Unconscionability in Franchise Agreements: Rethinking the Commercial Parties Exception in Indian Contract

Abstract

Indian courts will only invalidate an unfair contract term when the contracting parties are unequal, and the contract is not "commercial". The exception originated as a single sentence in Central Inland Water Transport Corp. v. Brojo Nath Ganguly and later hardened into a rule in S.K. Jain v. State of Haryana and ICOMM Tele Ltd. v. Punjab State Water Supply & Sewerage Board. Franchise agreements are typically boilerplate documents presented on a take-it-or-leave-it basis, yet they fall on the wrong side of that exception. The question posed in this article is whether the assumption that business transactions are equal is applicable to franchising. It traces how the doctrine narrowed, tests the presumption against the Reebok India and Subway disputes, and compares the position in the United States, the United Kingdom, Australia and France. It concludes that franchisees in India have no remedy under any of the three provisions—unconscionability, Article 14 or the general provisions of the Contract Act. It advocates for a brief statute mandating pre-contract disclosure, a fairness test for standard-form clauses, an enforcement authority, and continued freedom for franchise systems to use standard-form contracts.

Keywords: *Unconscionability; Franchise agreements; Commercial parties exception; Standard-form contracts; Bargaining power; Pre-contract disclosure*.

I. Introduction

Indian contract law has a doctrine addressing one-sided bargains. In Brojo Nath, the Supreme Court observed that an unfair and unreasonable term imposed by a stronger party is unenforceable as contrary to public policy under Section 23 of the Indian Contract Act, 1872, and, where the State is involved, under Article 14.[1] The Court qualified that the principle "may not apply where both parties are businessmen and the contract is a commercial transaction," while cautioning that in "today's complex world of giant corporations" commercial character alone would not suffice.[2]

Later decisions retained the first half of that qualification and discarded the warning. The doctrine stopped protecting franchisees once franchise agreements came to be treated as commercial. The law treats the two businesses as equal bargainers, even though one is a franchisee who invested savings to build a business on the franchisor's brand.

This article explores whether the presumption applies to franchising, and what the law should do in its place. Part II follows the evolution of the doctrine from Brojo Nath to LIC v. CERC and then to S.K. Jain and ICOMM Tele, and illustrates that Article 14 will not aid if neither party is the State. Part III examines the use of the term "sophisticated" by courts and tests its validity against the Reebok India dispute in India and the Subway disputes in the United States. Part IV examines the general remedies under the Indian Contract Act in comparison to the United States, the United Kingdom, Australia and France. Part V concludes.

This is a doctrinal and comparative study based on judgments, statutes and press reports. The disputes examined suggest a pattern, not a rule: many franchise conflicts are settled or referred to arbitration.

II. The Doctrinal Transformation: From Protecting the Weak to Excluding the Commercial

In Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly, the doctrine of unconscionability was instituted within Indian contract law.[3] The Supreme Court struck down a service rule permitting a government corporation to terminate a permanent employee's services on three months' notice (or pay in lieu), without any guidelines for its exercise and without any hearing.[4] It was a rule replete with arbitrariness. Madon, J., writing for a two-judge bench, held that courts have the power to strike down an unfair and unreasonable contract or clause entered into between parties possessing unequal bargaining power.[5] This reasoning was supported by the concept of "public policy" under Section 23 of the Indian Contract Act, 1872, as well as the spirit of equality enshrined under Article 14.[6] However, the Court refused to instate this as an absolute rule or an exhaustive test; instead it offered illustrations and immediately qualified its own holding—"[t]his principle may not apply where both parties are

[1] Indian Contract Act, 1872, No. 9 of 1872, § 23 (India); India Const. art. 14.
[2] Central Inland Water Transport Corp. v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶ 89 (India)
[3] Id. Brojo Nath, (1986) 3 SCC at ¶ 80 (India).
[4] Id. Brojo Nath, (1986) 3 SCC at ¶ 112 (India), (considering Rule 9(i) of the Central Inland Water Transport Corporation Ltd. Service, Discipline and Appeal Rules, 1979).
[5] Id. Brojo Nath, (1986) 3 SCC at ¶ 89 (India).
[6] Indian Contract Act, 1872, No. 9 of 1872, § 23 (India); India Const. art. 14.

businessmen and the contract is a commercial transaction"—while in the same passage warning that in "today's complex world of giant corporations" the commercial nature of a contract alone would not suffice.[7] Each case must be judged on its own facts. The renowned commercial-parties exception is thus rooted not in a categorical bar but in a single qualifying sentence with an immediate caveat. The exception was hence a rebuttable presumption dependent on facts, and not the absolute rule it later became.

L.I.C. of India v. Consumer Education & Research Centre has received limited attention in discussions of the commercial-parties exception. It is largely overlooked because of its holding's limited relevance, but its reasoning anticipates ICOMM Tele and holds prime importance. The dispute arose with respect to a condition in LIC's Table 58 term insurance policy, which confined proposals under the policy to persons in Government, quasi-Government or "reputed commercial" organisations, thereby excluding those in the unorganised and self-employed sectors.[8] Writing for the bench, K. Ramaswamy, J., struck down the restrictive clause as arbitrary and violative of Article 14, holding the offending part severable from the rest of the policy.[9] The Court further drew on English authority, including the House of Lords, and restated the commercial/non-commercial fork alongside Brojo Nath, which it quoted.[10] Relying on Lord Diplock in A. Schroeder Music Publishing Co. Ltd. v. Macaulay, the Supreme Court noted that where parties to a commercial transaction of equal bargaining power adopt a standard form, it is intended to be binding on them.[11] The Court also reproduced, through Professor Eisenberg's article, Arthur Leff's distinction between procedural unconscionability (unfairness in the bargaining process) and substantive unconscionability (unfairness in the bargaining outcome, that is, in the terms).[12] LIC v. CERC therefore shows that the commercial-parties fork is not novel but a comparative-law-derived principle, articulated in a case that did not involve two private commercial parties. The relevance lies in how franchise agreements may be substantively unremarkable through their royalty structure, territory clauses or quality control, while remaining procedurally unconscionable, with no opportunity to negotiate any of their terms.

S.K. Jain v. State of Haryana applied as a dispositive rule what had been noted as dicta in Brojo Nath and restated as a comparative principle in LIC v. CERC.[13] A government contractor challenged an arbitration clause on the ground that it required only him (and not the government) to furnish a security deposit of seven per cent of the amount claimed before arbitration could be invoked, arguing that the clause was unconscionable and an instance of unequal bargaining power.[14] The appeal was dismissed by the Supreme Court, which read

[7] Brojo Nath Ganguly, (1986) 3 SCC 156 at ¶ 89 (India).
[8] Life Insurance Corporation of India v. Consumer Education & Research Centre, (1995) 5 SCC 482, ¶ 31 (India), (describing the Table 58 eligibility clause), [hereinafter LIC v. CERC].
[9] Id. at ¶ 52.
[10] Id. at ¶ 37; Brojo Nath Ganguly, (1986) 3 SCC 156 at ¶ 89 (India).
[11] Id. at ¶ 84; A. Schroeder Music Publ'g Co. v. Macaulay [1974] 1 WLR 1308, 1315, (HL) (appeal taken from Eng.)
[12] Melvin Aron Eisenberg, The Bargain Principle and Its Limits, 95 Harv. L. Rev. 741, 752-754, (1982), (which draws on Arthur Allen Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 487 (1967)).
[13] S.K. Jain v. State of Haryana, (2009) 4 SCC 357 at ¶ 8 (India).
[14] Id. at ¶¶ 2–4, 8.

Brojo Nath, at paragraph 89, as laying down that the concept of unequal bargaining power has no application to commercial contracts.[15] In S.K. Jain, a two-fold observation holds great regard. First, the Court applied the rule without any case-specific inquiry into the comparative bargaining strength that the Haryana government retained; the commercial character of the contract was deemed sufficient to foreclose the plea altogether. Second, and most underrated, the Court relied on Assistant Excise Commissioner v. Issac Peter, a passage of which, reproduced in S.K. Jain, was confined to contracts "entered into pursuant to public auction, floating of tenders or by negotiation," and expressly left open contracts entered into otherwise.[16] Franchise agreements, by contrast, are handed to a prospective franchisee as standard-form adhesion contracts on a take-it-or-leave-it basis, and none of these three modes of contract formation fits.

In ICOMM Tele Ltd. v. Punjab State Water Supply & Sewerage Board, the exception hardened into a settled rule. The appellant challenged a tender clause requiring a ten per cent 'deposit-at-call' before arbitration could be invoked, refundable only in proportion to the amount awarded.[17] Writing for the bench, Nariman, J. noted that the principle in Brojo Nath, which he described as concerning contracts of adhesion between private persons and the State, does not apply where both parties are businessmen and the contract is a commercial transaction.[18] The clause was struck down not on the ground of unconscionability but on Article 14 arbitrariness.[19] The Court found that the deposit bore no direct nexus to deterring frivolous claims and could let the party that lost the arbitration forfeit most of a successful claimant's deposit, something "no reasonable man would agree to."[20] A dispute between a private franchisor and a private franchisee lacks such an anchor, as Article 14 arbitrariness review is rooted in the requirement that one of the contracting parties be an instrumentality of the State.[21] This proves that the exception creates a protective vacuum, one that is structurally unavailable where neither party is the State.

By following the trail of these four decisions, the doctrine's trajectory is seen to grow narrower: from a fact-based standard in Brojo Nath, through its restatement as settled comparative doctrine in LIC v. CERC, to its active application in S.K. Jain and ultimately its entrenchment in ICOMM Tele. A protective vacuum is left, as franchise agreements are neither tendered nor negotiated and are never contracted with the State, keeping them outside the purview of the commercial-parties exception's authentic rationale and ICOMM Tele's constitutional substitute.

[15] Id. at ¶ 8 (citing Brojo Nath, (1986) 3 SCC 156, ¶ 89).
[16] Id. at ¶ 13 (quoting Excise Commr. v. Issac Peter, (1994) 4 SCC 104, ¶ 26 (India)).
[17] ICOMM Tele Ltd. v. Punjab State Water Supply & Sewerage Board, (2019) 4 SCC 401, ¶¶ 2, 5 (India).
[18] Id. at ¶ 11 (citing Brojo Nath, (1986) 3 SCC 156 at ¶ 89).
[19] Id. at ¶¶ 16–17, 23, 28.
[20] Id. at ¶ 23.
[21] Id. at ¶ 15.

III. Sophistication in Practice: Franchise Disputes in India and Abroad

The label "sophisticated" is used in American law. Under Indian law, however, the same idea is conveyed through "businessmen" in a "commercial transaction."[22] One specific assumption that the courts carry is that businesses bargain as equals, which leads to a refusal to review commercial contracts for unfairness. When the contract is enforced as written, the substantial questions (was the contract a standard form? could any term be negotiated? how far apart were the parties in size, information and dependence?) are left unexamined. The weaker party is left with fraud, duress or a statute. Hence, the label differs but the effect is the same. Sophistication is a matter of degree, and one merchant may be structurally stronger than another. Even defenders of the presumption concede that merchants range from large corporations to small sole proprietors, although the logic of the presumption assumes that merchants survive in a competitive market.[23] Burger King Corp. v. Rudzewicz shows the usage of the label by a U.S. court.[24] The District Court found the franchisee and his partner to be "experienced and sophisticated businessmen" who had not acted under economic duress imposed by the franchisor, and the Supreme Court, declining to disturb that finding, noted that the franchisee had been represented by counsel, had negotiated for five months and had secured a modest reduction in rent and other concessions.[25] Though the Court refused to adopt a general rule or presumption that participation in an interstate franchise relationship amounts to consent to the franchisor's forum, it noted that commentators have argued that franchise relationships may involve unfair business practices.[26] No comparable inquiry appears in the Indian decisions discussed above. The disputes below portray this accurately.

In 2012, Adidas, Reebok's owner, told its Indian franchisees that it was ending the minimum-guarantee model.[27] A minimum-guarantee model is one in which franchisees are assured a baseline return irrespective of sales. Adidas had disclosed that commercial irregularities at Reebok India caused a pre-tax hit of ₹870 crore, and accused top executives of fraud.[28] A franchisee reportedly invests between ₹40 lakh and ₹1 crore.[29] Franchisees in Delhi-NCR were told to accept the new terms or shut by 31 August.[30] A later letter recommended a flat 50 per cent sale until 30 November and said that unsold stock might be repurchased at a "mutually agreed" price that the company expected to be no more than 10 per cent of the wholesale

[22] See supra Part II (discussing Brojo Nath, (1986) 3 SCC at ¶ 89 (India)).
[23] Simone M. Sepe, Freedom of Contract, Commercial Rationality, and State Cooperation, 1428–1434.
[24] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 484–485 (1985).
[25] Id. at 484–485.
[26] Id. at 485.
[27] Reebok Store Owners Upset over New Rules, FashionUnited (Aug. 27, 2012), https://fashionunited.in/v1/apparel/reebok-store-owners-upset-over-new-rules/201208272806, [https://perma.cc/8TMX-FHY5] (last visited Oct. 15, 2026).
[28] Roudra Bhattacharya & Priyanka Pani, 'Flawed' Sales Model Stops Reebok Run, Hindu BusinessLine (May 9, 2012), [https://www.thehindubusinessline.com/companies/flawed-sales-model-stops-reebok-run/article20432131.ece], [https://perma.cc/F5EL-DD5Q] (last visited Oct. 15, 2026); Agitated Rebook [sic] Franchises Threaten Legal Action, FashionUnited (Sept. 4, 2012),[https://fashionunited.in/v1/apparel/agitated-rebook-franchises-threaten-legal-action/201209042847], [https://perma.cc/3E8S-U7TL] (last visited Oct. 15, 2026).
[29] Bhattacharya & Pani, supra note 28.
[30] Reebok Store Owners Upset over New Rules, supra note 27.

price.[31] The Delhi Reebok Franchisee Association, representing 125 stores, refused the terms, said dues had not been settled and threatened legal action.[32] No court appears to have tested these terms for fairness. A separate complaint by a Reebok franchisee to the Competition Commission of India, concerning an agreement signed in 2003 and alleging terms that were unfair and discriminatory compared with those of other franchisees, failed.[33] The Commission observed that a manufacturer is not obliged to follow a single template agreement throughout its existence and that commercial arrangements may change over time.[34] Irrespective of the merits of the case, it shows the gap. In the absence of a franchise statute, the franchisees' recourse was a threat of litigation and, in one instance, a competition complaint that failed.

The same logic is tested with respect to Subway's U.S. franchisor, Doctor's Associates. American courts have enforced its standard franchise agreements, which send disputes to arbitration. In Doctor's Associates, Inc. v. Casarotto, a Subway franchisee case, the Supreme Court held that the Federal Arbitration Act pre-empted a Montana law requiring special notice of arbitration clauses, while noting that generally applicable defences such as unconscionability remain available.[35] The acknowledgement referred to unconscionability as a general defence, which matters substantially. A federal court in Connecticut compelled arbitration of a dispute brought by prospective franchisees whose application Subway had declined, holding that the application's arbitration clause also covered their claims against Subway's development agent.[36] In 2019, the Second Circuit, in a summary order, affirmed an injunction against a franchisee couple's California state-court suit against the franchisor and its development agent, leaving the enforceability of the arbitration clause, including its bar on suing the agent, for the arbitrator to decide in the first instance.[37] The cases tell a clear story. A franchisee who calls the terms unfair is usually sent to the forum the franchisor chose. The United States, unlike India, at least has pre-sale disclosure rules for franchisors,[38] and unconscionability remains open as a general defence. But the dispute clause itself is usually enforced as written.

Two distinct disputes show one pattern. In each, no court or regulator questions whether the parties had bargained as equals. In each, the franchisor unilaterally set or changed the terms. Reebok franchisees lost their minimum guarantee; Subway franchisees were sent to arbitration. The franchisee has no room to argue, owing to its status as a "business."

[31] Reebok Gives Ultimatum to Franchises, FashionUnited (Aug. 31, 2012), [https://fashionunited.in/v1/apparel/reebok-gives-ultimatum-to-franchises/201208312835], [https://perma.cc/W4UQ-GZ5L] (last visited Oct. 15, 2026).
[32] Reebok Store Owners Upset over New Rules, supra note 27 (125 stores); Reebok Gives Ultimatum to Franchises, supra note 31 (unsettled dues); Agitated Rebook [sic] Franchises Threaten Legal Action, supra note 26 (threat of legal action).
[33] Om Datt Sharma v. Adidas AG, Case No. 10 of 2014, Order Under Section 26(2) of the Competition Act, 2002, ¶ 22(Competition Comm'n of India May 13, 2014) (India).
[34] Id. at ¶ 23.
[35] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).
[36] Doctor's Assocs., Inc. v. Burr, No. 3:16-cv-1335, 2016 WL 7451620 (D. Conn. Dec. 28, 2016).
[37] Doctor's Assocs., LLC v. Tripathi, No. 16-4329-cv, 2019 WL 7182196, 2019 U.S. App. LEXIS 38161, (2d Cir. Dec. 23, 2019) (summary order), [https://learned.law/case/2019-9691670/doctors-assocs-v-tripathi], [https://perma.cc/2RV2-9RQG] (last visited Oct. 15, 2026).
[38] Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. pt. 436 (2025).

IV. Comparative Models: How Other Jurisdictions Address the Imbalance

The general remedies available in Indian law for franchisor–franchisee disputes do not adequately address the problems franchisees face. Section 16(3) of the Contract Act shifts the burden of proof for unconscionable transactions in only such situations where one party dominates the other's will. Proving domination is inherently uncertain, particularly between businesses. Sections 17 to 19 are limited to fraud and misrepresentation, and does not include honest non-disclosure of unfavourable system data. Section 74 permits courts to reduce unreasonable stipulated damages, yet does not touch unilateral variation or termination clauses. Abuse of dominance under Section 4 of the Competition Act, 2002 is available only where dominance is shown in a clearly defined 'relevant market'.[39] Each remedy mentioned herein is partial and does not fully address the structural problem.

Other countries have designed mechanisms to address these issues. In the US, the Federal Trade Commission's Franchise Rule requires a Franchise Disclosure Document to be furnished at least 14 calendar days before the prospect signs or pays.[40] Several states also add registration requirements and limits on termination without good cause.[41] Taken together, the models work largely before or outside litigation. Only France and Australia combine disclosure with a fairness standard, and India has neither. The model attacks information asymmetry before signing but leaves post-contract terms largely to the parties. Left alone, this can entrench the very imbalance that disclosure seeks to cure.

The United Kingdom has no franchise statute and relies on the British Franchise Association's self-regulatory code, but Section 3 of the Unfair Contract Terms Act 1977 subjects business standard terms that exclude liability or permit substantially different performance to a reasonableness test.[42] This shows that the bounded review of business standard terms already exists.

Australia's mandatory Franchising Code of Conduct requires disclosure documents, a cooling-off period and good faith in dealings, and standard-form contracts with small businesses fall under the unfair contract terms regime of the Australian Consumer Law.[43] The 2014 regulation has since been repealed and replaced by the Competition and Consumer (Industry Codes—Franchising) Regulations 2024, which applies to agreements entered into or renewed on or after

[39] Indian Contract Act §§ 16(3), 17–19, 74; Competition Act, 2002, No. 12 of 2003, § 4 (India)
[40] 16 C.F.R. § 436.2(a) (2025), https://www.ecfr.gov/current/title-16/chapter-I/subchapter-D/part-436 (last visited Oct. 15, 2026).
[41] Cal. Corp. Code § 31110 (West 2026); 815 Ill. Comp. Stat. 705/10 (2026); Cal. Bus. & Prof. Code § 20020 (West 2026); 815 Ill. Comp. Stat. 705/19 (2026).
[42] Unfair Contract Terms Act 1977, c. 50, § 3 (UK), https://www.legislation.gov.uk/ukpga/1977/50/section/3 (last visited Oct. 15, 2026).
[43] Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Cth) sch 1 (Austl.) (Select Legislative Instrument No. 168 of 2014), repealed by Competition and Consumer (Industry Codes—Franchising) Regulations 2024 (Cth) (Austl.), [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_reg/caccr2014n168o2014699/sch1.html], [https://perma.cc/3QA9-CQZ3] (last visited Oct. 15, 2026).

1 April 2025. In the new instrument, the substance is retained in Chapter 2 rather than Schedule 1, with the good faith and cooling-off provisions in sections 18 and 50 respectively.[44]

France's Loi Doubin requires a pre-contract information document at least twenty days before signing, and article L442-1 of the Code de commerce sanctions terms creating a significant imbalance in the parties' rights and obligations.[45] That is the closest foreign analogue to the fairness standard proposed below. Each model works by combining disclosure with fairness review, and as of now India has neither. Indian franchising ranges from international brands granting master franchises to small domestic chains, so a statute must avoid burdening sophisticated, well-resourced franchisees with protections they do not need. For instance, it could exempt large-investment or master-franchise arrangements, as the United States Franchise Rule does for large investments and large franchisees.[46] It must also designate an enforcing authority, since disclosure duties without a regulator or a private remedy would be empty. Finally, any statute formulated should preserve the freedom to negotiate. The proposal is to make unilateral drafting reviewable, not to prohibit standard forms. A dedicated statute must take into consideration the unequal bargaining positions of the parties and the factors that influence the formulation of such contracts.

V. Conclusion

The commercial-parties exception began as a qualified sentence in Brojo Nath wherein it warned that commercial character alone would not decide the matter. Through S.K. Jain and ICOMM Tele it hardened into a presumption of equal bargaining power, applied without asking whether the parties were in fact equally placed. For franchisees, who typically sign the franchisor's standard-form agreement unchanged, that presumption leaves little protection: unconscionability is closed to them, Article 14 is unavailable against a private franchisor, and the general provisions of the Contract Act reach only fraud, domination of will or stipulated damages. The Reebok and Subway disputes illustrate the result, with unilateral changes and forum clauses going unreviewed because the franchisee is a business.

Other jurisdictions show that the answer is to regulate franchising before and around the contract. India must enact a dedicated statute that prescribes pre-contract disclosure, subjects unilateral and standard-form terms to a fairness test, designates an enforcing authority and exempts large or master franchisees who do not need protection while preserving the freedom to use standard forms. Until legislation intervenes, courts should treat "sophistication" as a question of fact rather than a label attached to every commercial party.

[44] Competition and Consumer (Industry Codes—Franchising) Regulations 2024 (Cth) ch 2 ss 18, 50 (Austl.), [https://www.legislation.gov.au/F2024L01605/latest/text], [https://perma.cc/562M-2G8Y] (last visited Oct. 15, 2026).

[45] Code de commerce [C. com.] arts. L330-3, L442-1 (Fr.); Loi 89-1008 du 31 décembre 1989 (Fr.), [https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/], [https://perma.cc/N35L-K7LU] (last visited Oct. 15, 2026).

[46] 16 C.F.R. § 436.8(a)(5)(i)–(ii) (2025), https://www.law.cornell.edu/cfr/text/16/436.8 (last visited Oct. 15, 2026) Loi n° 89-1008 du 31 décembre 1989, Journal Officiel de la République Française [J.O.] [Official Gazette of France], [31st December, 1989], 1-3 (Fr.), [https://sd4f531262b7377cf.jimcontent.com/download/version/1280478373/module/4343218161/name/Loi%20Doubin.pdf], [https://perma.cc/8D7L-JYNK] (last visited Oct. 15, 2026).