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UNCONSCIONABILITY – LEGAL ANALYSIS OF AN UNSUNG EQUITY DOCTRINE

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Abstract
The word unconscionability in its literal sense means unreasonableness. It is very much a relative term, and its meaning differs depending on the context in which it is used. The unconscionability involves various principles and policies framework that makes it a doctrine. This doctrine, with no comprehensive definition, can be interpreted and applied to a contract that demands the exclusion from performance. Unconscionability subjectively varies in its application and to make it objective, one should know the nuances of this doctrine. The doctrine of unconscionable mainly at the outset seems as tiny as a needle in a haystack – hard to find and small in size. However, this doctrine must not be judged by its objectivity as it is portrayed to be a defence. Still, it is so deep a concept as it holds the potential to be subjectively applied in cases varying in concepts and facts. Thus, it requires a more robust research especially on areas concerning its applicability. As there is no fixed parameters in the legal framework of what is irrational, anyone who considers breach more attractive than performance may use this doctrine as a defence. In contrary, this doctrine is essential in order to protect the people who entered into a contract in good faith, thus this doctrine of unconscionability is a big dilemma. This research paper is one of the contributions towards analyzing the unconscionability in the light of implications.

Keywords: Unconscionability, Irrational, Unreasonable, Contract, Exception.

1. Introduction

There is no contract without an agreement between the parties. On the contrary, we are moving to a novel phase of formation of a contract such as smart contracts, standard form of contracts etc. In this modern era, a single click is concluding the agreements, and all of it happens to take-it or leave-it module. In fact, the negotiation part is shrinking and virtually no more.1 Various factors are contributing towards this situation such as the number of contracts entered into, the dearth of time to negotiate, routine contracts entered between parties etc. These factors moved from the regular module of negotiation by both the parties to only one of the parties, where he is in a position to draft the terms of the contract and imposes it on the others. Taking this into consideration, ultimate power that one of the parties enjoys in determining the rights and obligations of the contract and it has become necessary to develop legal mechanisms that provide the solution for such misuse of authority2. Perhaps it happens with or without the intention of getting advantage using the dominant position.3 When a contract gives advantage, and the degree of that advantage becomes sufficiently immoral, unjust, or inequitable, the doctrine of unconscionability becomes a prophylactic of those who are not in a position to negotiate on the terms and conditions and are more vulnerable.4 Although outside of contractual settings, the advantageous behaviour of humans, sometimes arising from an abundance of self-love or a failure of empathy, rarely has a viable legal remedy5. When such conduct is documented in an otherwise legally binding contract, there is recourse for victims of such injustice. However, what constitutes an unconscionable contract remains amorphous.6

Researching the doctrine of unconscionability is an attempt to avoid the unlimited and abusive exercise of the unequal power by restricting the autonomy of will and the freedom of the parties to enter into a contract7. The word unconscionable means unfair, unjust and unreasonable. The biggest problem in using this as a defence is that there is no statutory definition. However, the literal interpretation is, it is either a term in a contract or the entire contract itself is unreasonable.8 If proved that the contract is unconscionable it will invalidate the contract itself and at the same time this doctrine can be misused also. Thus, this doctrine must be used with utmost caution.9 As other doctrines, this also should have reasonable restrictions, conditions and rules to be followed

[1] Bianca Bosker, The binge breaker, THE ATLANTIC, Nov. 2016, http://www.theatlantic.com/magazine/archive/2016/11/the-binge-breaker/501122/.
[2] The Unconscionable Contract or Term, 31 U Pitt L Rev 337, 337 (1970).
[3]Although, as we have seen, Nourse L.J. preferred dishonesty for knowing assistance but knowledge/unconscionability for knowing receipt. Nolan supports this, supra, n. 59.
[4] Unconscionability and the Code- The Emperor's New Clause, 115
U Pa L Rev 485,486 n 3 (1967).
[5]Gordley, Contract, Property, and the Will at 70 (cited in note 14) (emphasis added).
[6] Thomas Hobbes, 5 The English Works of Thomas Hobbes of Malmesbury 51-53 (Scientia
1966) (William Molesworth, ed).
[7]www.otago.ac.nz › research › journals › otago672747
[8] S.M. Waddarns, Unconscionability in Contracts, 39 MOD. L. REV. 369 (1976).
[9] Morris, [1861-78] All E.R. at 302 (Selborne, L.J.).

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during its implementation. This paper will be extensively dealing with the origin, nature, importance, validity, misuse and consequence of the doctrine of unconscionability.

1.1. Origin

While the unconscionability doctrine was not formally adopted into the legal lexicon until the 20th century, in contrary its footprint has been traced back to the 18th century. The idea is that courts should refuse to enforce grossly unfair bargains,10 or at the least be generally suspicious of them. It is nothing new, in the era of 19th-century, augmentation of economic revolution and globalization there were numerous contracts formed instantaneously.11 Further, changes in the economic and social climate of the early 20th century created a glaring need for how courts can and should adjudicate extremely unfair bargains.12 The large businesses which originated during this time were looking for quick, swift, trouble-free and standardized ways to contract, as we all know, trust is the founding element for any contract. When entering into business transactions we tend to trust the other party due to various factors such as experience, field of expertise, integrity etc. Unconditional trust is the reason for adopting contracts littered with numerous boilerplate provisions which were extremely favourable to the party who is powerful than the other. Such provisions were usually take-it or leave-it provisions,13 as a result of trust, we tend to overlook the hidden provisions in the contract. The unconscionability doctrine was primarily promulgated in order to protect the unsophisticated negotiating party. To address various contract issues like these, previously unconscionability was adopted.14 Judges would use the metaphorical puzzle pieces of other legally recognized doctrines, like duress and undue influence, in order to apply the doctrine to the cases brought before them which do not entirely conform to the black letter doctrine.15 Otherwise, even in cases where the facts do not adapt itself to the puzzles of the contract defences entirely or accurately, judges are left with no choice, but only with one option which is to enforce grossly unfair contracts. This is the most significant clog to judicial formalism which does not make sense, nor seems fair. Unsurprisingly, this spawned concerns over judicial distortion of traditional contract law and unpredictability of judicial decision making.16

1.2. Nature

Unconscionability is one among the several defences in contract law. Depending on the compelling situation a contracting party can also try various methods and defences to prove irrationality such as duress, undue influence, fraud and misrepresentation to escape liability or to avoid the enforcement of a contract. The same way a person can use the doctrine of unconscionability in some situations. Therefore, in most of the jurisdictions in order to prove unconscionability, a party must prove either procedural or substantive unconscionability or sometimes both.17 The determination of unconscionability must rely upon and should focus more on the relative positions of the parties, the adequacy of the bargaining power, the meaningful alternatives which are available to the plaintiff, and most importantly the existence of unfair and unreasonable terms in the contract.

Procedural unconscionability can be explained and understood as it is the disadvantage due to unequal bargaining power which is suffered by the weaker party during the formation of the contract and there is absence of opportunity to negotiate. It is prevalent only during the formation of a contract.18 It means and includes the so-called take-it or leave-it contracts"19. Thus, these agreements by their very nature itself indicates the presence of extreme inequality in the bargaining power between the parties contracting at the time of formation. On the other hand, procedurally where the dominant party oppresses, and typically it results in suppression of the subservient party due to unequal bargaining power which is abuse during contract formation.20

Substantive unconscionability means the unfairness in the actual terms and conditions of the contract itself. A term is considered to be substantively unconscionable where it is prejudiced or overly harsh, shocking to the conscience, or which are exceedingly calloused.21 As stated above, the unconscionable contractual term renders the agreement against natural justice. It also refers to the situation where the important terms and conditions lack clarity and are harmful interpretations are hidden in a maze of fine print or legalese. Sometimes depending on the situation, only the presence of an extremely unfair condition or clause can lead to

[10] S. M. Waddams "Unconscionability in Contracts" [1976] 39 M.L.R. 369.
[11] [1990] 2 W.L.R. 414, 433, 451
[12] S.M. Waddarns, Unconscionability in Contracts, 39 MOD. L. REV. 369 (1976).
[13] A. Phang and H. Tijo, "The Uncertain Boundaries of Undue Influence" (2002) 2 L.M.C.L.Q. 231
[14] D. Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 L.Q.R. 479.
[15] A.Leff, "Unconscionability and the Code: The Emperor's New Clause" (1967) 115 U. Pa. L. Rev. 485.
[16] Knapp, Crystal & Prince, supra n. 10 at 585.
[17] Jennings [2002] EWCA Civ 159 at [50].
[18] 1990] 2 All E.R. 536, 540. Quaere whether the way this is put indicates some distancing from this approach.
[19] Although the potential was there, of the early duress cases only "The Atlantic Baron" [1979] Q.B. 705, 718, in which Ormes v. Beadel (1860) 2 Giff. 166 was cited, considered the position in equity.
[20] As recommended by the Director General of Fair Trading, [1989] P.L. 552.
[21] Law Com. No. 40, paras. 14-16 (because of the inequality of bargaining power, the ability of a commercial party to have property surveyed, and the greater diversity of commercial uses).

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the opinion that the passage or clause, or even the entire contract in question as unconscionable. Unlike procedural unconscionability,22 substantive unconscionability might occur only during the time of formation of the contract. However, if the terms and conditions "shock the conscience" to the point where under any such circumstance no reasonable normal person would have agreed to them, there is no mandatory rule that the substantive unconscionability must pair with the procedural unconscionability, as the overwhelming nature of the procedural unconscionability may be sufficient. 23 However, the opposite is not true, i.e., unconscionability cannot be proved by only proving substantive unconscionability. The legal doctrine of unconscionability is a judge-centred doctrine, which means that it is in the hands of the judges, who ultimately determine as to whether a contractual clause or the entire contract is unconscionable or not, because of the lack of comprehensive definition of what is unconscionable. Therefore, it is important that before accepting or rejecting the plea of unconscionability, a lot of thought process must be involved.24 The reason behind this is the perplex nature of this doctrine, in a given situation it can be used both objective and subjective as well. In some cases, the defence of unconscionability will be solely based on superior bargaining power, which means it is procedurally unconscionable, but it will be justified as commercially reasonable. As any business is done to make a profit, the profit-making must also be reasonable. For example, in case of a company manufacturing vaccines and medicines, they can fix their own price which is exercising superior bargaining power and with no choice, consumers will be bound to pay that amount, as it is a life-or-death issue. In cases like these, it cannot be justified that it is commercially reasonable; what is and what is not reasonable will be explained below.

2. Significance of the Doctrine

There are two ways unconscionable may arise in a contract: one is the unequal bargaining power, and another is the presence of hidden interpretations in the terms. Contracts of adhesion or the standard form of contract by their very nature itself are presumptively unconscionable because it clearly shows that there is no equal bargaining power e.g. loan, employment and insurance contracts.25 When parties enter into insurance contracts, they never have the chance to negotiate and just agree and accept to all the terms and conditions mentioned in the form, the same applies to banking agreements as well. This is because the parties are not with equal bargaining power, they are forced to enter into such agreements by taking advantage of the customer emergency.26 Big companies usually use their extreme bargaining power so that they can tip the contracting scales in their favour.27 Similar to that of the chip leaders in the poker table, superior parties become the dictator and often dictate the action and, also, bully the weaker parties. It is not only in the businesses, but we come across unconscionability in all walks of life like when we park our vehicles in the malls, and we just accept and pay the parking fee, with no room for negotiation. There is no contradiction to making a profit in a business, but at the same time it should be reasonable. Again, the word reasonable cannot be measured as it is very much relevant,28 as what is reasonable for one might not be reasonable for the other. This can be illustrated in the case of Groner Vs. Lakeview Management Corp29, the tenant claimed that her apartment did not have hot water for 6 days during the time of winter in New-York and also the elevator was out of service for forty-five days. The court held that this case was a classic example of unconscionability. Further in Belmar Realty Corp Vs. Brown30, a lease provision which allowed harbouring of animals only with the landlord's permission and that the permission is revocable at any time. The Court in this case declared that the landlord can arbitrarily and capriciously withdraw his permission at any time for personal vengeance also, thus the provision was held unconscionable. Another instance is charging a higher price for water bottles and bites in the theatre are definitely unreasonable, that also can be argued that it is done for profit, but that cannot be justified as the viewers are not allowed to carry food with them, here they take undue advantage and benefit of the viewers. Therefore, there are situations in which majority of us would think it is unreasonable,31 so even all that can be charged by using unconscionability. In cases of agreements by superior power, and later found to be a mistake by both the parties, after concluding the contract, there is no remedy available in contract law, but the unconscionability doctrine can be used. Having a standard form of contract is in itself unconscionable. Thus, having the doctrine of unconscionable is inevitable. Moreover, this doctrine is not only used as a defence, but it is one of the elements for proving promissory and proprietary estoppel.

It is impossible to change the terms and conditions in each clause for each and every party, which is the reason for having a standard form of contract, but this should not be misused, 32 where they take undue advantage of the parties.

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[22]Dishonesty in civil commercial claims: a state of mind or a course of conduct?" [2012] J.B.L. 29.
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[24]The Search for Principle" (1983) 59 Proc. Acad. 169, 186.
[25]152 D.L.R. (4th) 411, noted L. Smith (1998) 114 L.Q.R. 394. See also Gold v. Rosenberg (1997) 152 D.L.R. (4th) 385
[26]Although, as we have seen, Nourse L.J. preferred dishonesty for knowing assistance but knowledge/unconscionability for knowing receipt. Nolan supports this, supra, n. 59.
[27]Trident General Insurance Co. Ltd. v. McNiece Bros Pty Ltd. (1988) 80 A.J.L.R. 574. Cf. Rogers in Finn, Essays on Contract (1987), Chap. 3.
[28]2000] 1 B.C.L.C. 511, 516, where the Court of Appeal allowed an appeal against summary judgment on a knowing receipt claim.
[29] Id. at 935, 373 N.Y.S.2d at 810.
[30] N.Y.L.J., July 25, 1974, at 11, col. 2 (Civ. Ct. N.Y.).
[31]Thomas J. in Powell v. Thompson [1991] 1 N.Z.L.R. 597 at 609 that "it is whether in all the circumstances, the conscience of equity is offended by the unjust enrichment." See also Gardner, supra, n. 24 at 87, Y.L. Tan, supra, n. 56 at 375.
[32][1990] 3 W.L.R. 414 on which see Fleming (1990) 106 L.Q.R. 514 to which the following is indebted.

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In Henningsen Vs. Bloomfield Motors, Inc,33 it was held by the court that a disclaimer of warranty on a new car was unconscionable. In reaching this conclusion, the court noted that the ordinary buyer has "no real freedom of choice" and that a car is a "necessary adjunct of daily life".34 The Henningsen court's inclusion of cars within this universe is problematic because it fails to clearly demarcate any limits as to what qualifies as a necessity. Thus, this doctrine is so deep that it can be used to challenge from scrap to metal.35 There are lot of chances for its misuse also, but the main aim of this doctrine is to protect the people who entered into agreement in good faith. We see many contracts being challenged under duress or coercion,36 undue influence, etc. and all these are only elements of unconscionability, before this term unconscionability was coined these elements were used, In the case of Alaska Packers Vs. Domenico37, a group of seamen hired under a contract that entitled them to a wage of $50 for the season and $2 per fish they catch. The employer agreed, but later on the fishing vessel he did not comply with the terms, the seamen having no choice agreed but later filed a case claiming it was under coercion and it is irrational.

Further in the case of Davis Vs. Kolb,38 the court ordered for the recession of the timber deed as the purchaser using his experience and knowledge of the value of the timber misrepresented the seller and the seller has relied based on trust to his detriment on the purchaser's low estimate. Fraud and duress are being common law doctrines find their way into cases of unconscionability. It does not mean always there will be duress, undue influence, coercion in determining unconscionability. Even in places where fraud, duress or undue influence doesn't apply, the doctrine of unconscionability can be used to save the innocent; this doctrine of unconscionability can be compared with water. Water has no shape of its own, it takes the shape of the container, and similarly this doctrine also can be interpreted and applied.

Lamed Vs. First Chicago Corp, 39 the court decided that a $58 finance charge on a credit card balance was not unconscionable. In reaching this conclusion, the court looked at the general character of the market for credit cards rather than a plaintiff's personal characteristics. Similarly, in Brunsman Vs. Dekalb40, the court decided and ordered that the disclaimer of a warranty in a contract of hogs was not unconscionable based on an evaluation of the character of the market rather than on the personal characteristics of the plaintiff. Thus, in both these cases, it is clear that it is unreasonable for the plaintiff, but the court gave more importance to what is ultimately necessary.41 The term necessity thus plays a vital role in determining what is unconscionable and what is not.

3. Legislative legacy

Unconscionability was incorporated in the United States legislative enactment, Uniform Commercial Code (the UCC) in 1952.42 Though it is mentioned in the UCC under section 2-302, the legal provision only prescribes the consequences of what has to be done if the contract or clause is proved to be unconscionable, it do not define what is unconscionable, neither prescribes in what all circumstances the defence can be applied, the provision is very vague and thus can be used only to legally recognize the word unconscionable.43 Although the application of UCC is exclusively for the sale of goods at the time of the contract, the formal adaptation into the UCC paved the way for the recognition of the doctrine of unconscionability in the equity law, which governs from the period of the sanctity of the contracts which are more preferably and predominantly concerned with services, or contracts that are related to insurance, sale of real estate or otherwise any other intangible assets rather than goods, and in general every other type of contracts. Whether the contract concerns primarily goods or services determines whether or not the UCC or the Equitable law applies.44 The doctrine of unconscionability can be used as a defence for any contract irrespective of the nature of it, obviously to those contracts contain the subject matter of both goods and services.45 For example, when we hire a roofer to repair the roof, payment is not only made for the materials and supplies, but also the skill of the person performing the contract which is more likely

[33]161 A.2d 69 (N.J. 1960),
[34]Report of the United Nations Commission on International Trade Law on the work of its 28th session, May 2-26, 1995, General Assembly, Official Records, 50th Session, (Supplement No 17 (A/50/17).
[35]Law Com. No. 40, paras. 14-16
[36] United States v. Bethlehem Steel Corp., 315 U.S. 289, 300 (1942) ("The word duress implies feebleness on one side, overpowering strength on the other."
[37]117 F. 99, 1902 U.S. App. LEXIS 4410
[38] 263 Ark. 158, 563 S.W.2d 438 (1978).
[39]139 Ill. App. 3d 374
[40]952 F. Supp. 628 (1996)
[41] The Philosophical Dimensions of the Doctrine of Unconscionability, 70 U. CHI. L. REv. 1513, 1514-15 & n.9 (2003)
[42]*www.law.cornell.edu* › Uniform Commercial Code
[43]Mason C.J. (1994) 110 L.Q.R. 238 at 253. Although Lord Millett has suggested (1998) 114 L.Q.R. 399
[44]Halliwell, Equity and Good Conscience in a Contemporary Context, (Old Bailey Press, 1997), p.131.
[45]Verwayen (1990) 170 C.L.R. 394 at 412 per Mason C.J. and at 475 per Toohey J.

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predominant or costs more (as an indication of which facet of the contract is more prominent) the goods or the service. Here in the given illustration, if the materials which are required costs more or is more vital for the performance of a contract, then in countries where UCC is recognized they can refer to the concept of unconscionability under UCC, on the other hand, if the skill of the person is more vital, then equity law can be used. In this illustration, without the raw materials, the skill cannot be performed at all, which implies that goods are vital, therefore to such cases UCC can be relied on. One more example, if we place an order to an artist for painting, his exclusive skills are more vital and he is paid for that more. Thus, in cases like this, unconscionability as an equity law principle can be relied on. Many countries neither have legislation like UCC, nor agree with the equity law application.

4. Judicial implication

Williams v. Walker-Thomas Furniture Co.,46 was one of the landmarks and predecessor decisions on unconscionability. The opinion declared that courts in the District of Columbia could refuse to enforce a sales contract if the bargain was "unconscionable" meaning that choice was absent for one party along with terms which are more and unreasonably favourable to the other party. Williams, defaulted, after paying off most of the debt, the store claimed the right of repossessing everything which Williams had purchased during the entire five years. Wright proved that the store's contract was potentially "unconscionable". Wright described the Williams decision, and unconscionability more generally, as part of a growing area of the law the law of the poor47 this is deliberate also this case clearly states that unconscionability is very important here the word poor does not necessarily mean financially poor but in general the vulnerable people.48

In the case of Earl of Chesterfield Vs. Janssen,49 it was held that unconscionability means it will involve contracts as no person in his/her senses and not under delusion would make, on the one hand, and no fair and honest person would accept on the other. Unfortunately, this definition was short of details, and it should be left to the judgment of the courts on a case-by-case basis.

Further, in the case of Mandel Vs. Liebmen a case reported in the New York,50 In this judgment also the court declared that unconscionability means grossly unreasonable, which depicts that there is a lack of clarity in the term unconscionable.

5. Possible misuse of the doctrine

Let us consider A and B enter into an agreement, where A says he will give Rs. 10,000/- per sack of organic rice, trusting this B produces the rice in a more organic way, as per the agreed terms and conditions, but now A claims that he does not want the rice bags, B enforces the contract, telling it is a breach of the agreement, but now A can use the defence of unconscionability, where on the face of it all of us think charging Rs. 10000/- for a bag of rice is unreasonable, even though if B tells A has signed the Agreement, B can still use the defence of unconscionability but the same should be strictly proved. Also, rice being a necessity for all, the court will definitely consider the claim of unconscionability and invalidate the contract between A and B, here the person who actually suffered is B, but A can use the unconscionability doctrine not to perform the contract. This is a very small instance, but even in big dealings, the parties can use this doctrine to escape from performing the contract or even to escape from the liability this doctrine can be used. The negativities of this doctrine do not give less importance to the doctrine as the main aim of the law is to protect and render justice to the people, as anything and everything will have both positive and negative effects, this doctrine also is no exception to it. Thus, we need to find ways to limit the harmful usage51 and promote the doctrine for a good cause.52

6. Consequences of the application of this doctrine

The validity of a contract having an unconscionable clause will be discussed. When there is an unconscionable clause in a contract, the court in all circumstances will not invalidate the entire contract. As the main aim of the court is the performance of the contract,53 most of the times unconscionable or unreasonable clause in the agreement will be removed, and the contract will be allowed to be performed. However, this does not mean every time despite proving unconscionability the contract will be enforced. It

[46] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Cf. Grayiel v. Appalachian Energy Partners 2001-D, LLP, 736 S.E.2d 91 (W.Va. 2012); C&J Fertilizer, Inc. v. Allied Mutual Insurance Co., 227 N.W.2d 169 (Iowa 1975).
[47] Letter from Hon. J. Skelly Wright to William E. Shipley, supra note 1
[48] Hines, 668 F.Supp.2d at 366-67 (quoting Southwest Airlines Co. v. BoardFirst, L.L.C., No, 06- CV-0891-B, 2007 WL 4823761 at *4 (N.D.Tex. September 12, 2007).
[49] (1751) 28 Eng Rep 82
[50] 303 N.Y. 88, 94 (1951)
[51] The Significance of Comparative Bargaining Power in the Law of Exculpation, 37 COLUM. L. REv. 248, 249 (1937) (analyzing cases in which courts upheld or invalidated exculpatory contract provisions).
[52]laurencekoffman&elizabethmacdonald, the law of contract 4 (6th ed. 2007).
[53]An excellent summary can be found in Solo Industries UK Ltd v Canara Bank [2001] 2 Lloyd's Rep. 578, CA, and the encyclopedic Bank of Nova Scotia v Angelica-Whitewear (1987) 36 D.L.R. (4th) 161 (SCC).

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depends on the nature, terms and conditions agreed that the contract may be validated and invalidated. In the case of Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly,54 the Supreme Court of India declared the three-month termination notice given to an employee is arbitrary and unconscionable in nature, as the clause puts the employer in an advantageous position while making the employee vulnerable and open to exploitation. Also, in the case of Phulchand Exports Ltd. Vs. O.O.O. Patriot,55 it was held by the Supreme Court of India that where the parties are involved in transactions concerning international business, where there is equal bargaining power and that they have entered into a contract, then the agreed terms between the parties cannot be said to be unreasonable, unjust and unfair56. Thus, the application and usage of this doctrine of unconscionability and the stand taken by the courts in India on this doctrine is quite clear and unambiguous. Therefore, from this case it is clear that general exception to any contract or agreement is terms and conditions. Regarding procedural unconscionability, mostly there are chances where the court may invalidate the entire contract but in the case of only substantial unconscionability, the court may either order to modify or void that part alone. This is to prevent misuse of the doctrine and at the same time it is also a remedy for the aggrieved party.57 In the case of Davidovitis Vs. De Jesus Reality Corp58 there was an agreement entered into between the seller and the buyer, but the buyer was profoundly handicapped and unable to understand the terms, as the agreement was in the language that he cannot understand. Believing that he agreed and signed the agreement, but later the buyer filed a case using the defence of procedural unconscionability and the court invalidated the entire contract. Another important concept to be dealt with in case of substantial unconscionability is severability or separability rule. If the terms are divisible then the court can invalidate the term or clause which is unconscionable and the rest of it can be saved. For example, A gave B Rs.1000, and in return, B should give a bag of rice and a bag of opium and later B challenged under the concept of unconscionability. Here the agreement terms being divisible, the bag of opium alone can be invalidated, and the rest can be performed. In case, if the contract clause is non-severable, the court cannot invalidate the unconscionable term alone, but the whole agreement must be invalidated. In such a situation, we need to decide based on the aftermath if it should be performed or invalidated.

Thus, when each case of unconscionability is reported in the court it is the duty of the court to analyse all the nuances in order to really identify if it's unconscionable or not,59 As there is no exact definition and principles to be followed in cases of unconscionability, many of them will use this as an advantage to prolong the case. Mere appearance of inequality itself is not likely to result in a finding of unconscionability.60 There must be more, the offending covenant must create a profoundly adverse and unfair result.

6.1. Burden of Proof

It is very important to deal with the aspect of the burden of proof as in most of the cases the party claiming must prove with evidence to support his stand. In the case of unconscionability, the party who challenges using this doctrine as a defence must prove that the agreement or a term is unconscionable. For example, in case of mining contracts the workers impliedly and voluntarily agree to the risk at work, later if the workers claim that they did not agree to such terms, like going 1000ft below the earth and claim it to be unconscionable because the workers have willfully and voluntarily agreed to the work, doesn't mean the claim will be invalidated but the burden of proof lies on the workers to prove that the work is hazardous than they expected it to be. In the case of George Backer Mgt. Corp. Vs. Acme Quilting Co,61 it was held that if the party has accepted to the risk, but later if they regret having accepted such risk as it is beyond what they expected it to be, it is the duty of the party claiming to prove their stand. Therefore, it is the duty of the party who uses the defence of unconscionability to prove it. In the case of Rothwell Vs. Chemical and Insulating Co. Ltd and Anr.,62 the employees brought an action against the employer for negligently exposing them to asbestos and as a consequence the employees developed Pleural Plaques. It was held that the employees cannot claim the use of doctrine of unconscionability to sue the employer as the symptomless plaques were not compensable and as proof of future damage was also not evident. This case is an obvious occupational hazard, the case of Mangesh G. Salodkar Vs. Monsanto Chemicals of India Ltd.,63 the petitioner suffered from brain hemorrhage due to the exposures at work and filed a suit against the respondent. It was decided that the intensity is more than mere occupational hazard and is unconscionable and hence the respondent must be made absolutely liable not only to the petitioner's health but also to all its employees. Therefore, the court mandated to pay compensation to all its employees and to create conditions of preservation. Thus, it is noteworthy that proof of damage is an essential element for determining unconscionability.

[54]1986 SCR (2) 278
[55](2011) 10 SCC 300
[56] John P. Dawson, Duress and the Fair Exchange in French and German Law, 11 Tul. L. Rev. 345, 12 Tul. L. Rev. 42 (1937)
[57]P.S. Atiyah (1985) 48 M.L.R. 1
[58] A.D.2d 924, 474 N.Y.S.2d 808 (2d Dep't 1984)
[59][1992] 2 Qd. R. 54. See also Washington Constructions Co Pty Ltd v Westpac Banking Corp [1983] Qd. R. 179, Sup. Ct.
[60] James D. Gordon III, Essay, How Not to Succeed in Law School, 100 YALE L. 1. 1679,1696 (1991).
[61] 46 N.Y.2d 211, 413 N.Y.S.2d 135 (1978).
[62] [2007] UKHL 39
[63]2007 (2) BomCR 883

7. Findings and possible Solutions

It is very much evident from the cases discussed that the doctrine of unconscionability is used as a defence to avoid performance of unfair contracts, but the people who unnecessarily suffer because of the unfair bargaining power must be compensated, therefore it is proposed that this doctrine must not only be used as a shield but also as a sword. This will allow the aggrieved party in not only discharging from the performance and also to claim damages.

As we discussed earlier under the significance of the doctrine of unconscionability, many countries do not have legislations like UCC, but there are countries like the United States which recognizes and implements it. Countries which recognised the doctrine of unconscionability has rendered justice to those parties suffering from the unconscionable terms which they could not have avoided by any other defence available under law. So, it is a lesson learnt from the countries which implements the doctrine of unconscionability.

Even in those countries which follows the codified law, recognises some common law doctrines such as promissory estoppel. As deliberated under the significance of this doctrine, common law remedies are proved to be a vital solution in cases were the codified law has not been rendered justice. So, it is very important to include the common law principles in the justice delivery system to uphold the fairness.

To minimise the misuse of this doctrine the wrong doer must be made responsible and liable under both civil and criminal law, as explained in the illustrations, if it is found that the case is false and a fabricated one, or by those who consider breach more attractive than performance they should be made liable to pay exemplary damages for their acts as it has the element of malice in most of the cases.

Moreover, if there is only civil liability like decided in most of the cases cited above, there are possibilities that the wrong doer will easily escape by paying the compensation, as this will not prevent the person from doing it but it simply gives remedy after the consequences. It is much important to look at the burden of proof shifting from the claimant to the respondent. If the respondent failed to prove that he has acted with good faith, then he should be liable not only to pay the actual compensation in addition to it, he should be made paying the exemplary compensation which will greatly help in reducing the negative use of this doctrine.

Again, deciding what is unreasonable is a big dilemma. What is reasonable for a person may not necessarily be reasonable for another person. There are no fixed parameters to fix the unconscionability. Depending on the situation and circumstances it may vary. However, unconscionability may be decided based on yet another common law principle as a normal prudent person. The doctrine of unconscionability and the normal prudent man can be used to complement each other to render justice to the aggrieved party. In order to decide unconscionability, as discussed earlier in this paper, a lot of material thought process must be involved such as reasonable, unreasonable, necessity, commercially reasonable etc. The reflection of all these elements will vary depending on the circumstances. Thus, the usage of unconscionability must not be static and fixed; instead, it has to be flexible so that we can decide if the issue is unconscionable or not based on the situation and circumstances. In order to identify whether reasonable or unreasonable, the following factors can be taken into consideration to assess unconscionability.

- Some contracts on the face of it might seem overwhelmingly one-sided with boilerplate provisions.
- Most important factor is proof or evidence needs to be provided to substantiate damage or future damage.
- As held in the Wednesbury case[64] and Council of Civil Services Unions v. Minister for the Civil Services[65], an issue is outrageous in its defiance of logic is when no sensible person who has applied his mind to the question would come up with such a solution. Means employed to achieve the end result, must be legally permitted, this has to be considered when deciding unconscionability.
- Educational qualification of the parties must be one of the elements. Capacity of the parties to understand the documentation.
- Bargaining strength of the parties, the terms and conditions should be such that, which includes the legitimate interests of contracting parties.
- Unfair surprise in the contract, is yet another important factor to determine unreasonableness.
- Harsh terms in the contract like notice period, price disparity etc. may constitute unconscionability.
- Age and mental capacity of the parties must be considered.

Determination of unconscionability is finally in the hands of the judges to decide whether the contract or the contractual clause in issue is unconscionable or not. The entire burden lies on the party claiming, this is proposed to reduce the negative usage of this doctrine, at the same time it should not be fixed on him alone, sometimes it should be shifted to the respondent. The main purpose

[64] [1984] 1 KB 223
[65] [1984] UKHL 9

of this doctrine is to protect the innocent parties, but there is room for possible misuse also as discussed in the illustration. Thus, the burden of proof may be anchored more on the party claiming which will reduce the use of this doctrine of unconscionability by those who consider breach more attractive than performance.

8. Concluding Remarks

Defining unconscionability has been handled by the legislature as if it were a hot potato due to the lack of a comprehensive definition. The courts were left to fill this void. In meeting this challenge, they created a series of rules that the practitioner can use to evaluate most covenants. The flexibility that the legislature created when it passed the responsibility on to the courts for the most part has been realized, but this does not mean we have arrived at a conclusion. Each case of unconscionability will enlighten the courts with new principles and rules for the effective functioning of this doctrine. The doctrine is evolutionary, not static, and with time no doubt novel scenarios such as smart contract, block chain, e-contracts etc. appear for review, and the courts may be called upon to fashion additional rules. The practitioner should keep in mind that unconscionability is a conclusion reached after a covenant has been agreed to. Its effects are reviewed against the simple standard of what is or is not reasonable under a given circumstance, but again what is and what is not reasonable may not be the same for all, therefore to put it in a nutshell the only way to understand and conclude unconscionability is to analyse each situation like that of an ordinary reasonable and prudent person. The doctrine can be used for both good and bad, but as the main aim of the law is that to bring rationality to a situation. Despite the capability of the doctrine to be misused, this defence of the doctrine of unconscionability is a salient feature to protect the innocent person and the same has been given to the judiciary to use the doctrine in a way it serves the purpose.

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