

Bill No. LVIII of 2018

UNFAIR (PROCEDURAL AND SUBSTANTIVE) TERMS IN
CONTRACT BILL, 2018

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BILL

to declare certain provisions of the laws relating to contracts and specific performance, as procedural and substantive, to further define unfairness in contracts, as procedural and substantive, to determine impact of unfairness on contracts, to provide guidelines for such determination and to enable Courts to grant certain reliefs to parties from the effect of unfairness in contracts.

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

1. (1) This Act may be called the Unfair (Procedural and Substantive) Terms of Contracts Act, 2018.

Short title,
extent and
commencement.

5 (2) It extend to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In this Act, unless the context otherwise requires,—

Definitions.

(a) 'contract' means a contract as defined in clause (h) of section 2 of the Indian Contracts Act, 1872 and includes an agreement as defined in clause (e) of section 2 of that Act.

	(b) 'court' means a Civil Court of competent jurisdiction and includes every Consumer Dispute Redressal Agency referred to in section 9 of the Consumer Protection Act, 1986 and an Arbitral Tribunal referred to in clause (d) of sub-section (1) of section 2 of the Arbitration and Conciliation Act, 1996.	68 of 1986
	(c) Words and expressions not defined in this Act and defined in the Indian Contract Act, 1872 shall have the meanings assigned to them respectively in that Act.	5 26 of 1996
Procedural provisions of the Act.	3. The following provisions of the Indian Contract Act, 1872 shall be procedural namely:—	9 of 1972
	(a) section 15 which deals with coercion,	
	(b) section 16 and 19A which deal with undue influence,	10
	(c) section 17 which deals with fraud,	
	(d) section 18 which deals with misrepresentation,	
	(e) section 19 which deals with agreements without free consent.	
Procedural provisions of the Act.	4. The following provisions of the Specific Relief Act, 1963 shall be procedural, namely:—	47 of 1963 15
	(a) clause (a) of sub-section (2) of section 20 in so far as it deals with the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant.	
	(b) clause (c) of sub-section (2) of section 20 which deals with a defendant who entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable, to enforce specific performance.	20
	(c) clause (a) of sub-section (1) of section 27 which deals with a contract voidable or terminable by the plaintiff and where any person interested in the contract sues to have it rescinded and such rescission is adjudged.	25
General procedural unfairness.	5. Without prejudice to the provisions of sections 3 and 4, a contract or a term thereof shall be procedurally unfair if it results in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party or the manner in which or circumstances under which the contract has been entered into or the term thereof has been arrived at by the parties.	30
Guidelines for determining general procedural unfairness.	6. For the purposes of section 5, a Court may take into account the following circumstances, namely:—	
	(a) the knowledge and understanding of the promisee in relation to the meaning of the terms thereof or their effect;	
	(b) the bargaining strength of the parties to the contract relative to each other;	35
	(c) reasonable standards of fair dealing or commonly accepted standards of dealing;	
	(d) whether, or not, prior to or at the time of entering into the contract, the terms were subject to negotiation or were part of a standard terms contract;	
	(e) whether or not it was reasonably practicable for the party seeking relief to negotiate for the alteration of the contract or a term thereof or to reject the contract or a term thereof;	40
	(f) whether expressions contained in the contract are unreadable or incomprehensible.	

(g) whether or not, even if he or she had the competency to enter into the contract based on his or her capacity and soundness of mind, he or she,—

(i) was not reasonably able to protect his or her own interests or of those whom he or she represented at the time the contract was entered;

5 (ii) suffered serious disadvantages in relation to other parties because he or she was unable to appreciate adequately the contract or a term thereof or their implications by reason of age, sickness, physical, mental, educational or linguistic disability, emotional distress or ignorance of business affairs.

10 (h) whether or not independent legal or other expert advice was obtained by the party seeking relief under this Act;

(i) the extent, if any, to which the provisions of the contract or a term thereof or their legal or practical effect were accurately explained by any person, to the party seeking relief under this Act;

15 (j) the conduct of the parties to the contract in relation to similar contracts or courses of dealing to which any of them had been party; or

(k) whether a party relied on the skill, care or advice of the other party or a person connected with the other party in entering into the contract.

9 of 1872

7. The following provisions of the Indian Contract Act, 1872 shall be substantive, namely:—

Substantive provisions of Act.

20 (a) section 10 which deals with agreements which are contracts if made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, not otherwise expressly declared to be void,

(b) section 20 which deals with both the parties to an agreement who are under a mistake,

25 (c) section 23 and 24 which deal with consideration or objects of an agreement which are not unlawful,

(d) section 25 which deals with an agreement without consideration,

(e) section 26 which deals with an agreement in restraint of marriage of any person, other than a minor,

30 (f) section 27 which deals with an agreement in restraint of trade,

(g) section 28 which deals with an agreement in restraint of legal proceedings,

(h) section 29 which deals with an agreement which is uncertain,

(i) section 30 which deals with an agreement by way of wager, and

(j) section 56 which deals with an agreement to do an act impossible in itself.

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8. Clause (a) of section 18 of the Specific Relief Act, 1963 where on account of fraud, mistake of fact or misrepresentation, the written contract of which performance is sought, is in terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract, shall be substantive.

Substantive provisions of Act.

40 **9.** A contract or a term thereof shall be deemed to be substantively unfair if it,—

(a) excludes or restricts liability for negligence;

(b) excludes or restricts liability for breach of express or implied terms of a contract without adequate justification therefor.

Exclusion or restriction of certain liabilities to be substantively unfair.

Exclusion or restriction of rights, duties or liabilities.	10. In contracts to which this Act applies as stated in sub-section (1) of section 18, any exclusion or restriction of the rights, duties or liabilities referred to in section 62 of the Sale of Goods Act, 1930 shall be deemed to be substantively unfair unless there is adequate justification therefor.	3 of 1930
Application of terms of foreign country law.	11. Where a contract contains terms applying or purporting to apply the law of a foreign country despite the contract being in every respect wholly unconnected with the foreign country, such terms shall be deemed to be substantively unfair.	5
General substantive unfairness.	12. Without prejudice to the provisions of sections 7 and 8 of this Act, a contract or a term thereof shall be substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties.	10
Guidelines for determining general substantive unfairness.	13. For the purposes of sections 9 to 12 of this Act, the Court may take into account the following circumstances, namely:—	
	(i) whether or not the contract or a term thereof imposed conditions which are,—	
	(a) unreasonably difficult to comply with, or	15
	(b) not reasonably necessary for the protection of the legitimate interests of any party to the contract;	
	(ii) whether the contract is oral or wholly or partly in writing;	
	(iii) whether the contract is in standard form;	
	(iv) whether the contract is in standard form;	20
	(v) whether the contract or a term thereof is contrary to reasonable standards of fair dealing or commonly accepted standards of dealing;	
	(v) whether the contract, agreement or a term thereof has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties;	25
	(vi) whether the benefits to be received by the disadvantaged party are manifestly disproportionate or inappropriate to his or her circumstances;	
	(vii) whether the disadvantaged party was in fiduciary relationship with the other party; or	
	(viii) whether the contract or a term thereof,—	30
	(a) requires manifestly excessive security for the performance of contractual obligations; or	
	(b) imposes penalties which are disproportionate to the consequences of a breach of contract; or	
	(c) denies or penalises the early repayment of debts; or	35
	(d) entitles a party to terminate the contract unilaterally without good reason or without paying reasonable compensation; or	
	(e) entitles a party to modify the terms of a contract unilaterally.	
Burden of proof.	14. If a contract or a term thereof excludes or restricts liability as stated in clause (b) of section 9 or excludes rights, duties and liabilities referred to in section 62 of the Sale of Goods Act, 1930 as stated in section 10, the person relying on such exclusion or restriction shall prove that it is not without adequate justification.	40
Provisions of the Act to apply for executed contracts.	15. The Court may grant relief on the basis of sections 5, 6, 9 to 14 of this Act in relation to a contract notwithstanding that the contract has been wholly or partly executed and for that purpose it may consider whether and to what extent restitution is possible in the facts and circumstances of the case and where such restitution is not, either wholly or partly possible, whether any compensation is payable.	45

16. A Court may, in proceeding before it, raise an issue as to whether a contract or its terms are unfair under sections 5, 9 to 12, even if none of the parties has raised the issue in its pleadings.

Court's power to raise an issue of unfairness of contract or a term thereof.

9 of 1872
47 of 1963
3 of 1930

5 **17. (1)** Without prejudice to the provisions in the Indian Contract Act, 1872 **Specific Relief Act, 1963** Sale of Goods Act or to the provisions of any other law for the time being in force, where the Court comes to the conclusion having regard to section 5, 6, 9 to 14 that a contract or a term thereof is either procedurally or substantively unfair or both, the Court may grant any one or more of the following reliefs:—

Relief to be granted by Court.

- (a) refusing to enforce the contract or the term thereof;
- 10 (b) declaring the contract or the term is unenforceable or void;
- (c) varying the terms of contract so as to remove the unfairness;
- (d) refund of the consideration or price paid;
- (e) compensation or damages;
- (f) permanent injunction;
- 15 (g) mandatory injunction; or
- (h) any other relief which the interests or justice require as a consequence of the non-enforcement of the contract or the term thereof which is unfair. Provided that where the contract or its term is procedurally unfair as stated in section 5, the person who suffers the disadvantage may, at this option, insist that the contract or term shall be performed, and that he may be put in the position in which he would have been if the conduct, manner or circumstances referred to in that section did not permit the disadvantageous term to form part of the contract.

20 (2) For the purpose of granting the reliefs under sub-section (1), the Court may determine if any of the terms of the contract which are unfair are severable and may thereafter determine whether and to what extent and in what manner, the remaining terms of the contract shall be enforced or given effect to.

25 **18.** The provisions of this Act, other than sections 3, 4, 7 and 8, shall: (a) apply to all contracts entered into after the commencement of this Act and (b) shall not apply to:

Applicability of the Act and exemptions.

- 30 (i) contracts and relations between employers and workmen under the labour laws in force;
- (ii) public employment under the Central Government or a State Government or their instrumentalities or under local authorities;
- (iii) employment under public sector undertakings of the Central Government or a State Government;
- 35 (iv) employment under corporations or bodies established by or under statutes made by Parliament or State Legislatures; and
- (v) contractual terms in respect of which measures are provided in international treaties or agreements with foreign countries to which the Central Government is a signatory.

STATEMENT OF OBJECTS AND REASONS

The subject of 'Unfair Terms in Contract' has attained profound significance in the recent times, in relation to both consumer contracts and other contracts. The tremendous expansion in economic activity has led to the need for greater ease of business in the country. Hence, it becomes important to have a comprehensive set of laws to deal with 'unfairness' in contracts. This would not only protect the weaker party against the stronger but also create a just and conducive environment for doing business in the country.

In the last two decades, several countries have undertaken new laws on the subject in order to protect small businessmen and consumers and particularly to grant protection from the disadvantages of extensive introduction of standard terms of contracts which are one sided.

Another important aspect is the division of unfairness into 'procedural' and 'substantive' unfairness to have separate focus on both the aspects. A contract or a term thereof is *procedurally unfair* if it has resulted in an unjust advantage or unjust disadvantage to one party on account of the conduct of the other party or the manner in which or the circumstances under which the contract has been entered into or the term thereof has been arrived at by the parties. A contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties.

The Indian Contract Act, 1962 has several provisions relating to 'voidable contracts'. These provisions deal with undue influence, coercion, mistake, misrepresentation, etc. and are 'procedural' provisions. Likewise, the Contract Act deals with 'void' contracts or 'void' terms. These are 'substantive' provisions. Similarly, the Specific Relief Act, 1963 contains provisions for granting relief whether there is procedural or substantive unfairness. However, no clear demarcation of unfairness has been provided by the law till date.

The Bill declares certain provisions of the Indian Contract Act, 1872 and Specific Relief Act, 1963 as procedural and substantive and provides statutory guidelines for each of their determination by courts. Absence of such guidelines leaves them to judicial interpretation and results in uncertainty of outcome for the parties involved. A clear demarcation would ensure both clarity and certainty of law which is of extreme importance in a democracy.

Hence, this Bill.

V. VIJAYASAI REDDY

RAJYA SABHA

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to declare certain provisions of the laws relating to contracts and specific performance, as procedural and substantive, to further define unfairness in contracts, as procedural and substantive, to determine impact of unfairness on contracts, to provide guidelines for such determination and to enable Courts to grant certain reliefs to parties from the effect of unfairness in contracts.

(Shri V. Vijayasai Reddy, M.P.)