Navigating the Legal Landscape of EULAs: Balancing Consumer Protections in the Internet of Things Era

Dr. Sangeetha Sriraam*

Introduction

The world around us is proliferated with interconnected devices known as the Internet of Things (hereinafter 'IoT'). From smart bulbs to self-driving cars, the market for IoT is growing exponentially as they provide consumers with convenience and comfort in an unprecedented manner. However, this technological evolution has brought legal challenges to the forefront, particularly regarding the rights of consumers in relation to embedded software within these devices.

At the heart of this issue lie End-User License Agreements (hereinafter 'EULAs'). EULAs are legally binding agreements between the retailer or owner of the software application and the end-user that outline the rights and restrictions of the use of the software. EULAs are attached to the purchase of digital media content such as e-books, digital music and movies, and IoT products. EULAs are non-negotiable adhesion contacts characterised by lengthy and convoluted legalese and often overlooked by an average consumer. Yet, by means of these agreements, consumers unwittingly relinquish significant rights and protections.

This paper delves into the critical examination of how EULAs, by design and practice, restrict the rights of consumers while granting extensive powers to the retailers and manufacturers who are incidentally the intellectual property holders in embedded software. Traditionally, the doctrine of exhaustion provided a balance between the consumer who purchases or uses the product and the rights of the software developers. However, EULAs disrupt this equilibrium by rendering the consumers as mere licensees of the software embedded in the devices that they believe they own.

The author seeks to use the doctrine of unconscionability in contract law. The law in the United States explicitly recognises the doctrine, whereas, in jurisdictions like Canada and India, the Courts have long relied on this doctrine to invalidate contracts that, by exploiting the imbalance of powers between the parties, impose unfair terms. The threshold for applying the principles of unconscionability is generally very high. However, it is accepted that consent does not

* Assistant Professor, Department of Law, Central University of Tamil Nadu

operate on the internet as it used to operate traditionally.[1] Therefore, the author argues that there is an opportunity to reevaluate and potentially redress the imbalance of rights between consumers and software licensors through the application of a rejuvenated doctrine of unconscionability. Furthermore, this paper proposes other measures to rebalance this equation.

For the purpose of this paper, the author will employ the term 'retailer' to refer to the sellers, manufacturers, developers, and licensors of products with embedded software and 'consumers' to refer to purchasers of these devices. Though the expansion and modifications to the rule of exhaustion under copyright and patent law may aid in the enhancement of consumer protection, the paper will not delve deep into it. The exploration of intellectual property laws will be limited to understanding the rule of exhaustion as a traditional mechanism to balance the rights of consumers and retailers. While the contentions and suggestions in this paper can be applied across jurisdictions, the paper focuses on the Indian context.

The Perils of EULAs

The process of procuring an e-book and a physical book online is pretty much the same. The shopper browses the site and, upon selecting the book, chooses the format. The consumer is then invited to press the same "Buy Now" button. Despite these similarities, retailers offer essentially different products to buyers of digital and analogue goods.

Digital media content can be removed from devices even if the customer has clicked "Buy Now" and paid the full price for the transaction. This is not hypothetical. In 2009, on account of a conflict with the publisher, Amazon removed books authored by George Orwell from Kindle.[2] Digital content may also be deleted from devices for other reasons, such as a government ban, the shutdown of the business, or simply because they choose to. For instance, as of December 2023, Amazon's Kindle has stopped supporting their flagship MOBI file format

[1] COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE B.N. SRIKRISHNA, A FREE AND FAIR DIGITAL ECONOMY PROTECTING PRIVACY, EMPOWERING INDIANS 32 (2018) https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf (last visited May 12, 2024).

[2] Brad Stone, *Amazon Erases Orwell Books From Kindle,* N.Y. TIMES, (July 17, 2009) *https*://www.nytimes.com/2009/07/18/technology/companies/18amazon.html (last visited May 15, 2024).

and requires consumers to re-download books in newer formats.[3] Retailers retain the right to revoke the license to the content without a refund.[4]

The reason to remove access to digital content need not be legal, regulatory, or technical. In January 2024, the Tamil movie *Annapoorani* was removed from Netflix's streaming service because of objections from fringe groups.[5] One may argue that Netflix is an 'All-You-Can-Eat' subscription service, and the removal of titles from the Netflix library is understandable. Yet, the lack of distinction between the permanence and stability of a procurement between a subscription service like Netflix and a "purchase" on Amazon is a major cause of concern. This scenario wouldn't work in the case of physical books, CDs, DVDs, etc. This is possible because the digital content is not stored on the shelves of the consumer but in a remote server maintained by the retailer. Similar risks run along with the Internet of Things.

The Internet of Things covers a range of devices, including smartphones, smart home devices, entertainment systems, wearable technologies, and even driverless cars that may soon become a reality. These products combine hardware with embedded software, internet connectivity, sensors, and data analytics to allow the devices to interact with the cloud servers in real time. They are subjected to the same range of susceptibilities, vulnerabilities, and controls as digital media content. For example, Revolv, a home automation device maker, sold the 'Revolv hubs' for $300 with a lifetime subscription for support, new features, and updates. However, Revolv was acquired by Google Inc. in 2014, and by 2016, Google had stopped supporting the Revolv hubs. By 15 May 2016, the Revolv app and the hub stopped working.[6] This could happen to any IoT, including medical devices and driverless cars, in the future.

Traditionally, whether it is a hardcover book, a DVD, or a car, the owner is free to deal with it however they please. This right runs with the product and is integral to the notion of ownership. Ownership comprises a bundle of distinct and separable interests, including the right to possess, control, use, manage, and authorise others to use or possess, charge rent, stop its trespass,

---

[3] S Aadeetya, *Amazon Has Issued Warning About Major Change For Kindle Users From Next Month: Know More*, NEWS18, (Oct 12, 2023) https://www.news18.com/tech/amazon-has-issued-warning-about-major-change-for-kindle-users-from-next-month-know-more-8613153.html#:~:text=Amazon%20explains%20the%20MOBI%20is,in%20the%20MOBI%20file%20format (last visited May 15, 2024)

[4] *See* Spotify Terms of Use, https://www.spotify.com/in-en/legal/end-user-agreement/ (last visited May 15, 2024)

[5] Naman Ramachandran, *'Annapoorani' Controversy: Star Nayanthara Apologizes, Says 'We Did Not Expect the Removal of a Censored Film',* VARIETY, Jan 19, 2024, https://variety.com/2024/film/asia/nayanthara-annapoorani-pulled-netflix-hindu-complaints-1235868630/ (last visited May 15, 2024)

[6] Rob Price, *The Smart-Home Device That Google Is Deliberately Disabling Was Sold with a 'Lifetime Subscription',* BUSINESS INSIDER, (Apr 5, 2016), http://www.businessinsider.com/revolv-smart-home-hubs-lifetime-subscription-bricked-nest-google-alphabet-internet-of-things-2016-4 (last visited May 14, 2024)

alienate, sell or give it away. Limitations on the use of the products by the owners, if any, are imposed by law and not by the retailer.

Things are different under the EULA. Most EULAs that consumers hastily click "I agree" to preclude the consumers from lending, renting, reselling or otherwise transferring their purchases. For example, Apple's license, despite stating that "all transactions... are final," insists that customers cannot "rent, lease, loan, sell, [or] distribute" the movies and music they acquire from iTunes.[7] The terms and conditions of an IoT device, such as Tesla's Full Driving Capability, do not allow the car to be used for commercial ride-sharing purposes.[8] In sum, the consumers are basically permitted to use the product in the manner that the retailer allows them to.

But how can an agreement override centuries of settled legal wisdom and practice pertaining to ownership? This is possible because, as per the terms of EULAs, the consumer does not purchase digital content but merely licenses it. This may be evidenced by the Kindle Store Terms of Use.[9] In the case of devices with embedded software, the consumers own the hardware, but the software in the device is only licensed.[10] General Motors' infamous statement – "proponents incorrectly conflate ownership of a vehicle with ownership of the underlying computer software in a vehicle", is a stellar illustration of this.[11] Thus, you own only the hardware. However, the software that adds value to the instrument by running everything from the basic functionality to the built-in apps that belong to the company. This is contrary to what most consumers have in mind when they enter into the transaction.

Can this be argued as a case of lack of *consensus ad idem,* a fundamental requirement for a valid contract under § 13 of the Indian Contract Act, 1872? The retailers would argue that the customers made an informed decision to enter into the contract. But consumers seldom read the EULAs. To illustrate, PC Pitstop, a software developer, offered a monetary reward in their

---

[7] *See,* Apple Media Services Terms and Conditions, https://www.apple.com/legal/internet-services/itunes/ (last visited May 14, 2024)

[8] Aaron Perzanowski and Jason Schultz, *Do you own the software that runs your Tesla?*, N.Y. TIMES,, (Nov. 4, 2016) https://www.latimes.com/opinion/op-ed/la-oe-perzanowski-schultz-tesla-software-ownership-20161104-story.html (last visited May 13, 2024)

[9] *See*, Kindle Store Terms of Use, https://www.amazon.in/gp/help/customer/display.html?nodeId=201014950 (last visited May 14, 2024)

[10] Tesla, Terms of Use, https://www.tesla.com/legal/terms (last visited May 14, 2024); Steve Hanley, Software & You: Who Actually Owns That New Car You Are Driving?, CLEAN Technica, https://cleantechnica.com/2022/07/27/software-you-who-actually-owns-that-new-car-you-are-driving/ (last visited May 11, 2024)

[11] Mike Masnick, GM Says That While You May Own Your Car, It Owns The Software In It, Thanks To Copyright, TECHDIRT, Apr. 23, 2015, https://www.techdirt.com/2015/04/23/gm-says-that-while-you-may-own-your-car-it-owns-software-it-thanks-to-copyright/ (last visited May 14, 2024)

EULA to a limited number of users who contacted them. It took 3000 sales and five months before the reward was first claimed.[12]

Prima facie, it appears that consumers are negligent. However, EULAs run into hundreds of pages of complex legalese, leaving consumers with little incentive to read the EULAs thoroughly. Several EULAs of IoTs are presented as shrink-wraps, wherein the terms and conditions are inside the box or on the website on the seller and the consumer by opening or using the product. Even for clickwrap contracts, i.e., those wherein the consumers click "I agree" to terms and conditions, the EULAs are standardised and non-negotiable and only allow consumers to either accept the terms or not make the transaction. This led the Srikrishna Committee to conclude that meaningful consent to the provisions in a detailed manner is lacking.[13] Moreover, the terms of EULAs vary from retailer to retailer, from time to time and even from product to product. This practice prohibitively increases the information cost, and expecting consumers to peruse each of these contracts is unreasonable. This, in turn, dissuades any incentive for retailers to draft consumer-friendly EULAs, resulting in a market for lemons, i.e., an information asymmetry where the seller knows more about the product than the buyers.

The world is increasingly being run by software-enabled devices that can and are controlled remotely by the manufacturer, and the software is inseparable from the essential functions of most modern devices. The manufacturers/retailers argue that limiting who can access the systems within the devices is for safety and security reasons. But this has real implications on the notions of ownership.[14] Taking away the right to own the embedded software takes away ownership of the device in its true sense. Consumers will enjoy lesser and lesser control and rights over their devices – a real and growing threat to the rights of consumers. Consumers can no longer take apart the products as they please, service them in a local repair shop, or even use generic spare parts and accessories without voiding the warranties or violating the EULAs. The industry can thus effectively kill the accessories, repair and resale market.

Manufacturers are building cars, electronics, and other devices that we can't truly own, and consumers are losing their autonomy and rights over the products. A balance needs to be struck between the rights of consumers and retailers.

---

[12] A Thousand Dollar Reason to Read Fine Print, PRICECONOMICS, https://priceconomics.com/a-thousand-dollar-reason-to-read-fine-print/ (last visited May 15, 2024)
[13] B.N. SRIKRISHNA COMMITTEE, *Supra* note 1, at 33
[14] Jason Torchinsky, *Carmakers Want to Use Copyright Law to Make Working on Your Car Illegal,* JALOPNIK, APR. 21, 2015, https://jalopnik.com/carmakers-want-to-make-working-on-your-car-illegal-beca-1699132210 (last visited May 14, 2024)

Rule of Exhaustion

The embedded software in IoTs is safeguarded by intellectual property laws, particularly copyright law. The legal framework shields the underlying intangible work of the developer in the software and prevents the unauthorised distribution of their protected works. However, an unfettered version of this right would imply that the purchaser would own a product without enjoying most of the rights of ownership, such as resale, donation, sharing, lending, etc. To avoid this situation, the doctrine of exhaustion or the first sale doctrine was introduced.

The rule of exhaustion implies that the intellectual property rights holder relinquishes a certain amount of control over a product once it is sold to a new owner. Exhaustion allows the copy owner, i.e., the consumer, to sell, give away, lend, rent or otherwise deal with their copies even when the copyright holders object. While the copyright law in the United States of America explicitly provides for the rule of exhaustion and its ambit in various situations,[15] the Copyright Act, 1957 in India is less overt. The original 1957 Act did specify rules of exhaustion. The High Court of Delhi, in the seminal judgement of *Penguin Books Ltd.* v. *India Book Distributors and Ors.*[16] in 1984, interpreted § 14(a)(ii) of the Act to include the rule of exhaustion internationally. Subsequently, the Copyright Act was amended in 1984 to protect software under § 14(b) explicitly. § 14(b)(ii) was amended in 1994 to exempt the application of copyright exhaustion to software. Subsequently, in 1999, the provision was amended again to reintroduce the first sale doctrine to software. Thus, the doctrine of exhaustion applies to software, including software embedded in devices.

Acknowledging the application of the rule of exhaustion as understood in the physical market to its digital counterpart poses significant challenges. The jurisprudential basis for this rule is that a consumer fairly compensates the retailer by paying the price of that one copy of the product. Thereafter, the consumer should be free to resell, lend, destroy or deal with the copy as they please. While this holds water in the physical world, in the digital sphere, the consumer can potentially create and distribute countless copies of the product – complicating the application of the rule of exhaustion.

This challenge inhibits law from transposing the rule of exhaustion as is applied in the physical world to the digital market – and that is well-exploited by retailers.

---

[15] Copyright Act of 1976, 17 U.S.C. § 109, *Also see,* the Digital Millennium Copyright Act, 1998
[16] Penguin Books Ltd. v. India Book Distributors and Ors., AIR 1985 Delhi 29

The rules of exhaustion are conventionally based on the distinction between the rights of the author in the intangible work and the rights of the owner in the tangible copy. With digital goods lacking a tangible form, the justification behind the rule of exhaustion becomes considerably weakened. This challenge is well-exploited by the retailers by using EULAs.

In *Engineering Analysis Centre for Excellence Pvt. Ltd.* v. *CIT,*[17] the Hon'ble Supreme Court held that EULAs *per se* are not licenses[18] as it provided nothing more than the right to use. The EULA does not transfer or exhaust any right protected by §§ 14(a) or 14(b). In other words, the terms of EULAs prevail over the norms set in copyright law.

EULAs are able to overwrite the equilibrium between the rights of the creators and the consumers that intellectual property laws, through the rules of exhaustion, sought to maintain. They grant the retailers much greater control over the consumers and the secondary market than was envisaged by law. By insisting that the consumers are not owners of their devices, the retailers effectively eliminate the resale and repair market. Given that the rights are now being declared by the agreement and not the laws of ownership or intellectual property, balance has to be now struck by the law of contracts, particularly the doctrine of unconscionability.

EULAs and Contract Law

EULAs are an example of the standard form of contract, boilerplate or adhesion contracts. EULAs are drafted by retailers who have significantly stronger bargaining power and may include terms allowing unilateral alteration or termination of the agreement. On the other hand, the consumers have no choice but to either take it or leave it. For example, the Amazon terms of use for the purchase of Echo Dot—a product that allows you to control smart home devices using Amazon's voice service called "Alexa"—has the following clause: "If you do not accept the terms of this Agreement, then you may not use Alexa".[19] These terms are on the Amazon site and do not pop up unless specifically searched for.

The practical convenience of online transactions is often outweighed by the dangers of consenting to lengthy terms and conditions that consumers typically do not read. Studies show

[17] Engineering Analysis Centre for Excellence Pvt. Ltd. v. CIT, Civil Appeal No(s). 8733-8734/2018
[18] *Id.* ¶ 139
[19] Alexa Terms of Use, https://www.amazon.in/gp/help/customer/display.html?nodeId=201809740 (last visited May 14, 2024).

that generally, businesses do not want the consumer to read the adhesion contracts,[20] and are aware that their EULAs will not be read.[21]

Boilerplate contracts, in general, have a higher chance of being unreasonable due to their one-sided nature. That, however, does not necessarily affect the binding force of the contract. In the case of the EULA, the contractual intent of the consumer is ascertained from the notice of the terms and conditions rather than from establishing whether the assent was meaningful. This is because the law of contract relies heavily on the 'duty to read'.

Under the doctrine, contracting parties are presumed to have read the contract before agreeing to its terms. Failure to do so does not absolve the party, no matter how convoluted, long or complicated the terms are.[22] While the doctrine originated in the United States of America, it is applicable in most common law jurisdictions, including India. The duty to read doctrine developed from individually negotiated contracts but is now applicable for adhesion contracts as well.[23] Indian courts have recognised and upheld the applicability of the doctrine in adhesion contracts[24] as well as e-contracts.[25] Thus, EULAs are not objectionable *per se.* The presumptive validity stems from the assumption that consumers acted rationally while giving their consent.[26] However, if the party with the superior bargaining power exercises it and introduces extremely far-reaching, technical and one-sided provisions, the judicial mechanism must refuse to enforce it. In such cases, the doctrine of unconscionability is the sole defence against unfair terms in such adhesion contracts.[27]

Doctrine of Unconscionability

The doctrine of unconscionability is a judge-centric doctrine[28] that allows courts to strike down a contract or its terms if they are unconscionable, i.e., unfair or unreasonable. The doctrine is based on equity and intent to protect the weaker party.

---

[20] Meyerson, Michael I. *The reunification of contract: The objective theory of consumer form contracts*, 47 UNIV. MIAMI LAW REV. 1263, 1270 (1993).
[21] Randy E. Barnett, *Consenting to form contracts,* 71 Fordham Law Rev. 627 (2002).
[22] Uri Benoliel and Samuel I. Becher, *The duty to read the unreadable*. 60 B. C. L. Rev., 2255, 2260 (2019)
[23] LAW COMMISSION OF INDIA, REPORT NO. 199: Unfair (Procedural and Substantive) Terms in Contracts 76 (2006)
[24] Bihar State Electricity Board v Green Rubber Industries, (1990) 1 SCC 731.
[25] Uttarakhand Power Corpn. Ltd. v ASP Sealing Products Ltd., (2009) 9 SCC 701; Bharathi Knitting Co. v DHL Worldwide Express Courier, (1996) 4 SCC 704; Ferro Alloys Corpn. Ltd. v A.P. State Electricity Board, 1993 Supp (4) SCC 136.
[26] James P. Nehf, *Shopping for privacy online: consumer decision-making strategies and the emerging market for information privacy*, U. Ill. J.L. Tech. & Pol'y 55 (2005).
[27] Melissa T. Lonegrass, *Finding room for fairness in formalism—The sliding scale approach to unconscionability,* 44 Loy.U.Chi.L.J. 4 (2012).
[28] Thomas Gamarello, The evolving doctrine of unconscionability in modern electronic contracting. LAW SCHOOL STUDENT SCHOLARSHIP 647 (2015).

The US Uniform Commercial Code[29] and the Restatement (Second) of Contracts[30] both provide for unconscionability. On the other hand, there is no normative coherent theory of the application of unconscionability in India. The Indian Contract Act, 1872 (hereinafter 'Act') does not have an explicit provision dealing with unconscionability.

The Law Commission of India in 1984 recommended the insertion of § 67A to the ICA to set aside contracts due to unconscionability.[31] This recommendation has not seen the light of the day. In the absence of a specific provision, the judiciary has had to resort to § 16 of the Act. However, the threshold for invoking § 16 is very high. To prove unconscionability, the party invoking the doctrine must not only prove that the terms were unfair but also that the dominant party exercised undue influence.[32] If undue influence was not established, relief on the grounds of unconscionability could not be given.[33]

The Indian judiciary has attempted to circumvent the high threshold under § 16 by adjudging unconscionable terms as being opposed to public policy under § 23. The Supreme Court, for the first time, applied the doctrine beyond § 16 of the Act in the case of *Central Inland Water Transport Corporation Ltd.* v. *Brojo Nath Ganguly*.[34] This position was unanimously upheld in *Delhi Transport Corporation* v. *D.T.C. Mazdoor Congress*,[35] "*… exercising equity jurisdiction, this Court would relieve the weaker parties from unconstitutional contractual obligations, unjust, unfair, oppressive and unconscionable rules or conditions*…"[36] The Apex Court in *L.I.C. of India* v. *Consumer Education and Research Centre* accepted the principle's application to adhesion contracts and stated that — "*it was settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational one must look to the relative bargaining power of the contracting parties*".[37]

The Doctrine of Unconscionability and Consumer Law

The doctrine of unconscionability was not covered under the Consumer Protection Act, 1986, nor did it find a place in the 2019 Act. However, courts have, in multiple instances, found consumer contracts with one-sided clauses to constitute unfair trade practice. In *Pioneer Urban*

[29] § 2-302
[30] § 208
[31] LAW COMMISSION OF INDIA, REPORT NO. 103: UNFAIR TERMS IN CONTRACT 5 (1984).
[32] Poosathurai v. Kannappa Chettiar, (1919) ILR 43 Mad 546 (PC)
[33] U. Kesavulu Naidu v. Arithulai Ammal (1912) ILR 36 Mad 533
[34] Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, para. 91
[35] Delhi Transport Corporation v. D.T.C. Mazdoor Congress, [1991] Supp (1) SCC 600.
[36] *Id.* ¶ 281
[37] L.I.C. of India v. Consumer Education and Research Centre, (1995) 5 SCC 482., Para 47.

Land & Infrastructure Ltd. v *Govindan Raghavan*,[38] the Supreme Court of India held that "*incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per § 2(r) (of the Consumer Protection Act, 1986).*" This decision was upheld in several key decisions in recent times, *inter alia, Jacob Punnen and Another* v. *United India Insurance Co. Ltd*.,[39] *IREO Grace Realtech (P) Ltd.* v. *Abhishek Khanna*,[40] *Experion Developers (P) Ltd.* v. *Sushma Ashok Shiroo.*[41] Given that the notice and consent framework is broken as a result of the unequal bargaining power,[42] it is reasonable to expect many more cases of consumer contracts, particularly EULA, to be evaluated by the judiciary in an attempt to rebalance the relationship between the parties.

While Indian courts have shown a willingness to strike down terms that are unconscionable, the contours of unconscionability, particularly in EULAs, remain unclear. Two major sources offer clues on how unconscionability may be determined: the 199th Report of the Law Commission of India on Unfair (Procedural and Substantive) Terms in Contract, 2006 and the Supreme Court of Canada case of *Uber* v. *Heller.*[43]

Law Commission Report, 2006

Acknowledging the rapid growth in the use of standard form contracts, particularly consumer contracts, the Law Commission of India decided to revisit the provisions pertaining to unfair terms in contracts. The Report notes that there is no statutory provision in the Indian Contract Act, 1872, under which courts can give relief to the consumer on the grounds of unconscionability. The Commission also admits that the threshold prescribed under the existing provisions is very high, and courts may find themselves helpless. The Report proposes new Unfair (Procedural and Substantive) Terms in the Contract Bill.[44] in which, in § 13, it puts forth guidelines on assessing substantive fairness. The presence of these factors may hint at the contract being substantially unfair:[45]

- Unreasonably difficult to comply with or has terms that are not needed to protect the legitimate interest of the parties

[38] Pioneer Urban Land & Infrastructure Ltd. v Govindan Raghavan, (2019) 5 SCC 725.
[39] Jacob Punnen and Another v. United India Insurance Co. Ltd., 2021 SCC OnLine SC 1207.
[40] IREO Grace Realtech (P) Ltd. v. Abhishek Khanna, (2021) 3 SCC 241
[41] Experion Developers (P) Ltd. v. Sushma Ashok Shiroo, 2022 SCC OnLine SC 416
[42] B.N. SRIKRISHNA COMMITTEE, *Supra* note 1, at 32; Avery Katz, *Your terms or mine? The duty to read the fine print in contracts*, 21(4) The RAND Journal of Economics, 518, 527, https://doi.org/10.2307/2555466 (last visited May 11, 2024).
[43] Uber Technologies Inc v Heller, 2020 SCC 16
[44] LAW COMMISSION OF INDIA (2006), *Supra* note 23, at 183
[45] *Id.* at 210

- The contract is in standard form
- Terms that are contrary to standards of fair dealing
- Substantial imbalance in the exchange of monetary values or the bargaining powers
- The benefits received by one party are disproportionate to their circumstances
- Fiduciary relationship
- The contract imposes excessive security for performance or penalty for breach
- Allows for unilateral termination or modification of the contract without reason or compensation

The Commission has suggested certain generic guidelines that courts may use to assess EULA. A more insightful reference to conditions in which an EULA may be struck down as unreasonable is the Canadian Supreme Court case of *Uber* v. *Heller.*

Uber v. *Heller*

Uber v. *Heller*[46] is a 2020 Canadian Supreme Court decision which dealt with an arbitration clause in an employment contract. Uber Inc., the dominant party and the drafter of the contract, is a ridesharing platform that connects riders to drivers through their mobile app. Both the riders and the drivers enter into a contract with Uber Inc. through standard form service agreements; in the case at hand, Uber required the weaker party to the contract, a driver based out of Toronto, Canada, to bring their labour complaint before an arbitral tribunal in the Netherlands, The Supreme Court of Canada found the said arbitration clause to be unconscionable and hence, unenforceable.

While the case concerned a service agreement, the principles articulated herein are applicable to all standard form contracts, including EULAs. This was also held in the case of *Douez* v. *Facebook, Inc.,* of the Supreme Court of Canada.[47]

Pertinently, the Court noted that:

> "Unconscionability requires both an inequality of bargaining power and a resulting improvident bargain. An inequality of bargaining power exists when one party cannot adequately protect its own interests in the contracting process. A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable. Improvidence is measured at the time the contract is formed and

[46] Uber v. Heller *Supra* note 43
[47] Douez v. Facebook, Inc., 2017 SCC 33

> must be assessed contextually. The question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. Although one party knowingly taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, it is not essential for a finding of unconscionability. Unconscionability does not require that the transaction was grossly unfair, that the imbalance of bargaining power was overwhelming, or that the stronger party intended to take advantage of a vulnerable party.".

The Court outlines the requirements for a doctrine of unconscionability as follows:

- Presence of inequality of bargaining power
- Improvident bargain, i.e., the contract unduly benefits the strong party,

The Court also held that the imbalance in bargaining power need not be overwhelming nor that the clause needs to be grossly unfair.

The Court clarified that the intent and knowledge of the strong party is immaterial. Even if the stronger party, i.e., the retailer, is unaware or did not seek to exploit the vulnerability of the weaker party, i.e., the consumer, the doctrine may be invoked. The Court opined that viewing knowledge or intent as an essential requirement would improperly emphasise "*the state of mind of the stronger party, rather than the protection of the more vulnerable*".[48] Imposing a strict standard linked to the stronger party's mindset would undermine the contemporary significance of the unconscionability principle. Given the lack of negotiation or even interaction between the parties, no improvident adhesion contract can be subject to scrutiny if the mindset of the stronger party is considered vital.[49] *Uber* v. *Heller* thus lowered the requirement for finding a contract unconscionable.

In addition to the tests set out by the Law Commission of India and in *Uber* v. *Heller*, courts can consider a few other factors to evaluate if the restrictions placed by the EULA, particularly in terms of reselling, leasing, sharing, and disposing, are valid. Aaron Perzanowski and Jason Schultz suggest that disclosures of these restrictions must be assessed on four Ps, namely, prominence, presentation, placement, and proximity.[50]

---

[48] Uber v. Heller *Supra* note 43, ¶ 85
[49] *Id.*
[50] AARON PERZANOWSKI AND JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 175 (2016).

Prominence necessitates that the disclosure in question is easily visible and readable. Fine prints of the EULAs would not suffice. The second requirement, i.e., of Presentation, requires that the terms restricting the rights of the consumers be easily understood and not shrouded in complex legalese. Placement looks into whether the disclosures are placed in a location that the consumer is likely to chance upon. Again, EULAs that consumers don't read are disqualified, according to Perzanowski and Schultz.

The most intriguing recommendation pertains to the fourth limb, i.e., proximity. The authors recommend that while evaluating a disclosure, the relationship between the disclosure and the claim it seeks to modify must be studied. For instance, an e-book with a "Buy now" button is not proximate to a product that is merely licensed.

Way Ahead

Admittedly, the digital consumer landscape is vastly different from the traditional analogue marker, and the rules that apply to the latter cannot be readily transplanted to the digital realm. That does not imply that we forgo or allow for ownership and consumer rights to diminish. However, the transition to EULAs was, in essence, a veiled attempt to dispense with the rule of exhaustion and shift power from the consumers to the retailers. Here, the doctrine of unconscionability can step up and prove to be central to the protection of consumers if EULAs employ unfair terms.[51]

The question of how to understand unconscionability has been considered not once but twice by the Law Commission of India. The Commission has established guidelines on circumstances under which a clause in a contract may be invalidated as being unfair. These guidelines were put forth in the form of a Bill, which has yet to be enacted. However, the guidelines may still be employed, and EULAs may be reviewed as being offensive to § 23 of the Indian Contract Act, 1872. The parameters set out in *Uber* v. *Heller* are also incredibly sound. Indian courts must start paying close attention to EULAs and the manner in which they are reshaping the rights of consumers, particularly to ownership.

No doubt, the digital world poses serious threats to retailers and their interests. The risk of piracy and endless duplication can potentially jeopardise the entire industry. It is understandable that retailers want to secure their interests by introducing software locks and

[51] Salazar V, Alberto R, *Unconscionability, Smart Contracts, and Blockchain Technology: are consumers really protected against power abuses in the Digital Economy?* 9 IJCLP 74, 76, (2021); Stelios Tofaris, *The regulation of unfair terms in Indian contract law: Past, present and future,* in STUDIES IN THE CONTRACT LAWS OF ASIA III: CONTENTS OF CONTRACTS AND UNFAIR TERMS, 132 (M. Chen-Wishart and S. Vogenauer, 2020).

restricting access to unauthorised personnel. At the same time, this defence should not be used to justify the complete erosion of ownership – especially when the consumer has been misled about the nature of the transaction.

Today, several products are being put up in the Indian market wherein consumers struggle to discern whether they purchase a product outright or obtain a license with usage restrictions. These licenses fundamentally redefine the relationship that the consumer has with their products. Perzanowski and Schultz insist that these licenses are nothing more than grants of permission.[52] Therefore, in addition to the two-fold test of unequal bargaining power and improvident bargain set out in *Uber* v. *Heller,* the court needs to assess how the transaction is being projected to the consumer. To this end, the author recommends that while looking into the unconscionability of EULAs, courts should assess the following factors:

- How the transaction is communicated to the consumers – for example, if the product is clearly advertised as a subscription service, as in the case of Microsoft 365, Netflix or Spotify, it may not be considered unconscionable. However, if a product is being sold with a "buy now" button but the retailer retains the right to cease support for the device or delete the copy from the consumer's device, it is deceitful and must be viewed as unconscionable.
- Duration of possession or access – If a product is intended to be used by the consumer for its lifetime and even has the right to dispose of it, it must not be treated as a license. Any EULA that insists it to be so should be unconscionable.
- Payment modality: When a consumer pays a one-time fee for a product, they must be considered an owner rather than a licensee.

Does this imply that the law should grant the consumer unlimited rights, including the cataclysmic right to make unlimited copies? The answer has to be negative. Retailers must have the right to restrict copying the software. However, rights such as diagnosing and repairing their device themselves or through third-party repair services, reading the e-book on an unsupported device, or transferring ownership in the copy would go a long way in not just protecting the rights of the consumers but also in promoting the right to repair.

These rights indubitably do not extend to subscription models. However, the right to choose between ownership, rental, all-you-can-eat subscription models or licensing should be with the consumer – and not because retailers are able to push license models without

[52] PERZANOWSKI AND SCHULTZ, *supra* note 50, at 174

repercussions. The emphasis is on consumers enjoying meaningful choices, which is under threat under the present regime run by complex EULAs.

The law is at a critical juncture wherein it must strive to achieve a renewed balance between retailers and consumers by employing a rejuvenated doctrine of unconscionability. Ultimately, protecting consumer rights must be a function of law and not left to the grace and mercy of retailers.