LIMITATION OF LIABILITY CLAUSES IN COMMERCIAL CONTRACTS: JUDICIAL INTERPRETATION UNDER THE INDIAN CONTRACT ACT

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ABSTRACT

The purpose of this paper is to examine the legality and legislative approach towards limitation of liability clauses in business contracts, with an emphasis on the Indian Contract Act, 1872 and evolving reform requirements. It examines the legal framework under Sections 23, 28, 73, and 74 of the Act, following the jurisprudential development from the fundamental tenets of freedom of contract and caveat emptor to the current judicial examination of exclusionary clauses in standard form and Master Service Agreements (MSAs). The paper analyses the doctrine of unconscionability as developed by Indian and common law courts, looks at the comparative lessons offered by England's Unfair Contract Terms Act 1977 (UCTA) and the UNIDROIT Principles on International Commercial Contracts, and finds specific legislative gaps that currently undercut commercial certainty. It concludes with particular reform recommendations including: codification of a reasonableness standard for exclusion clauses, statutory safe harbours for liquidated damages, explicit acknowledgement of liability caps, and harmonization with the Insolvency and Bankruptcy Code 2016. The study shows that a tiered legislative system calibrated to the relative complexity and bargaining power of the contracting parties may help to control the tension between contractual autonomy and substantive fairness, not that it is unsolvable.

Keywords: Limitation of liability; exclusion clauses; unconscionability; Indian Contract Act 1872; standard form contracts; freedom of contract; UCTA 1977; UNIDROIT Principles; liquidated damages; MSA; insolvency; commercial law reform

Introduction

At the crossroad of contractual autonomy, commercial risk allocation, and court monitoring, restriction of liability provisions have a debatable location. By their most prevalent types — liability caps, consequential damage exclusions, and indemnification clauses— these clauses are the devices sophisticated parties try to price risk and obtain commercial certainty before they get into intricate, long-term business partnerships. Their enforceability, however, is neither complete nor uniform, and the extent of judicial examination given to them differs greatly depending on the character of the parties, how the contract was negotiated, and the country where the conflict arises.

In India, the legal framework controlling these provisions is rooted in the Indian Contract Act of 1872, a law created in the colonial period that has not been widely modified to match the contractual realities of a contemporary, service-driven economy. Sections 23, 28, 73, and 74 provide a skeletal framework that judicial development under the principles of public policy, unconscionability, and contra proferentem supplements. Although over decades the Supreme Court has amassed a complex body of case law —from Central Inland Water Transport

Corporation v. Brojo Nath Ganguly to Kailash Nath Associates v. Delhi Development Authority—the lack of established statutory norms causes unpredictability that affects commercial players, especially in infrastructure, technology, and MSME-facing deals.[1]

Four sections make up this essay. Part 2 studies the legislative and doctrinal basis for liability clause enforcement under Indian law. Part 3 follows the evolution of the unconscionability theory and its use in business situations. Part 4 examines the comparative frameworks provided by the UNIDROIT Principles and UCTA 1977. Part 5 points out particular legislative gaps and suggests aimed reforms. The paper suggests that the most ethical approach to reconciling contractual autonomy with substantive fairness is a tiered statutory system calibrated to the relative complexity and negotiating power of contracting parties.

Statutory Framework under the Indian Contract Act, 1872

The validity of clauses intended to restrict or exclude liability under the Indian Contract Act,

[1] Indian Contract Act, 1872 (Act No. 9 of 1872), as amended. The Act remains the primary legislation governing contracts in India and has not been comprehensively revised since its enactment.

1872 is considered mostly from two separate perspectives: illegality and public policy as well as contractual certainty. Section 23 provides that a contract is void if its goal or consideration is illegal or defeats the requirements of any law. Although exclusion clauses are not always illegal, courts have always reviewed them when they aim to absolve a party from responsibility for fraud or gross carelessness, considering such exemptions as against public policy when they undermine the basic contractual obligation. The Supreme Court determined in Central Inland Water Transport Corporation Ltd v. Brojo Nath Ganguly (1986) 3 SCC 156 that courts of equity in India have the authority to strike down unjust and unconscionable clauses in contracts negotiated between parties of uneven bargaining power, therefore establishing public policy under Section 23 as a live basis of objection against oppressive liability terms.[2]

In academic work, the generalization of Section 28 of the Act often leads to its neglect or lack of relevance. It invalidates any agreement that extinguishes the rights of any party or releases any party from liability upon the expiry of a stipulated time, therefore restricting the ability of contracting parties to contractually shorten the limitation period otherwise available under the Limitation Act, 1963. Confirming that contractual limitation periods cannot supersede statutory rights, the Supreme Court struck down an insurance policy clause seeking to extinguish the insured's right to claim after a period shorter than that prescribed by the Limitation Act in National Insurance Co. Ltd v. Sujir Ganesh Nair & Co. (1997) 4 SCC 366 by means of Section 28. For business agreements trying to time-bar claims or limit remedies within arbitrarily reduced periods, this idea has important consequences.[3]

The clauses controlling indemnity under Sections 124 to 147 of the Act are more immediately relevant for transactional practice. According to Section 124, a contract of indemnity is one by which one party guarantees to shield the other from harm brought on by the actions of the promisor or any other individual. The Bombay High Court ruled in Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri AIR 1942 Bom 302 that a party requesting indemnity need not wait until actual loss is sustained where liability has been incurred, thereby establishing a crucial guideline for the timing of claims for recompense in commercial contracts. The interplay between indemnity clauses and limitation of liability caps in

[2] Central Inland Water Transport Corporation Ltd v. Brojo Nath Ganguly (1986) 3 SCC 156. This landmark decision established the judiciary's equitable power to strike down unconscionable terms in contracts marked by unequal bargaining power.

[3] National Insurance Co. Ltd v. Sujir Ganesh Nair & Co. (1997) 4 SCC 366. The Court confirmed that parties cannot contractually override statutory limitation periods under the Limitation Act, 1963.

contemporary commercial contracts generates a major conflict: courts must decide if the cap applies to indemnity claims as well as direct damages when a contract includes both a wide indemnity obligation and a liability cap; this is a issue Indian courts are increasingly asked to answer in technology and infrastructure agreements.[4]

Any examination of liability clauses starts with the requirements of Sections 73 and 74. Under Section 73, a party is entitled to compensation for any loss or damage brought about by a breach of contract that naturally flowed from the breach or which the parties had knowledge at the time of contracting would probably occur. Section 74 provides that courts may award reasonable compensation not more than the stated amount, addressing clauses specifying a sum to be paid upon breach. In ONGC Ltd v. Saw Pipes Ltd (2003) 5 SCC 705, the Supreme Court radically redefined Section 74, declaring that the court is capable of awarding smaller compensation than the agreed upon amount when the actual loss is less, and that the stipulated sum serves as a ceiling rather than as automatic entitlement. Directly affecting liability cap provisions—where a contract specifies a maximum responsibility, courts employing the ONGC ratio will consider whether the cap reflects a sincere pre-estimate of loss or an unconscionable restriction on recovery.[5]

Further elaborating this stance in Kailash Nath Associates v. Delhi Development Authority (2015) 4 SCC 136, the Supreme Court drew distinctions between legitimate pre-estimated loss clauses and penalty clauses, holding that Section 74 demands proof of actual loss before any compensation can be awarded, so severely limiting the ONGC stance and adding more uncertainty for those depending on contractual liability limits.[6]

Judicial Interpretation and Evolving Standards

Indian courts have consistently interpreted clauses that exclude or restrict liability, especially when they show in conventional form contracts or contracts of adhesion characterised by a major inequality of bargaining power. Incorporated in the contra proferentem rule—that

[4] Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri AIR 1942 Bom 302. A foundational decision on the timing of indemnity claims, holding that a promisee may seek indemnification upon incurring liability, without waiting for actual loss to crystallise.

[5] ONGC Ltd v. Saw Pipes Ltd (2003) 5 SCC 705. The Supreme Court held that the stipulated sum in a liquidated damages clause operates as a cap on recovery, and that a court may award lesser compensation where actual loss is less than the stipulated amount.

[6] Kailash Nath Associates v. Delhi Development Authority (2015) 4 SCC 136. This decision significantly qualified the ONGC ratio by a[irming the requirement of proof of actual loss under Section 74.

unclear contractual language is to be construed against the party who wrote it and seeks to profit from it—the fundamental principle is that such clauses must be construed strictly and narrowly against the party seeking to rely upon them. Particular care must be given to the treatment of typical form contracts. The Supreme Court ruled in contracts between parties of unequal bargaining power, especially in the insurance and essential services sectors, exclusion clauses that are one-sided, unfair, or unconscionable may be declared void under Section 23 as being against public policy. Drawing on the premise set in Central Inland Water Transport, the Court determined that the contractual freedom to reject liability is not absolute and must yield to fairness considerations when the less powerful party had no real option but to accept the conditions provided. Gradually, this argument has been applied to telecommunications, banking, and digital services contracts in which standard conditions are given on a takeit-or-leave-it basis.

The court always emphasizes the difference between clauses purporting to exonerate a party from responsibility for intentional misconduct, gross negligence, or fraud and those limiting liability for normal negligence. Clauses exonerating fraud are uniformly invalidated; they work in outright opposition of the public policy ground under Section 23 and the need of free consent under Section 14. The Supreme Court confirmed in Bharat Petroleum Corporation Ltd v. P. Kesavan (2004) 9 SCC 772 that no party can contractually exempt itself from the effects of its own fraud, therefore any clause attempting to do so is invalid ab initio irrespective of the specific wording used.[7]

Interpreting clauses limiting liability for negligence, courts analyze whether the language employed clearly and unequivocally covers the particular breach that occurred. The Supreme Court determined in United India Insurance Co. Ltd v. Pushpalaya Printers (2004) 3 SCC 694 that if an exclusion clause is ambiguous, the contra proferentem rule calls for the ambiguity to be resolved in favour of the insured, therefore confirming that the author of a standard form contract cannot rely upon uncertain language to deny a valid claim.[8]

In M/s Suraj Lamp and Industries Pvt Ltd v. State of Haryana (2012) 1 SCC 656, where the Supreme Court noted that contractual provisions cannot be used to make the fundamental

[7] Bharat Petroleum Corporation Ltd v. P. Kesavan (2004) 9 SCC 772. Confirmed the absolute rule that no party may contractually exempt itself from liability for fraud; any clause purporting to do so is void ab initio.
[8] United India Insurance Co. Ltd v. Pushpalaya Printers (2004) 3 SCC 694. Applied the contra proferentem rule to hold that ambiguous exclusion clauses must be construed against the insurer as the drafting party.

commitment illusory, the principle that a party cannot exclude liability for the non-performance of its essential obligations was authoritatively declared. Courts will decline to uphold an exclusion provision on the ground that it defeats the very aim for which the contract was formed when it essentially removes all significant liability for the main performance obligation. For technology service contracts and outsourcing agreements where liability caps are frequently set at levels bearing no appreciable relation to the possible loss a counterparty could face from a major breach, this idea is especially important.[9]

By applying the Consumer Protection Act, 2019, the judiciary toolkit at hand to question restrictive clauses in business-to- consumer transactions has been much expanded. An unjust contract is one that, under Section 2(46), significantly upsets the rights and responsibilities of the parties to the disadvantage of the consumer; Section 49 gives the National Consumer Disputes Redressal Commission the power to declare such terms void. The Supreme Court upheld the authority of consumer groups to assess the fairness of contractual provisions in real estate deals in Emaar MGF Land Ltd v. Aftab Singh (2019) 12 SCC 751, confirming that the Consumer Protection system operates independent of and in addition to the general law of contract.[10]

The Doctrine of Unconscionability and Freedom of Contract

Courts followed the idea of laissez-faire in contract law with great fidelity for centuries. The conventional viewpoint—often summarized as the adage caveat emptor and the presumption that groups of equal bargaining strength have read and agreed to the conditions—required little court interference. Courts realised that examining every provision of every business contract would undercut business certainty. Even violent language was carried out provided it had clearly been agreed upon. This unwillingness to regulate the material justice of agreements provides the starting point against which any action must be evaluated.

Developing the Doctrine of Unconscionability

The interventionist turn became imperative as the complexity of commercial transactions grew

[9] M/s Suraj Lamp and Industries Pvt Ltd v. State of Haryana (2012) 1 SCC 656. Established that an exclusion clause cannot be used to hollow out the primary performance obligation of the contract.
[10] Emaar MGF Land Ltd v. Aftab Singh (2019) 12 SCC 751. Confirmed that consumer forums retain jurisdiction to examine the fairness of standard contractual terms in real estate agreements under the Consumer Protection framework.

and inequalities in negotiating power became more clear, especially in consumer transactions or specialized B2B activities involving standard form contracts. Courts came up with the idea of unconscionability, which normally demands two components. Procedural unconscionability addresses flaws in the contract's creation: oppression, concealed conditions, or lack of any significant option. Substantive unconscionability addresses flaws in what was agreed upon: terms so one-sided that enforcement shocks the conscience, a standard that, notwithstanding its rhetorical force, courts have used unevenly and critics have long assailed for vagueness.

Though it should be noted that this provision regulates goods transactions particularly, in the United States the doctrine is codified in UCC Section 2-302; Unconscionability in service contracts and general common law contexts evolves along distinct, occasionally diverging routes. Courts using the standard have struck down unilateral debt acceleration clauses and predatory late charges in consumer adhesion contracts, even where the borrower signed.[11]

Balancing in Commercial Contexts

Between complex commercial parties, the reach of the doctrine becomes somewhat limited. Where counsel represented both sides, courts normally presume they were able to safeguard their own interests, saving involvement for fraud, duress, or open infractions of public policy.

However, even B2B deals are open to examination. Courts will consider whether there was a real meeting of the minds on the specific damaging term, not just accepting the signature as conclusive, where a significant power imbalance exists—a larger buyer directing nonreciprocal cancellation rights to a smaller supplier. A frequent fighting ground is arbitration provisions that limit available remedies or demand inconvenient venues, therefore compelling courts to balance the procedural efficiency of arbitration against the actual denial of justice to the weaker side. Contract law negotiates a continuing conflict: predictability and autonomy on the one hand, fairness and equity on the other. The dogma does not allow courts to change unwise deals; It intervenes selectively, where the combination of procedural defect and substantive oppression is great enough that enforcement becomes unjustifiable.

[11] Uniform Commercial Code § 2-302 (United States). Codifies the unconscionability doctrine for goods transactions; a court finding a contract or clause unconscionable at the time it was made may refuse to enforce it, enforce the remainder without the unconscionable term, or limit its application.

Comparative Frameworks: UCTA 1977 and the UNIDROIT Principles

The Impact of the Unfair Contract Terms Act 1977

Directly limiting the degree to which parties can exclude or limit liability for breach of contract or negligence, the UCTA 1977 constitutes one of the most significant legal interventions in English contract law. Its tiered categorization of clauses depending on the nature of the parties provides India with its main lesson. UCTA distinguishes between consumer contracts, in which exclusionary clauses are often invalid, and B2B contracts, in which the benchmark is reasonableness judged against the Schedule 2 guidelines—factors including the relative bargaining strength of the parties, whether any inducement was offered to accept the term, and whether the customer knew or should have known of the presence of the clause. Regardless of how it is written, no clause seeking to exclude responsibility for carelessness causing death or personal injury can pass this test critically.[12]

India now deals with repressive terms mostly by judicial interpretation of Section 23 of the Contract Act on public policy grounds—a mechanism that is reactive, erratic, and strongly reliant on the attitude of particular courts. Designed on UCTA, a tier statutory framework calibrated to Indian commercial realities would replace this uncertainty with specified thresholds by differentiating between big businesses and MSMEs in B2B context. It would set upfront which liabilities are truly negotiable and which have to remain absolute.

UNIDROIT Principles: Promoting Substantive Fairness

Though persuasive rather than legally binding, the UNIDROIT Principles offer the most coherent global system for genuine contractual fairness. India finds two clauses especially pertinent. The requirement of good faith and fair dealing under Article 1.7 permeates contract negotiation and performance; though recent judicial trends have tentatively moved in this direction, the Indian Contract Act does not expressly require this. Formalising this responsibility in legislation would help to unite these trends and bring Indian commercial

[12] Unfair Contract Terms Act 1977 (UK), c. 50. The Act renders void any clause purporting to exclude liability for negligence causing death or personal injury, and subjects other exclusion clauses to a reasonableness test assessed against the Schedule 2 guidelines.

legislation with international standards.[13]

More urgently, Articles 6.2.1 of the UNIDROIT Principlescover suffering—circumstances when an obligation becomes unduly difficult because of unforeseeable events beyond the control of the impacted party. Where difficulty is present, the Principles call for renegotiation instead of automatic dismissal. This is in sharp conflict with Section 56 of the Indian Contract Act, which views disappointment as an all-or-nothing proposition: either the agreement is cancelled entirely or the parties continue to be totally bound. The COVID-19 epidemic revealed the insufficiency of this dichotomous strategy: many supply chain agreements were neither fairly frustrated nor legitimately implementable on original terms. Adding a statutory difficulty and renegotiation mechanism would provide Indian courts with the means to achieve proportional results rather than compelling an artificial choice between whole enforcement and complete discharge.

Balancing Freedom of Contract with Protection

Taken together, UCTA and UNIDROIT make the same basic argument: freedom of contract is a tool for fostering real agreement between parties able of serious consent, not an end in itself. Unconstrained enforcement yields results that are neither economically effective nor substantively just when that ability is missing—because of information asymmetry, uneven negotiating power, or unanticipated supervening events.

Although India's Consumer Protection Act 2019 covers unethical business methods, it falls short of demanding regular substantive examination of common contract conditions. This disparity is great in an economy when adhesion contracts control both consumer and MSME transactions alike. To include clarity, proportionality, and the real ability of the weaker party to grasp and dispute the conditions to which they are bound, the standard of fairness must be defined in law, not only in judicial discretion. Switching from procedural compliance to substantive examination is not a deviation from contractual freedom; it is the circumstances under which that freedom becomes significant.

Legislative Gaps and the Case for Reform

Unpredictability in Indian contract law mostly comes from the lack of a statutory definition of

[13] UNIDROIT Principles of International Commercial Contracts (2016 ed.), Art. 1.7. The duty of good faith and fair dealing is mandatory and cannot be excluded by contract.

what qualifies as an unreasonable exclusion clause. Courts citing public policy or general reasonableness principles produce erratic results among countries, especially in typical contract and vital services agreements. For consumer transactions, the Consumer Protection Act 2019 offers a partial response; the benchmark for commercial contracts is left to judicial judgement rather than clear policy.

Drawing on the well-developed distinction in common law jurisdictions between liability for fundamental breach and liability for negligence, legislative reform should provide explicit standards for permissible exclusion. Where specifically and unambiguously stated, the latter is often more readily excludable; the former attracts more rigorous analysis since allowing a party to contract out of its main obligation defeats the core aim of the contract. Codifying this distinction would offer the commercial certainty that judicial discretion, however wellintentioned, cannot always deliver rather than leaving courts to recreate it case by case.

Inherent Vulnerability in Standard Forms and MSAs

Consider the possibility of a software licensing agreement wherein the vendor's liability is restricted to payments made within the last six months. The provision acts not as a fair risk allocation but rather as a nearly-complete immunity from consequence if a system failure causes the client to lose many times that amount in operational interruption. This is the fundamental weakness of MSAs and standard form agreements: Drafted unilaterally by the party with more bargaining power, they shift risk onto the counterparty systematically through liability clauses contained in boilerplate that the non-drafting party lacks both negotiating authority and, in most cases, the chance to completely grasp.

Standard form courts dealing with liability clause disagreements use a technique quite different from how they treat contracts negotiated individually. The first question is one of conspicuousness: did the way the liability restriction was shown have given the other party actual knowledge of its effect? Relevant but not determinative are capitalisation, bolding, and explicit cross-referencing; the issue is whether a sensible party in that corporate setting would have understood the scope of the clause before signing. The second query asks about the link between the exclusion and the main goal of the contract. Courts won't allow a liability clause to weaken the main responsibility it supports.

Statutory Clarification on Penalty and Liquidated Damages

Though the Supreme Court moved toward a more realistic interpretation whereby courts need not restrict awards to actual loss demonstrated when a legitimate pre-estimate of damage was made at the time of contracting, section 74 of the Indian Contract Act remains rather controversial. The challenge that continues is definitional: In legislation, the threshold between a valid liquidated damages clause and an unenforceable penalty is unknown; this begs lawsuits the pre-estimate test was meant to stop.

Legislative changes should expressly codify the contemporary judicial approach and establish a safe harbour for liquidated damages clauses satisfying specified criteria: clear drafting, proportional to contract value, and lack of unconscionability. Though it has merit that any numerical threshold is arbitrary, it misses the mark: The aim is a narrowing of the range of debatable cases rather than absolute accuracy. One particular safe harbour clause fully eliminates one kind of conflict.

Statutory Recognition of Limitation of Liability Clauses

Indian courts generally support liability caps—especially those linking maximum exposure to contract value or insurance coverage—but they are subject to challenge where gross negligence or deliberate misconduct is claimed. Judicial reluctance to impose agreed caps in infrastructure projects with high risk and financial arrangements reliant on precisely allocated liability ceilings increases the cost of capital and in some cases discourages investment entirely, therefore adding a risk premium.

Statute should stipulate that parties working at arm's length are free to cap their liability—including for significant breaches—absent contravention of specific legislation guiding implied warranties or mandatory protections provided the clause is clear and does not exclude responsibility for fraud or purposeful wrongdoing. This is not a revolutionary idea; rather, it reflects what astute business entities already assume when drafting these clauses. Explicitly stating removes the presumption of contestability currently attached to every hat independent of its quality.

Harmonisation with Specific Legislation

Two harmonisation gaps call for consideration. The first is about the Insolvency and

Bankruptcy Code 2016. Most legal actions are paused under Section 14's moratorium when a contract enters the IBC resolution process; nevertheless, how contractual liability restrictions relative to that moratorium is treated is not well stated. Courts have handled inconsistently whether a counterparty can enforce a liability cap against the insolvent estate or if the resolution process properly overrules negotiated allocations. To create liability clauses trustworthy tools in transactions involving bankruptcy risk, statutory clarification—either within the IBC or via a harmonisation clause in the Contract Act—is required.[14]

The second gap separates commercial and consumer contracts. In many ways, particular consumer laws already trump basic contract rules, but especially in hybrid transactions involving small and midsize businesses, the border is not always obvious. Subject to appropriate disclosure and the lack of unconscionability, a statutory assumption of commercial reasonableness for liability clauses negotiated between those of same bargaining power would define this line and give B2B contracting the predictability now missing.

Conclusion

This study has investigated the legal framework controlling restriction of liability clauses in Indian commercial contracts, following its evolution from the basic rules of the Contract Act 1872 to the significant body of Supreme Court case law that has molded their application. Clearly come some conclusions.

First, the complexity of modern commercial contracting calls for a framework sturcturely insufficient. Using Section 23's public policy basis as the main barrier against oppressive exclusionary provisions generates results that vary across courts and are inherently reactive—able to correct unfairness after the fact but unable to provide the ex ante clarity that business players demand while pricing risk and organizing transactions.

Second, the comparative frameworks investigated in this paper—UCTA 1977 and the UNIDROIT Principles—show that the conflict between contractual freedom and substantive fairness is not unmanageable. By tiered regulatory systems tailored to the nature of the parties and the nature of the transaction, both instruments accomplish a principled accommodation.

[14] Insolvency and Bankruptcy Code, 2016 (Act No. 31 of 2016), s. 14. The moratorium provision suspends enforcement of most civil proceedings against the corporate debtor; the interaction with pre-agreed contractual liability allocations remains unsettled in case law.

India's contractual framework, updated along comparable lines, could provide the same housing without compromising the commercial certainty that freedom of contract aims to create.

Third, the targeted, realistic, and consistent direction already indicated by the Supreme Court's changing case law is found in the specific legislative changes suggested in Part 5: a coded reasonableness standard for exclusion clauses, statutory safe harbours for liquidated damages, explicit support of liability caps outside cases of fraud and wilful behaviour, and harmonization with the IBC. Wholesale reform of the Contract Act is not necessary for them; They need the codification of principles the courts have already, step by step, established.

The larger need is obvious. The legal treatment of limitation of liability provisions is not a technical backwater in an economy in which conventional form contracts and MSAs regulate the most of commercial interactions—from infrastructure procurement to technology outsourcing to MSME supply chains. The apportionment of commercial risk, the cost of capital, and the practical availability of contractual remedies all depend on it. For the legal foundation of a contemporary business economy, reform is not just beneficial but also essential.

Suggestions for Legislative and Judicial Reform

Enact a Tiered Statutory Framework for Exclusion Clauses

The Government should enact a devoted statutory provision setting out a graded system for the enforceability of exclusion and limitation clauses, either as an amendment to the Indian Contract Act or as a separate instrument. The government ought to differentiate among (i) consumer contracts, where core liability exclusions should be null; (ii) contracts between big commercial businesses, where a reasonableness standard applies; and (iii) contracts between parties of equal degree of sophistication and bargaining power, where a commercial reasonableness presumption should apply subject to disclosure and the lack of unconscionability. The Schedule 2 requirements from UCTA 1977 provide a viable framework for the reasonableness evaluation.

Amend Section 74 to Codify the Liquidated Damages Safe Harbour

Section 74 should be changed to provide an explicit safe harbour for liquidated damages clauses meeting specified requirements: the clause must be written obviously and clearly; the agreed-

upon sum must be reasonably proportionate to the contract worth or expected loss; and the clause must not be unconscionable in light of the overall agreement. Clauses belonging inside the safe harbour should be enforceable without additional evidence of real damage. The amendment should also state unequivocally that existing sincere pre-estimate investigation still applies to clauses falling outside the safe harbor, hence preserving judicial discretion at the boundaries.

Statutory Endorsement of Liability Caps

Absent legislative restriction, parties working at arm's length may agree to cap their total liability under a contract—including in respect of significant or fundamental breaches—provided the limit is clear and does not try to exempt liability for fraud or deliberate misbehaviour. The provision should also confirm that a disproportion between the cap and the possible loss—where the disproportion was foreseeable at the time of contracting and both parties were commercially sophisticated—does not affect the enforceability of a liability cap.

Harmonise the Contract Act with the IBC 2016

The Law Commission ought to conduct a focused assessment of the intersection of contractual liability distribution and the IBC moratorium in order to provide guidelines or suggest a statutory provision clarifying the status of negotiated liability limits in bankruptcy resolution procedures. Particularly, the review should examine whether the moratorium under Section 14 of the IBC impacts the counterparty's capacity to enforce a liability limit against the bankrupt estate and whether resolution strategies may override pre-agreed liability allocations without the approval of the counterparty impacted.

Formalise the Duty of Good Faith in Commercial Contracts

Drawing on Article 1.7 of the UNIDROIT Principles, the Indian Contract Act should be amended to impose an express duty of good faith and fair dealing throughout the negotiation, performance, and enforcement of commercial contracts. At a minimum, this obligation should be specified to include honest dealing, disclosure of significant information impacting the rights of the other party, and the ban of behaviour that goes counter the reasonable expectations generated by the contract. The obligation must be restricted from overriding explicit contractual terms or creating responsibilities incompatible with the nature of the transaction.

Introduce a Statutory Hardship Mechanism

The limited and binary approach of frustration under Section 56 should be supplemented by a statutory mechanism of hardship in accordance with Articles 6.2.1 to 6.2.3 of the UNIDROIT Principles, which state that where a party's performance has become excessively onerous as a result of unforeseen events beyond their control, either party may request renegotiation. Where renegotiation is unsuccessful within a specified period of time, the court should have power to vary or terminate the contract on equitable terms. Such a mechanism would plug the gap left by COVID-19 supply chain issues.[15]

[15] UNIDROIT Principles of International Commercial Contracts (2016 ed.), Arts. 6.2.1–6.2.3. Hardship provisions require that where performance becomes excessively onerous owing to unforeseeable events, the affected party may request renegotiation; courts may adapt or terminate the contract where renegotiation fails.

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