement had, in

[3] *Earl of Ardglasse* v *Muschamp* (1684) 1 Vern 237; 23 ER 438, 438–9 (Lord Guilford); *Earl of Aylesford* v *Morris* (1873) LR 8 Ch App 484, 489–90 (Lord Selborne LC).

[4] While the traditional bargained out document was evidence of the understanding, the same cannot be said of the standard form document which is pre-printed and represents the wishes of the seller. Merely because a buyer signs a standard form document, that does not necessarily imply that he has acquainted himself with all the terms of the contract, and consequently accepted them.

most cases, to be respected (Tofaris 2020: 113). The Indian Law Commission Report of 1984 on the subject of adhesion contract, questioned if an individual understood the conditions and wanted to change them, could he negotiate and do so? If he cannot, what does it matter (Law Commission of India Report 1984: 4)? This lack of negotiating power is one of the strongest factors restricting the true freedom of contract (Mohan and Jain 2020: 8).

This unfortunate reality has led some scholars, like Margaret Radin, to conclude that such e-contracts should not even be considered a contract[5] (Margaret Radin 2013: 14). In other words, such documents cannot be deemed to be valid contracts, since the way these documents are agreed upon and signed belies any comprehension of, or 'agreement' to, the document. (Cornelius 2018: 9) However, Eliza Mik observes that we must not idealise traditional contracts over e-contracts. When discussing contract law in the internet context, some scholars seem to imply that traditional transactions reflect the 'meeting of minds'—the parties understand all legal consequences of their actions or that terms are negotiated. Such implications are incorrect (Mik 2016: 74). The traditional conceptualization of consent is not workable on the internet today (Srikrishna Report 2018: 38), and some courts are sympathetic to this view.

As highlighted by Srikrishna Committee Report in 2018 for India, there is uncertainty on what constitutes assent in e-contracts. This predicament not only extends to the US and the UK where failure to read is well documented but has global ramifications due to the deep and pervasive nature of the internet (Hillman 2017: 74).

Duty to Read

This paper makes a distinction between the duty to read in traditional contracts and e-contracts due to the mitigating factors which are present in the latter.

The duty to read doctrine developed from individually negotiated contracts but is now applicable for adhesion contracts as well (Law Commission of India Report 2006: 76). Under the duty to read doctrine, contracting parties are presumed to have read the contract before agreeing to its terms. Failure to fulfil this duty has three main legal implications. First, a party is normally bound by the terms of the contract notwithstanding its failure to read them. Second, refraining from reading the contract does not constitute grounds for voiding the contract. Third, failure to read the contract does not trigger a contractual mistake necessary for contract reformation (Benoliel and Becher 2019: 2060).

[5] Margaret Radin, while emphasizing the responsibility of the contract drafter states, '… I think that deployment of boilerplate—in cases where it is found to offend whatever standards are developed for it—should be an intentional tort. Those who draw up and deploy boilerplate know exactly what they are doing and are fully aware of its effects, and indeed intend those effects.' (Radin 2013: 215).

Several scholars have investigated why consumers do not read T&C.[6] Within this context then, one may appreciate the futility of reading, especially since the T&C are non-negotiable (Wilkinson-Ryan 2017: 127) and subject to unilateral change by the service provider[7] (Bar-Gill and Davis 2010: 17). There is also no way for new users confronted with a site's or service's T&C to know about prior users' objections to any of the provisions (Wilkinson-Ryant 2017: 170–171).

The duty to read doctrine has been well documented in various cases[8] in all jurisdictions of the US, the UK and India. Accordingly, the US courts typically enforce these agreements against consumers even if consumers do not read them (Benoliel and Becher 2019: 2296) but within reason. For example, in the US a district court in New York held that a consumer was not bound by the terms of their e-contract merely because of blanket assent to all T&C upon entering the website. The court reasoned so due to a lack of prominent display of the terms. The duty to read is a recognized doctrine in the US, but that does not mean that buyers will have to actively search for them.[9]

Similarly in the UK and India, the duty to read doctrine has been recognised and upheld in adhesion contracts.[10] A person who signs a document which contains contractual terms is normally bound by them even though that person has not read them and is ignorant of their precise legal effect.[11] The doctrine remains unchanged in

[6] Radin states seven reasons (not understanding, no other business alternative, unaware of T&C, trust the company, trust the enforcement system, no negotiating power, will not need legal remedy) on why a user might not read T&C (Radin 2013: 12). Easy to accept default options (Thaler and Sunstein 2008: 7–8). Classical conditioning effect (Petty et al. 1993: 341). People do not fail to read T&C because of 'mere laziness' (Rakoff 1983: 1226). Even when users read the policies they often did not agree with their meaning (McRobb 2006: 224).

[7] Because the drafters of these contracts know not only that their forms will not be read, but also that it is reasonable for consumers to sign them unstudied, a reasonable drafter should have no illusion that there has been true assent to these terms (Meyerson 1993: 1265). If the drafter of a form contract should know that a particular term was not read by the promisor, it may be argued that it is unreasonable to think the promisor meant to bind himself to that term, even if he signed the agreement, clicked 'I agree', or somehow manifested his assent to the form (Barnett 2002: 629). Mik argues that legal intention presupposes a certain level of understanding of the implications of one's actions. This distinction becomes relevant when a single click can create a contractual relationship and when the very existence of a contract could hinge on the user's contention that he did *not* intend any consequences. It is, however, overly simplistic to state that it suffices to intend to click without realising the possible legal implications. (Mik 2016: 82–84).

[8] See *Hines* v *Overstock.com, Inc*., 668 F. Supp. 2d 362 (E.D.N.Y. 2009), *Fteja* v *Facebook*, 841 F.Supp.2d 829 (S.D.N.Y. 2012),

[9] *Hines* v *Overstock.com, Inc.,* 668 F. Supp. 2d 362 (E.D.N.Y. 2009). The court sided with the consumer who was charged a restocking fee of 30 USD upon returning a vacuum that she bought on the website. The court stated that '… [the customer] lacked notice of the Terms and Conditions because the website did not prompt her to review the Terms and Conditions and because the link to the Terms and Conditions was not prominently displayed so as to provide reasonable notice of the Terms and Conditions. Very little is required to form a contract nowadays—but this alone does not suffice.'

[10] *L'Estrange* v *F. Graucob Ltd.* 2 K. B. 394 (1934), *Bihar State Electricity Board* v *Green Rubber Industries*, (1990) 1 SCC 731.

[11] See *ABN Amro Bank N.V.* v *Royal & Sun Alliance Insurance plc and others* [2021] EWCA Civ 1789, *Parker* v *South Eastern Railway [1877] 2 CPD 416*, *Levison* v *Patent Steam Carpet Cleaning* [1978] QB 69, Beatson, J., et al. Anson's Law of Contract. 31st ed., Oxford University Press, 2020,188.

case of e-contracts and so far has not seen a shift in understanding in the UK[12] and Indian[13] courts. Thus, irrespective of whether a person signs or clicks T&C without reading them, he is bound by the contract.

Unconscionability in E-contracts

The adhesion contracts remain almost entirely unregulated despite their pervasive usage and a significant departure from the classical model of a negotiated contract. The doctrine of unconscionability remains the sole defence against unfair terms in adhesion contracts (Lonegrass 2012: 4). Unconscionability is a judge-centric doctrine, which means the courts look for reasonable expectations of the parties (Gamarello 2015: 10). Hence, the decisions of the courts are unpredictable. The doctrine is formulated to address particulars of individual cases and cannot be uniformly applied (Radin 2013: 129).

The United States (US)

In the US, there are two major sources of contract law, the Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts (Restatement), which speak of unconscionability (Barnes 2005: 4). The framers of the UCC, while mentioning the doctrine of unconscionability in Article 2,[14] left it undefined without any framework for its implementation (Lonegrass 2012: 8), leaving the courts to develop the jurisprudence through case law.[15] The Restatement contains an unconscionability provision in Section 208[16] which is nearly identical to UCC Section 2–302. The official comments to UCC Section 2–302 explain in general terms that the doctrine

[12] *Higgins & Co Lawyers Ltd* v *Evans*, [2020] 1 WLR 141, *Green Deal Marketing Southern Ltd* v *Economy Energy Trading Ltd and others*, [2019] EWHC 507 (Ch), Qantas Cabin Crew (UK) Ltd v Lopez and another, UKEAT/0106/12/SM.

[13] *Uttarakhand Power Corpn. Ltd.* v *ASP Sealing Products Ltd.,* (2009) 9 SCC 701, *Bharathi Knitting Co.* v *DHL Worldwide Express Courier, (1996) 4 SCC 704*, *Ferro Alloys Corpn. Ltd.* v *A.P. State Electricity Board*, 1993 Supp (4) SCC 136.

[14] **§ 2–302. Unconscionable contract or Clause**.

(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 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.

[15] See *Williams* v *Walker Thomas Furniture Co.* (350 F.2d. 445C D.C. Cir 965).

[16] If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

seeks 'the prevention of oppression and unfair surprise' and directs against the 'disturbance of allocation of risks because of superior bargaining power.'[17]

The doctrine of unconscionability is a particularly salient kind of wild card because its main field of application is contracts of adhesion. The US courts have often defined unconscionability as 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party,'[18] and it is typically claimed by recipients attempting to invalidate sets of adhesion terms or specific (Margaret Radin 2013: 124).

Professor Arthur Leff classified unconscionability as procedural unconscionability and substantive unconscionability (Leff 1967: 487). He defined procedural unconscionability as fault or unfairness in the bargaining process, and substantive unconscionability as fault or unfairness in the bargaining outcome—that is, the unfairness of a contract as such, without regard to whether the bargaining process was fair (Eisenberg 2009: 2).[19]

The US courts have felt obligated to support an unconscionability determination through a two-step analysis of substantive and procedural unconscionability. The most troubling cases are those in which there is overwhelming evidence of one form of unconscionability and little evidence of the other form (DiMatteo and Rich 2006: 1073).

The US courts in a few cases have relied upon the doctrine of unconscionability as they deemed adhesion contracts as an abuse of contract law (McCullough 2016: 781). According to the official comments to the U.C.C.,[20] case law has established a high threshold for both procedural and substantive unconscionability, requiring that the unconscionable term must amount to 'oppression' or 'unfair surprise' on the procedural level and 'shocking the conscience' (in its one-sidedness) on the substantive level (Bar On 2019: 624). 'Unfair surprise' points to the formation of conduct while 'oppression' might refer either to the substantive effect of the clause or the bargaining process (Kornhauser 1976: 1158). The doctrine of unconscionability is, thus, cautious about disturbing the allocation of the risks that the parties undertake due to their superior bargaining power (McCullough 2016: 781). A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract.[21]

Another uniform law suggested in the US that should be taken note of is the Uniform Computer Information Transactions Act (UCITA), which lays out rules on contractual aspects of electronic commerce and deals with unconscionable contracts or terms under Section 111. If a contract or its terms have been tainted

[17] UCC § 2–302 cmt. 1. available at: https://law.justia.com/codes/ohio/2006/orc/jd_130215-53d7.html#:~:text=(A)%20If%20the%20court%20as,limit%20the%20application%20of%20any

[18] *Williams* v *Walker-Thomas Furniture Company*, 350 F.2d 445 (D.C. Cir. 1965), 449.

[19] For further discussion see Craswell, R. (2010). Two Kinds of Procedural and Substantive Unconscionability. *UC Berkeley: Berkeley Program in Law and Economics*. Retrieved from https://escholarship.org/uc/item/0hf7v16t

[20] Uniform Commercial Code § 2–302, Comment 1.

[21] *State ex rel. AT & T Mobility, LLC* v *Wilson, 703 S.E.2d 543* (2010), 578.

with unconscionability when it was made, the Court may invalidate the contract or may apply severability to the offending terms and enforce the rest of the contract. The Court may also limit the application of the unconscionable term to nullify unconscionability.[22]

For example, in *John Deere Leasing Agency* v *Blubaugh*,[23] the US District Court for the District of Kansas held a lease agreement containing liquidated damages to be unconscionable. The document drafted by John Deere Leasing Agency was in fine print, almost illegible and on the reverse side of the form. The court termed the agreement as an adhesion contract which was drafted in complex legalese and was drafted by one party i.e. John Deere Leasing Agency. The farmer lacked knowledge and voluntariness because of the inequality in bargaining power rendering the contract procedurally unconscionable. Additionally, the liquidated damage clause was held to be substantive unconscionability; the court found the liquidated damage provision to be substantively unconscionable since it amounted to a penalty.

The Civil Court of the City of New York, Trial Term, New York County in *Jefferson Credit Corp.* v *Marcano*[24] discussed a scenario where the consumer due to linguistic limitation has been unable to read and understand the terms of the agreement, the court held that this is a case of procedural unconscionability.

The judicial inquiry focuses on specific and objective criteria which demonstrate the inability to meaningfully assent to the contractual terms. The U.S. Supreme Court in *Carnival Cruise Lines* found that an adhesion contract is valid by stating that the '[f]orum selection clauses contained in form passage contracts are enforceable as long as they pass judicial scrutiny for fundamental fairness.'[25] It was held that if the customers have been given notice of the forum provision and they had the choice of rejecting it then the clauses of the contract pass judicial scrutiny and should be enforceable. However, in *Fairfield Leasing Corporation* v *Techni-Graphics, Inc.,*[26] the Superior Court of New Jersey invalidated an adhesion contract because its waiver clause was single-spaced and had a small font, the court deemed the clause to be too inconspicuous.

In *Specht* v *Netscape Communications Corp*,[27] Netscape tried to pursue arbitration as per the terms of the browse-wrap agreement provided on the home page of their website. The United States Court of Appeals for the Second Circuit declined to enforce the arbitration clause which was not visible on the screen but had to be

[22] Section 111. Unconscionable contract or term.

(a) If a court as a matter of law finds the contract or any term thereof 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 term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

(b) If it is claimed or appears to the court that a contract or any term thereof may be unconscionable, the parties must be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

[23] 636 F. Supp. 1569 (D. Kan. 1986).

[24] 302 N.Y.S.2d 390, 393–94 (Civ. Ct. 1969).

[25] *Carnival Cruise Lines, Inc.* v *Shute,* 499 U.S. 585 (1991) 595.

[26] (1992) 607 A.2d 703.

[27] 306 F.3d 17 (2d Cir. 2002).

scrolled down the webpage to a screen located below. The court stated—'[A] consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms…,'[28]

Thus, when the court analysed whether a site provides reasonable notice of T&C, it found that a reasonably prudent internet user would not necessarily scroll down to see the bottom of the page where the T&C were located. Hence, browse-wrap agreements (or links to such agreements) that a consumer cannot see on the screen do not force assent (Mann and Siebeneicher 2008: 991). The Courts have been reluctant to enforce browse-wrap agreements due to a lack of affirmative consent since the only notice is the tiny link located at the bottom of the website (Mislove and Wilson 2020: 547).

A commercial transaction entered in good faith and format using simple, concise contractual language and using capital letters to invite attention to key provisions mitigates the claim of procedural unconscionability.[29] Both procedural and substantive unconscionability is argued in Courts to set aside the terms of an adhesion contract.

The conventional approach to unconscionability has been to invalidate a contract or provision only when strong evidence of both procedural and substantive unconscionability is present. Specific indications that a consumer lacked meaningful choice in the terms of the contract are required to justify the court's intervention in the ordering of private affairs. Nevertheless, even when those indications are present, a court may not 'rewrite' the contract between the parties unless its substantive unfairness is particularly egregious (Lonegrass 2012:11).

Courts have extended the doctrine of unconscionability to consumer contracts in the recent past, and unconscionability has been fashioned as a check on standardized agreements by the introduction of the 'sliding scale' (Lonegrass 2012: 5). The sliding scale approach[30] decentres the formalistic, traditional model of assent while emphasizing the closer scrutiny of the contract for commercial fairness (Lonegrass 2012: 12). While the courts have sparingly utilized the sliding scale approach, it signals that courts may be covertly challenging the predominant doctrinal and societal understanding that resists judicial oversight of contracts due to their autonomy (Lonegrass 2012: 12). The sliding scale approach has the potential of enabling the stakeholders—consumers, legislators, arbitrators, as well as academia—to push back the oppression and overreaching in adhesion contracts. If cultivated normatively, the sliding scale can arrest the abuse of consumer contracts in a balanced manner (Lonegrass 2012: 5).

Thus, whenever a plea of unconscionability is made, the Courts look for both procedural and substantive unconscionability. While procedural unconscionability is about defects in the formation of the contract, substantive unconscionability

[28] Ibid at 30.

[29] *Bess* v *DirecTV, Inc.,* 885 N.E.2d 488, 497–98 (Ill App. Ct. 2008).

[30] Under the sliding scale approach, the two prongs are viewed in tandem, permitting the court to make a finding of unconscionability if the overall weight of the facts and circumstances favours intervention.

interrogates the contract itself. While the dominant understanding of the Courts has veered towards procedural unconscionability due to the nebulous nature of the doctrine itself which requires evaluation on a case-to-case basis thus diluting precedent value due to its inherent unpredictability.

United Kingdom (UK)

In the UK unlike US, the term ‘unconscionability’ does not find mention in the legislation. However the principle has been covered under the principles which deal with inequality of bargaining power. The Unfair Contract Terms Act 1977 (UCTA) regulates unfair contractual terms by restricting and operating their liability.[31]

The English common law has traditionally not recognised unfairness in contract law as a separate ground instead the parties argued based on duress or undue influence (Swaminathan 2019: 300).

The test of unconscionability has been a matter of contention. In 1974 Lord Denning propounded the ‘inequality of bargaining power’ principle[32] for unconscionability—

> English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.[33]

However the principle as stated by Lord Denning requires both substantive unfairness (‘terms which are very unfair’) and procedural unfairness (‘undue influences or pressures’) (Beatson et al. 2020: 375–376).

In the *Multiservice Bookbinding Ltd* v *Marden case*,[34] the court described unconscionable bargain as ‘a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience’.[35]

This was further developed by the *Alec Lobb (Garages) Ltd* v *Total Oil (Great Britain) Ltd*[36] wherein the three threads of the plea of unconscionability were summarised as—

> [I]f the cases are examined, it will be seen that three elements have almost invariably been present before the court has interfered. First, one party has been at a serious disadvantage to the other, whether through poverty, or igno-

[31] Unfair Contract Terms Act 1977 available at: https://www.legislation.gov.uk/ukpga/1977/50.

[32] *Lloyds Bank Ltd* v *Bundy* [1975] 1 QB 326.

[33] Ibid para 339.

[34] *Multiservice Bookbinding Ltd* v *Marden*, [1979] 1 Ch 84, 110.

[35] Ibid para 110.

[36] [1983] 1 WLR 87.

rance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken … secondly, this weakness of the one-party has been exploited by the other in some morally culpable manner … and thirdly, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive.[37]

These elements as propounded in the *Alec Lobb case* have been used as the basis of modern requirements in unconscionable cases. However, the three requirements are not mutually exclusive since the presence of one may have a strong effect on the court's finding of another. (Liew and Yu 2021: 210).

This inequality of bargaining power was repudiated by the House of Lords in the *National Westminster Bank* v *Morgan*[38] as going too far. The court questioned its role in formulating further restrictions when the legislature had already undertaken the responsibility of enacting necessary laws.

Thus, from the development of Courts, the doctrine of unconscionability went to the legislative sphere to draw upon restrictions on the freedom of contract. The development of protection of weaker contracting parties has been left to statutory intervention, particularly in the field of consumer contracts (Beatson et al. 2020: 377).

There are other regulations in the UK with specific focus on unfair terms in consumer protection as well—Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Rights Act[39] 2015 (CRA).

The Law Commission of the United Kingdom undertook a study on the unfair terms in consumer contracts to harmonise UCTA and UTCCR. This led to a report in 2012 that also recognized the protection of consumers against small print.[40]

CRA was also enacted in 2015 to protect the rights and interests of the consumers and Part 2 of the Act is a reflection of the efforts to simplify provisions of UCTA and UTCCA. The courts in consumer contracts have made comparable references to UTCCR.[41]

While the CRA does provide remedies[42] to the consumers in case of unfair terms, the application of UCTA provides a deeper understanding of unconscionability.

The two recent cases of Uber[43] have raised pertinent issues of unconscionability of contract due to adhesion contract, unequal bargaining power of the parties with

[37] Ibid para 94–95.

[38] [1985] AC 686.

[39] Consumer Rights Act 2015 available at: https://www.legislation.gov.uk/ukpga/2015/15/introduction.

[40] Small print' is marked by poor layout, densely phrased paragraphs, and legal jargon. The Law Commission opined that all small print terms should be assessable for fairness (The Law Commission and The Scottish Law Commission Report 2013: 3).

[41] *R and S Pilling t/a Phoenix Engineering* v *UK Insurance Ltd*, [2019] UKSC 16, *Cavendish Square Holding BV* v *Talal El Makdessi* [2015] UKSC 67.

[42] Section 62 (1) An unfair term of a consumer contract is not binding on the consumer.

[43] *Heller* v *Uber Technologies* 2020 SCC 16 (the Canadian court placed heavy reliance upon common law doctrine of unconscionability, holding that equitable doctrine allows contracts obtained by the abuse of unequal bargaining powers to be set aside by the courts.).

one party—Uber dictating the terms and the copious terms of contract which the other party is unable to read or comprehend.

The Supreme Court of the UK in the *Uber* case[44] dealt with the issue of the employment status of the drivers who use the smartphone application Uber to work. The court stated the inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary principles of contract law, except insofar as Parliament has made the relative bargaining power of the parties a relevant factor under legislation such as the Unfair Contract Terms Act 1977.[45] The purpose is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation which exercises control over their work. The legislation also precludes employers, frequently in a stronger bargaining position, from contracting out of these protections.[46]

The inequality of bargaining power is generally not treated as a reason for disapplying or disregarding ordinary principles of contract law, except insofar as Parliament has made the relative bargaining power of the parties a relevant factor under legislation such as the Unfair Contract Terms Act 1977.[47]

Uber could not have known the individuals' income, education, or knowledge level when they clicked 'Yes, I accept' to the adhesion services agreement in this situation. Examining the services agreement through the lens of unconscionability provides a foundation for dealing with other potentially unjust clauses, particularly in adhesion commercial agreements.

The UK Supreme Court in *Pakistan International Airline Corporation v Times Travel (UK) Ltd*[48] observed that 'the English law of contract seeks to protect the reasonable expectations of honest people when they enter into contracts. It is an important principle which is applied to the interpretation of contracts.'[49]

While the doctrine of unconscionability emanated from English common law, its juridical experiences in the US and UK are vastly different. In English law, courts have hedged and have been reluctant to invoke unconscionability as a doctrine to invalidate contractual enforcement. There is a lack of clarity on the substantive contents of the unconscionability principle in the UK since it originated from the equitable doctrine to protect the vulnerable. Unconscionable bargains have traversed a long path to now be read in undue influence and may also fall conjunctively in duress in English law. In the US, unconscionability is a standalone doctrine and clear demarcation of procedural and substantive unconscionability. The Courts in the US have vacillated between procedural and substantive unconscionability. They can invalidate the contracts based on either procedural, substantive or both- depending upon the facts of the case. The understanding of unconscionability is capacious

[44] *Uber BV and others* v *Aslam and others* [2021] UKSC 5.

[45] Ibid para 68.

[46] Ibid para 71.

[47] Ibid para 68.

[48] [2021] UKSC 40.

[49] Ibid para 27.

since there is a willingness to probe the formation as well as contents of the contracts leading to a much richer understanding of unconscionability.

India

India—like the UK—does not have a formal definition of 'unconscionability'. Comparing laws of India and the UK, Stelios Tofaris argues that it is very difficult to locate a statutory provision addressing 'unfair terms' in the Indian Contract Act, 1872 (ICA)— which codifies common law and equity doctrines—and this led to the emulation of the classical model of contract theory as was prevalent in the UK (Tofaris 2020: 113).

However, ICA does provide for Section 23 which deals with substantive matters that invalidate a contract. It states that the consideration or object of an agreement is lawful unless it is opposed to public policy.

The Indian Law Commission has been seized with questions of 'unfair terms' in contracts and has extensively discussed unconscionability in its 1984[50] and 2006[51] reports. Unlike the UK and USA which have legislative and juridical development on unconscionability simultaneously, India does not have a law on unfair terms yet, despite proposals by two Law Commissions.

The 1984 Law Commission Report proposed the addition of Section 67A to the ICA to set aside contracts due to unconscionability (Law Commission of India Report 1984: 9–10).

In 2006, the Law Commission Report proposed addition of new provisions regarding contractual unfairness which would include both procedural and substantive unfairness Law in a new Unfair (procedural and substantive) Terms in the Contract Bill Commission of India Report 2006: 183.

The Law Commission also noted that in most cases where the weaker party, under the pressure of circumstances (generally economic or due to ignorance) arising out of inequality of bargaining power enters into such contracts, the courts may not be able to help because all such cases do not fall within the four corners of Sections 16, 23 or 27 of the ICA (Law Commission of India Report 2006: 63).

The Supreme Court of India in the *Central Inland Water Transport Corporation Ltd. v Brojo Nath Ganguly*[52] for the first time, delved into unconscionability in the contractual obligations. However, the judgement did not refer to the 1984 Law Commission Report that had already recognised unconscionability. In its judgement, the Court broadened the applicability of unconscionability outside the boundaries laid down by Section 16 of the ICA. Section 16 of the ICA deals with and defines 'undue influence' in cases concerning the inequality of bargaining power,

[50] 103rd Law Commission of India Report on Unfair Terms in Contract available at: https://lawcommissionofindia.nic.in/101-169/Report103.pdf.

[51] 199th Law Commission of India Report on Unfair (procedural & substantive) Terms in Contract available at: https://lawcommissionofindia.nic.in/reports/rep199.pdf.

[52] (1986) 3 SCC 156.

The Court held that the category of unconscionable contracts did not fall within the four corners of the definition of 'undue influence' given in Section 16(1) of the ICA.[53] Adhesion contracts embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons or a group of persons if they are unconscionable, unfair and unreasonable, are injurious to the public interest, should be adjudged void under Section 23 of the ICA on the ground of being opposed to public policy.[54] However, this approach leaves the weaker party remediless since ICA mostly deals with procedural fairness. Public policy is covered by substantive fairness and is sparingly invoked to invalidate a contract.

The court also held the clause to be *ultra vires* of Article 14 of the Constitution of India.[55] Thus the court showed a marked willingness to interfere with adhesion contracts where there is ample evidence of unequal bargaining power.[56] Interestingly, Supreme Court justified the interference on the ground of unconscionability to secure distributive fairness and justice.[57]

The Supreme Court shied away from laying down any test and left it to judicial discretion. However the court did state—

> This principle may does not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations that result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The Court must judge each case on its facts and circumstances.[58]

The judgment of *Central Inland Water Transport* was unanimously affirmed in *Delhi Transport Corpn.* v *D.T.C. Mazdoor Congress*[59] wherein rule 9(b) of the Delhi Transport Corporation, a statutory body under Delhi Road Transport Act, 1950 allowed for the termination of permanent employees without inquiry or pay in lieu of notice.

The Court held that the rule giving the power to terminate the services of the permanent employee with one month's notice or salary in lieu thereof was unconstitutional. Justice Ramaswamy observed—

> As a court of constitutional functionary exercising equity jurisdiction, this Court would relieve the weaker parties from unconstitutional contractual obligations, unjust, unfair, oppressive and unconscionable rules or conditions

[53] Ibid para 91.

[54] Id.

[55] Ibid para 112.

[56] Ibid para 102.

[57] Ibid Para 82.

[58] Ibid para 89.

[59] [1991] Supp (1) SCC 600.

when the citizen is really unable to meet on equal terms with the State. It is to find whether the citizen, when entering into contracts of Service, was in distress need or compelling circumstances to enter into contract on dotted lines or whether the citizen was in a position of either to 'take it or leave it' and if it finds to be so, this Court will not shirk to avoid the contract by appropriate declaration. Therefore, though certainty is an important value in normal commercial contract law, it is not an absolute and immutable one but is subject to change in the changing social conditions.[60]

The Supreme Court in *L.I.C. of India* v *Consumer Education and Research Centre,*[61] accepted the principle laid down in *Central Inland Water Transport*[62] and applied it to the context of an adhesion contract. The court held that—'it was settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational one must look to the relative bargaining power of the contracting parties.' In adhesion contracts, there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power.[63]

Beside the ICA, India also has the Consumer Protection Act, 2019 (CPA), which was introduced to replace the Consumer Protection Act, 1986 (1986 Act).

Under Section 2(r), the 1986 Act covered six categories of 'unfair trade practices', whereas the new 2019 CPA under Section 2(47) has expanded the meaning of unfair trade practices by adding three[64] more categories.

While adhesion contracts are not covered under the meaning of unfair trade practices, the courts have adopted a wide approach towards its meaning. A recent Supreme Court judgment, *Pioneer Urban Land & Infrastructure Ltd.* v *Govindan Raghavan*,[65] invoked Section 2(r) of the CPA to state: 'incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(r)'. The court held that a term of a contract will not be final and binding if it is shown that the party had no option but to sign the adhesion contract which is 'ex facie one-sided, unfair and unreasonable'.[66]

Pioneer Urban Land was upheld in a recent 2021 judgement of *Jacob Punnen and Another* v *United India Insurance Co. Ltd.*[67] where the Supreme Court again applied the same principle to grant relief to the party.

IREO Grace Realtech (P) Ltd. v *Abhishek Khanna*[68] also relied on *Pioneer Urban Land* and stated—

[60] Ibid Para 281.

[61] (1995) 5 SCC 482.

[62] Supra note 84.

[63] Ibid Para 47.

[64] Not issuing proper bill, refuse return or withdraw of defective goods, disclosing a customer's information.

[65] (2019) 5 SCC 725.

[66] Ibid para 6.7.

[67] 2021 SCC OnLine SC 1207.

[68] (2021) 3 SCC 241.

> Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An 'unfair contract' has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.[69]

Experion Developers (P) Ltd. v. *Sushma Ashok Shiroor*[70] also has relied on *Pioneer Urban Land* and *IREO Grace Realtech* to emphasis on the unfairness of one-sided clauses of the agreement.

Jacob Punnen has discussed adhesion contracts and, quoting the 2006 Law Commission Report, stated the definition of 'unfair contract' in the draft bill. However, both *IREO Grace Realtech* and *Experion Developers* make a direct reference to 'unfair contract' under the CPA. Unfair contracts are defined under Section 2(46) as contracts where the terms can cause significant change in the rights of a consumer.

Though the newer cases have not yet utilised the scope of 'unfair contracts', it is likely that the courts in future will expand the meaning and affirm the application of unconscionability from unfair trade practices to unfair contracts under the CPA. This is because the 2019 CPA maintains a similar language and meaning of the phrase to the 1986 act. It is also worth noting that both cases still cite *Central Inland Water Transport Corporation*, even though it dealt with the ICA and not the CPA. This is because the CPA language sets standards, and *Central Inland Water Transport Corporation* gives the principles with which to lend definition to these standards.

The legislative developments in India mirror that of the United Kingdom since both have a specific provision dealing with unfair terms in consumer contracts. Both the Law Commission Reports of India have stressed the inequitable nature of adhesion contracts and the formal acknowledgement of unfairness in contractual obligations. There is no normative coherent theory of the application of unconscionability in India. Section 23 can read unconscionability in public policy but given the primacy of the judges in the doctrine rather than settled legal position, this subjectivity is exacerbated further in India. There is ambivalence within both judicial as well as legislative spheres since Indian judges as well as Law Commission Reports have uncritically cited the US as well as UK jurisprudence.

Thus, through comparison, the substance and circumstances of legislation and case law seem to differ across all referenced jurisdictions. The US adopts a broad doctrine of unconscionability, which addresses both substantive and procedural unconscionability within its ambit. However, it is subject to arguments of vagueness and heavily dependent upon judicial discretion. In the UK, on the other hand, the legislature has identified certain specific terms that must be subject to heightened scrutiny. While this may add some additional certainty to the approach, in the absence of an overarching principle it may lack some of the adaptability of the

[69] Supra note 110 at 274.

[70] 2022 SCC OnLine SC 416.

US model, in the face of changing behaviours in contracting. In India, the legislature has followed the UK approach by providing for specific legislation protecting consumers, and invalidating certain types of clauses. However, following the US jurisprudence on unconscionability, the Supreme Court has attempted to create an overarching framework for unconscionability under the ICA. And it is this strain of jurisprudence in India which has arguably yielded more protection for the consumer in India with regard to adhesion contracts, rather than the statutory language of the CPA.

Conclusion

Consumers have become acclimated to accepting whatever terms come their way as they have no way to negotiate them. Hence, the mere formality of perusing these terms seems to serve no purpose. These unilaterally drafted contracts provide the businesses with an unchecked advantage over the consumer since most people do not read the online contractual obligations that they enter.

A challenge of this sort needs an imaginative solution. Hence the paper proposes the following suggestions based on new technology and consumer-friendly.

In 2020, Robinson and Zhu undertook a study to determine whether simplifying language improved the user's (or consumer's) understanding of the T&C. They used the Elaboration Likelihood Model[71] (ELM) to evaluate their premise (Robinson and Zhu 2020: 1). Interestingly, the study did not find any difference in the understanding between the original and 'simplified' T&C. Based on the findings of the study, it can be argued that websites' T&C should not only provide a common-sense understanding of legal issues but also accommodate a consumer's convenience.

Daniel Susser suggests easy-to-understand summaries of relevant terms in context. When notice is attached to consent procedures, the issue of consent can be resolved as well (Susser 2019: 55).

Another approach is the 'Line-item Clicking technique' as suggested by Thomas Gamarello, if a company wishes to engage in online contracting, it should make all paragraphs or Sections clickable.[72]This would give prudent consumers similar authority as courts that employ the doctrine of reasonable expectations in considering unconscionability. We can expect one-sided terms or crook provisions to be culled and possibly shine a spotlight on the drafters (Gamarello 2015: 24–25).

[71] ELM was first developed in 1980 by Cacioppo and Petty (1984). It is a theoretical framework that explains how recipients' cognitive processes relate to a given piece of information affecting their understanding of the message. ELM suggests that an individual's motivation and capability to process information determines whether they invest any effort in analysing the message. From the results of the study, it appears that simplification of T&C to make them more readable and understandable may not be able to achieve its goal in real-world settings (Robinson and Zhu 2020: 8).

[72] But both the length of the contract and that of the clickable section should be limited to a reasonable word count, in the same way, that the agreement should be limited to reasonable fonts and colours. By requiring users to separately assent to any further terms, including crook provisions, the user retains a degree of power that they do not currently have (Gamarello 2015: 24–25).

Kristin B Cornelius proposes that a contract should be treated as a document, a record, and a piece of evidence in the most standardised, rigorous sense. He proposes the application of the document-engineering approach.[73] A change in the perspective towards adhesion e-contracts can allow for fine-tuned documents, which have systematic identification of the various components and an actual engagement with consumers who are open to alternate approaches.

Hillman emphasizes the potential role of rating services and watchdog groups. He also suggests that the strategy of early disclosure of e- adhesion terms could facilitate their effectiveness. If vendors were to disclose their terms in advance it would increase the likelihood of their enforcement. The principles also call for a more robust judicial exercise of policing tools, including unconscionability and public policy. (Hillman 2017: 78).

A law to the effect may put some onus on the businesses to make T&C readable and hold them accountable for drafting unconscionable terms. Deliberately drafting an unconscionable contract should attract some form of penalty.

But it is not the responsibility of the businesses alone. Consumers should also be prudent enough to raise concerns when they come across unconscionable terms. For example, the Claudette[74] tool.[75] The tool analyses the input text by separating it into sentences, and each of them is classified as either unfair or not, providing an unfairness category and reasons.[76] In this way, the user is not only informed about the unfairness categories and reasons for unfairness but also is given an indicator of how relevant these reasons are for the input text (Liepiņa et al. 2020: 3).

Since the first case on unconscionability, the world has changed dramatically; contracts can now be consented to by checking a box in an online app, with disputes resolved by a privately paid arbitration in another country applying the laws of a different jurisdiction. Individuals and institutions continue to exploit power imbalances and vulnerabilities notwithstanding these improvements, and contract law must be able to effectively respond to substantively unfair bargains originating from these situations (Gardner 2021: 8).

[73] Document-engineering is an approach by Robert J. Glushko and Tim McGrath outlined in their book that synthesises ‘complementary ideas from separate disciplines’, including information and systems analysis, electronic publishing, business process analysis and business informatics, and user-centred design (Glushko and McGrath 2008). The document-engineering approach uses both ‘document analysis’ that analyses text and ‘task analysis’ that analyses data and objects. It seeks to provide a spectrum of solutions addressing document and process specifications that could lead to a better comprehension of the adhesion contract (Cornelius 2019: 12).

[74] The tool can be accessed here: http://claudette.eui.eu/use-our-tools/index.html.

[75] It is an experimental scientific project dedicated to automated compliance assessment of T&C and privacy policies of online service providers which is a tool for the automatic detection of potentially unfair clauses in contracts.

[76] The list of legal rationales is employed by the underlying memory-augmented neural network (MANN model). Such a memory brings two important benefits to model representational capabilities: (1) the memory can act as an auxiliary tool to handle complex reasoning such as capturing long-term dependencies; (2) the memory can be employed to inject external domain knowledge directly into the model for different purposes, mainly interpretability, transfer learning and context conditioning.

These suggestions should be tested to see what works in helping the consumer understand their contracts better. It would also be prudent for the Indian legislature and judiciary to take cognizance of these studies. Instead of clicking 'I agree' we could engage with the clauses as suggested by *Gamarello* and *Cornelius*; make the ELM and *Hillman's* approaches a standard practice to draft the e-contracts in the first place and finally alert the public to use the Claudette tool. The legislature could very well legislate against service providers who insist on incorporating unconscionable clauses but that includes a whole lot of problems including attorney's fees, punitive and statutory damages, and creating more laws. Instead, if we are proactive, we could have a system that works towards weeding out unconscionable clauses and drafters instead of lawyers battling it out in the courtrooms.

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