The Unconscionability Doctrine in Electronic Standard Form Contracting:

A Critical Study of Libyan Contract Law

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I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

Signature: ……..

Abstract

The development of new types of contracts that are concluded over the Internet has created fresh challenges that currently confront Libyan contract law. Unfairness issues are foremost in this regard. While many jurisdictions are still grappling with the implications of these developments, countries such as Libya are only just beginning to acknowledge their existence. While signifiying that unconscionability suffers from a substantial deficiency in Libyan law and it is the only solution to the emerging challenges, this thesis initially examines the application of the doctrine in English and California law. It explains how the doctrine has been applied in traditional contracts and online contracting in these jurisdictions and then identifies lessons for Libyan contract law. In acknowledging that a comparative approach is unlikely to unpick the intricacies of a doctrine that has previously been described as 'chameleon-like', this thesis additionally adopts a doctrinal analysis to construct a theory that can explain the doctrine's rationales in different jurisdictions. This thesis further demonstrates that the doctrine is consistent with freedom of contract, distributive justice and certainty in law, thus it contends that the main criticisms of unconscionability are not intrinsic to the doctrine. Based on the findings of this thesis, it recommends a reform of Libyan law that combines the merits of different approaches to unconscionability that enable regulating unfairness issues in online contracting.

To my parents

Nureddin and Layla

To my children

Sarah, Mohammad and Leen

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Table of Statutes

The Electronic Commerce (EC Directive) Regulations 2002.

The Electronic Communications Act 2000

Translation of Meredith O. Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code an English Translation and a comparison with the Egyptian Civil Code* (The Oleander Press).

The Uniform Commercial Code 1952.

The California Civil Code.

Table of Cases

1- English Case

A Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 WLR 1308

Agip (Africa) Ltd v Jackson and Others [1991] Ch 547

Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1985] 1 WLR 173

Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd [1983] 1 WLR 87

Allcard v Skinner (1887) 36 Ch D 145

Aldrich v Norwich Union Life Insurance Co Ltd [1998] CLC 1621

Antony v Weeraskera [1953] WLR 1007

Arrale v Costain Civil Engineering Ltd [1976] 1 Lloyd's Rep 98

Astor Management AG v Atalaya Mining Plc [2017] EWHC 680 (Comm)

Ayres v Hazelgrow [1982] unreported 1982/NJ/1003 (QB)

Backhouse v Backhouse [1978] 1 WLR 243

Baker v Monk [1864] 55 Eng Rep 430 1829-1865

Baldwin v Rochford [1799] 95 Eng Rep 589 1378-1865

Bank of Credit and Commerce International SA v Aboody [1990] 1 QB 923

Bank of Montreal v Stuart [1911] AC 120

Barclays Bank Plc Appellants v O'Brien [1993] 3 WLR 786

Barrett v Hartley [1866] LR 2 Eq

Berkeley Community Villages Limited, Berkeley Group Plc v Fred Daniel Pullen, Kathleen

Beynon v Cook [1875] LR 10 Ch App

Birmingham City Council v Janet Beech [2013] EWHC 518 (QB) 2013 WL 617672

Boustany v Pigott [1995] 69 P & CR 298

Bowes v Heaps [1814] 35 Eng Rep 423 1557-1865

Bridge v Campbell Discount Co Ltd [1962] 2 WLR 439 [1962] AC 600

British and American Telegraph Co Ltd v Colson [1871] LR 6 Ex 108

Bryen & Langley Limited v Martin Boston [2005] EWCA Civ 973, [2005] WL 1767579

Burmah Oil Co v Bank of Engalnd [1979] 3 All ER 700

Chagos Islanders v Attorney General [2003] EWHC 2222 (QB), [2003] WL 22187670

Cityland and Property (Holdings) Ltd v Dabrah [1968] Ch 166

Civ 200, [2013] BLR 265

Clark v Malpas [1862] 4 De GF & J 401, 45 ER 1238

Clifford Davis Management Ltd v WEA Records Ltd [1975] 1 All ER 237

Compass Group UK and Ireland Ltd v Mid Essex Hospital Services [2013] EWCA

Cooke v Clayworth [1811] 34 Eng Rep 222 1557-1865

Credit Lyonnais Bank Nederland NV v Burch [1997] 1 All ER 144

Cresswell v Potter [1978] 1 WLR 255

Crowe v Ballard [1790] 30 Eng Rep 308 1557-1865

CTN Cash & Carry Ltd v Gallaher Ltd [1994] 4 All ER 714

D & C Builders v Rees [1965] 3 All ER 837

Davis v Marlborough [1818] 36 Eng Rep 555 1557-1865

Day v Newman [1788] 30 Eng Rep 36 1557-1865

Director General of Fair Trading v First National Bank Plc [2001] UKHL 52, [2002] 1 AC 481

Dunhill v Burgin [2014] 1 WLR 933

Dunnage v White [1818] 36 ER 329

Earl of Aldborough v Trye [1840] 7 Eng Rep 1136 1694-1865

Earl of Aylesford v Morris [1873] 8 LR Ch App 484

Earl of Chesterfield v Janssen [1750] 28 Eng Rep 82 1557-1865

Errington v Martell-Wilson [1980] Lexis Citation 591

Eurocom Cable Management Bulgaria EOOD [2012] EWCA Civ 584

Evans v Llewellyn [1787] 1 Cox's Chancery Cases 333, 29 ER 1191

Evans v Lloyd [2013] EWHC 1725 (Ch) [2013] 2 P & CR

Everitt v Everitt [1870] LR 10 Eq 405

Filmer v Gott [1774] 2 Eng Rep 156 1694-1865

Finland Investments Ltd v Pritchard [2011] EWHC 113 (ch)

First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] 2 Lloyd's Rep 194 (CA) 196

Fry v Lane [1887] 40 Ch D 312

Gillespie Brothers & Co Ltd v Roy Bowles Transport Ltd and another [1973] 1 All ER 193

Goldsworthy v Brickell [1987] Ch 378

Gowland v De Faria [1810] 34 Eng Rep 8 1557-1865

Greenclose Ltd v National Westminster Bank Plc [2014] EWHC 1156 (Ch), [2014] 2 Lloyd's Rep 169

Griffith v Spratley [1787] 1 Cox Eq Cas 383

Gutch v Homan [1835] 10 Eng Rep 752 1694-1865

Gwynne v Heaton [1778] 28 Eng Rep 949 1557-1865

Hammond v Osborn [2002] 2 P & CR DG20

Hamsard 3147 Ltd v Boots UK Ltd [2013] [2013] EWHC 3251 (Pat), 2013 WL 5826153

Harrison v Guest [1855] 43 Eng Rep 1298 1557-1865

Hart v O'Connor [1985] 2 All ER 880

Haygarth v Wearing [1871] LR 12 Eq 320

Heathcote v Paigon [1787] 29 Eng Rep 96 1557-1865

HIH Casualty v Chase Manhattan Bank [2003] 1 CLC 358

Horry v Tate & Lyle Refineries Ltd [1982] 2 Lloyd's Rep 416

How v Weldon [1754] 28 Eng Rep 330 1557-1865

Huguenin v Baseley [1807] 33 Eng Rep 526

Humphrey v Humphrey [2004] EWHC 2201 (Ch)

Imperial Loan Co v Stone [1892] 1QB 599

Inche Noriah v Shaik Allie Bin Omer [1929] AC 127

In re Craig v Middleton [1971] Ch 95

Interfoto Picture Library Limited v Stiletto Visual Programmes Limited [1987] WL 491981

Irvani v Irvani [2000] CLC 477

James v Kerr [1888] 40 Ch D 449

John Lee & Son (Grantham) Ltd and Others v Railway Executive [1949] 2 All

ER 581

Jones v Morgan [2001] EWCA Civ 995

Johnson v EBS Pensioner Trustees Limited [2002] EWCA Civ 164

Bassano v Toft 2 Ltd [2014] EWHC 377 (QB)

Lawrence v Poorah [2008] UKPC 21

Levison v Patent Steam Carpet Cleaning Co Ltd [1978] QB 69

L'Esrange v F Graucob Ltd [1934] 2 KB 394

Liverpool City Council v Irwin [1976] QB 319 (CA)

Lloyds Bank Ltd v Bundy [1975] QB 326

Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc [2013] UKSC 3

Longmate v Leger [1860] 66 Eng Rep 67 1815-1865

Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2001] UKHL 1, [2003] 1 AC 469

Marguerite Pullen, Alan John Pullen [2007] EWHC 1330 (ch) 2007 WL 1623169

McCrone v Boots Farm Sales Ltd [1981] SLT 103

Mountford v Callaghan [1999] Lexis Citation 3124

MSC Mediterranean Shipping Co SA v Cottonex Anstalt [2016] EWCA Civ 789

Multiservice Bookbinding Ltd and others v Marden [1978] 2 All ER 489

National Westminster Bank Plc Appellants v Morgan [1985] 2 WLR 588, [1985] AC 686

Nesbitt v Berridge [1863] 55 Eng Rep 111 1829-1865

Nevil v Snelling [1880] 15 Ch D 679

Newton v Hunt [1833] 58 Eng Rep 430 1815-1865

Norwich Union Life Insurance Society v Qureshi [1996] 3 All ER 61

O'Rorke v Bolingbroke [1877] 2 App Cas 814

Osmond v Fitzory [1731] 3 P Wms 129

Pao On v Lau Yiu Long [1980] AC 614

Parker v South Eastern Rly Co [1877] 2 CPD 416

Peacock v Evans [1809] 33 Eng Rep 1079 1557-1865

Petromec Inc v Petroleo Brasileiro SA [2005] EWCA CIV 891

Photo Production Ltd Respondents v Securicor Transport Ltd Appellants [1980] AC 827

Port Caledonia and The Anna [1903] P 184

Portman Building Society v Dusangh and others [2000] 2 All ER (Comm) 221

Powell v Powell [1900] 1 Ch 243

Printing and Numerical Registering Co v Sampson [1875] LR 19 Eq 462

Pritchard v Ovey [1820] 1 Jaob & Walker 396 37 ER 426

Proof v Hines [1735] 25 Eng Rep 690 1557-1865

Rainy Sky SA v Kookmin Bank [2011] 2 CLC 923; [2011]1 WLR 2900

Rees v De Bernardy [1896] 2 Ch 437

Re Morris [2000] Ch D (unreported)

Royal Bank of Scotland plc v Etridge [2002] 2 AC 773

Royal Brunei Airlines v Tan [1995] 3 WLR 64, [1995] 2 AC 378

Samuel v Newbold [1906] AC 461

Say v Barwick [1812] 35 Eng Rep 76 1557-1865

Schroeder Music Publishing Co v Macaulay [1974] 1 WLR 1308

Shelly v Nash [1818] 56 Eng Rep 494 1815-1865

Shiloh Spinners Ltd v Harding [1973] AC 691

Singla v Bashir [2002] EWHC 883 (Ch)

Stilk v Myrick (1809) 2 Camp 317, 170 ER 1168

Strachan v Brander [1759] 28 Eng Rep 701 1557-1865

Strydom v Vendside [2009] 6 Costs LR 886

Suisse Atlantique Société d'Armement Maritime SA Appellants v NV Rotterdamsche Kolen Centrale Respondents [1966] 2 WLR 944

The Libyan Investment Authority v Goldman Sachs International [2016] EWHC 2530 (Ch) 2016 WL 05930073

The Office of Fair Trading v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch), [2011] ECC 31

Turkey v Awadh [2005] EWCA Civ 382

Tufton v Sperni [1952] 2 TLR 516

UK Housing Alliance (North West) Ltd v Francis [2010] EWCA Civ 117, [2010] 3 All ER 519

Union Eagle Ltd v Golden Achievement Ltd [1979] 2 All ER 215

Vernon v Bethel [1762] 28 Eng Rep 838 1557-1865

Whalley v Whalley [1821] 4 Eng Rep 506

Walford v Miles [1992] 2 WLR 174, [1992] 2 AC 128

West v Ian Finlay & Associates (a firm) [2014] EWCA Civ 316, [2014] WL 1097105

White and Carter (Councils) Ltd v McGregor [1962] AC 413

Whittet v Bush [1888] 40 ChD 312

Wigan Borough Council v Green & Son (Wigan) Ltd [1985] 2 EGLR 242, C

Wood v Abrey [1818] 56 Eng Rep 558

Wright v Carter [1901 W 4492] - [1903] 1 Ch 27

Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB)

Yorkshire Bank plc v Tinsley [2004] 3 All ER 463

2- ECJ Cases

K asler v OTP Jelz.alogbank Zrt (Case C-26/13); [2014] 2 All ER (Comm) 443

3- US Cases

A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982)

American Software, Inc v Ali, 46 Cal App 4th 1386 (1996)

Appalachian Ins Co v McDonnell Douglas Corp, 214 Cal App 3d 1 (1989)

Aral v EarthLink, Inc, 134 Cal App 4th 544 (2005)

Archer v TIC—The Industrial Company, Slip Copy (2016)

Armendariz v Foundation Health Psychcare Servs, Inc, 99 Cal Rptr 2d 745 (2000)

Aronin v State Bar, 52 Cal 3d 276 (1990)

Baltazar v Forever 21, Inc, 62 Cal 4th 1237 (2016)

Berkson v Gogo LLC, 97 F Supp 3d 359 (2015)

Boghos v Certain Underwriters at Lloyd's of London, 36 Cal 4th 495, 30 Cal Rptr 3d 787, 115 P 3d 68, 70 (2005)

Bragg v Linden Research, Inc, 487 F Supp 2d 593 (2007)

Brobeck, Phleger & Harrison v Telex Corp, 602 F 2d 866 (1979)

Brown v Superior Court 34 Cal 2d 559 212 p 2d 878 (1949)

Buchwald v Paramount Pictures Corp, Not Reported in Cal Rptr 2d (1992)

California Grocers Assn v Bank of America, 22 Cal App 4th 205 (1994)

Carboni v Arrospide, 2 Cal App 4th 76 (1991)

Carmona v Lincoln Millenium Car Wash, Inc, 226 Cal App 4th 74 (2014)

Chalk v T-Mobile USA, Inc 1093 560 F 3d 1087 (9th Cir 2009)

City of Santa Barbara v Superior Court, 41 Cal 4th 747 (2007)

Comb v PayPal, Inc, 218 F Supp 2d 1165 (2002)

Comunale v Traders and General Insurance Company 50 Cal 2d 654 328 P 2d 198 (1958)

Cortez v Ross Dress for Less, Inc, Not Reported in F Supp 2d (2014)

Craig v Brown & Root, Inc, 84 Cal App 4th 416, 422–23, 100 Cal Rptr 2d 818 (2000)

Davis v O'Melveny & Myers, 485 F3d 1066, 1072–73 (9th Cir 2007)

Dean Witter Reynolds, Inc v Superior Court, 211 Cal App 3d 758, 769, 259 Cal Rptr 789 (1989),

DeJohn v The TV Corp Intern, 245 F Supp 2d 913 (2003)

DeVries v Experian Information Solutions, Inc, Slip Copy (2017)

Discover Bank v Superior Court, 30 Cal Rptr 3d 76 (2005)

Doe v Xytex Corporation, Slip Copy (2016)

Dotson v Amgen, Inc 181 Cal App 4th 975 (2010)

Dryer v Les Angeles Rams 40 Cal 3d 406 (1985)

E G Ground Management v YCharts, Inc, Slip Copy (2015)

Ellis v McKinnon Broadcasting Co, 18 Cal App 4th 1796 (1993)

Eyre v Potter, 56 US 42 (1853)

Fagerstrom v Amazon.com, Inc, 141 F Supp 3d 1051 (2015)

Farrar v Direct Commerce, Inc, 9 Cal App 5th 1257 (2017)

Flores v Transamerica HomeFirst, Inc, 93 Cal App 4th 846 (2001)

Freeman v Wal-Mart Stores, Inc, 111 Cal App 4th 660 (2003)

Garcia v Enterprise Holdings, Inc, 78 F Supp 3d 1125 (2015)

Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007)

Gentry v Superior Court 42 Cal 4th 443 (2007)

Graf v Match.com, LLC, Not Reported in F Supp 3d (2015)

Graham v Scissor-Tail, Inc 28 Cal 3d 807 (1981)

Gutierrez v Autowest, Inc, 114 Cal App 4th 77 (2003)

H S Perlin Co v Morse Signal Devices, 209 Cal App 3d 1289 (1989)

Harper v Ultimo, 7 Cal Rptr 3d 418 (2003)

Higgins v Superior Court, 140 Cal App 4th 1238, 45 Cal Rptr 3d 293, 297 (2006)

Highway Equipment Co v Caterpillar, Inc 707 F Supp 954 (S D Ohio 1989)

Hume v US, 132 US 406 (1889)

Ilkhchooyi v Best, 37 Cal App 4th 395 (1995)

IMO Development Corp v Dow Corning Corp, 135 Cal App 3d 451 (1982)

In re Amica Inc Bkrtcy N D Ill 1992 135 B R 534

In re Carter C A 9 (Cal) 511 F 2d 1203 (1975)

In re Facebook Biometric Information Privacy Litigation, 185 F Supp 3d 1155 (2016)

In re Marriage of Bonds, 24 Cal 4th 1 (2000)

Ingle v Circuit City Stores, Inc 328 F 3d 1165 (9th Cir 2003)

Jacklich v Baer 135 P 2d 179 (Cal Ct App 1943)

Kinney v United HealthCare Services, Inc, 70 Cal App 4th 1322 (1999)

Kitchen v Rayburn 86 U S 254 (1873)

Knutson v Sirius XM Radio Inc, 771 F 3d 559 (2014)

Kugler v Romain 58 N J 522 (1971)

Kurashige v Indian Dunes, Inc, 200 Cal App 3d 606 (1988)

Lhotka v Geographic Expeditions, Inc, 181 Cal App 4th 816 (2010)

Little v Auto Stiegler, Inc, 130 Cal Rptr 2d 892 (2003)

Magniac v Thomson, 32 US 348 (1833)

Marin Storage & Trucking, Inc v Benco Contracting and Engineering 89 Cal App 4th 1042 (2001)

Market Street Associates Ltd Partnership v Frey 941 F 2d 588 (1991)

Martinez v Master Prot Corp, 118 Cal App 4th 107, 12 Cal Rptr 3d 663, 669 (2004)

McGhee v North American Bancard, LLC, Slip Copy (2017)

Mercuro v Superior Court, 96 Cal App 4th 167 (2002)

Metter v Uber Technologies, Inc, Slip Copy (2017)

Mikhak v University of Phoenix, Slip Copy (2016)

Moran v Prime Healthcare Management, Inc, 3 Cal App 5th 1131 (2016)

Moreno v Sanchez, 106 Cal App 4th 1415 (2003)

Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005)

Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016)

Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006)

Net Global Marketing, Inc v Dialtone, Inc, 217 Fed Appx 598 (2007)

Nguyen v Barnes & Noble Inc, 763 F 3d 1171 (2014)

Nunes Turfgrass, Inc v Vaughan-Jacklin Seed Co, 200 Cal App 3d 1518 (1988)

Nyulassy v Lockheed Martin Corp, 120 Cal App 4th 1267 (2004)

Olney v Job.com, Inc, Not Reported in F Supp 3d (2014)

Painters Dist Council No 33 v Moen, 128 Cal App 3d 1032 (1982)

Parada v Superior Court 176 Cal App 4th 1554 (2009)

Parr v Superior Court 139 Cal App 3d 440 (1983)

Patterson v ITT Consumer Financial Corp, 14 Cal App 4th 1659 (1993)

PDC Laboratories Inc v Hach Co No 09-1110 (2009) US Dist Lexis 75378

Peng v First Republic Bank, 219 Cal App 4th 1462 (2013)

Perdue v Crocker Nat'l bank 38 Cal 3d 913 (1985)

Phelps v Peabody, 7 Cal 50 (1857)

Phillip Neghiem v Dick's Sporting Goods, Inc, Slip Copy (2016)

Phillippe v Shapell Industries, 43 Cal 3d 1247 (1987)

Pinnacle Museum Tower Assn v Pinnacle Market, 55 Cal 4th 223 (2012)

Rivera v American General Financial Services, Inc, 150 N M 398 (2011)

Riverisland Cold Storage, Inc v Fresno-Madera Production, 55 Cal 4th 1169 (2013)

Robison v City of Manteca, 78 Cal App 4th 452 (2000)

Rochin v California, 342 US 165, 72 s Ct 205, 96 L Ed 183 (1952)

Rodman v Safeway Inc, 125 F Supp 3d 922 (2015)

Rodriguez v Experian Services Corp, Not Reported in F Supp 3d (2015)

San Francisco Newspaper Printing Co v Superior Court, 170 Cal App 3d 438 (1985)

Sanchez v Valencia Holding Co, LLC, 61 Cal 4th 899 (2015)

Sanchez v Western Pizza Enterprises 172 Cal App 4th 154 (2009)

Scott v Lloyd, 34 US 418 (1835)

Sehulster Tunnels/Per-Con, v Traylor Brothers Inc /Obayashi Corp 111 Cal App 4th 1328 (2003)

Serpa v California Surety Investigations 215 Cal App 4th 695 (2013)

Shadoan v World Savings & Loan Assn, 219 Cal App 3d 97 (1990)

Shroyer v New Cingular Wireless Services, Inc, 498 F 3d 976 (2007)

Solo v American Association of University Women United States District Court 187 F Supp 3d 1151 (2016)

Sonic-Calabasas A, Inc v Moreno, 57 Cal 4th 1109 (2013)

Specht v Netscape Communications Corp, 306 F 3d 17 (2002)

Spinello v Amblin Entertainment, 29 Cal App 4th 1390 (1994)

Stirlen v Supercuts, Inc, 51 Cal App 4th 1519 (1997)

Szetela v Discover Bank, 97 Cal App 4th 1094, 1100, 118 Cal Rptr 2d 862 (2002) 1172 (N D Cal 2002)

Tagliabue v J C Penney Corporation, Inc, Not Reported in F Supp 3d (2015)

Tarver v State Bar, 37 Cal 3d 122 (1984)

Ticknor v Choice Hotels Int'l, Inc, 265 F 3d 931, 940–41 (9th Cir 2001)

U S Roofing, Inc v Credit Alliance Corp, 228 Cal App 3d 1431 (1991)

United States v Bethlehem 315 U S 289 (1942)

Vance v Villa Park Mobilehome Estates, 36 Cal App 4th 698 (1995)

Villa Milano HomeownersAss'n v IL Davorge, 84 Cal App 4th 819, 827, 102 Cal Rptr 2d 1 (2000)

W L May Co, Inc v Philco-Ford Corporation 543 P 2d 283 (1975)

Wallace v Red Bull Distributing Co, 118 Cal App 4th 702 (2004)

Walnut Producers of California v Diamond Foods, Inc, 187 Cal App 4th 634 (2010)

Washington Mutual Bank, FA v Superior Court, 24 Cal 4th 906 (2001)

Westlye v Look Sports, Inc, 17 Cal App 4th 1715 (1993)

Wille v Southwestern Bell Tel Co 219 Kan 755 (1976)

Winston v National Broadcasting Co, 231 Cal App 3d 540 (1991)

Woodside Homes of Cal Inc v Super Ct, 107 Cal App 4th 723 (2003)

Zappos.com, Inc, Customer Data Security Breach Litigation, 893 F Supp 2d 1058 (2012)

4- Libyan Cases:

The Libyan High Court, Appeal no 07/18 civ, 28/12/1971

The Libyan High Court, Appeal no 18/66 civ, 02/05/1972

The Libyan High Court, Appeal no18/27 civ, 20/07/1972

The Libyan High Court, Appeal no 22/44 civ, 14/11/1976

The Libyan High Court, Appeal no 23/13 civ, 16/02/1978

The Libyan High Court, Appeal no 19/23 civ, 26/10/1978

The Libyan High Court, Appeal no 68/40 civ, 18/10/1979

The Libyan High Court, Appeal no 191/39 civ, 04/07/1994

The Libyan High Court, Appeal no 67/40 civ, 23/01/1995

The Libyan High Court, Appeal no 38/39 civ, 29/01/1995

The Libyan High Court, Appeal no 93/39 civ, 18/10/1997

The Libyan High Court, Appeal no 196/43, civ, 29/12/2001

5- Australian cases

Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16

Commercial Bank of Australia Ltd v Amido (1982-3), 151 C L R 447

Louth v Diprose (1992) 175 C.L.R. 621

Prince (1997) FCA 1565; (1997) 152 ALR 127

Security, Department of Education, Employment, Training and Youth Affairs v

Service Station Association Ltd v Berg Bennett (1993) 117 A L R 39

6- Canadian cases

Bahsin v Hrynew 2014 SCC 71, [2014] 3 S C R 494

CivicLife.com Inc v Canada (Attorny General) (2006) 215 O A C 43

Mitsui & Co (Canada) Ltd v Royal Bank of Canada (1995) 2 S C R 187

6- South African Cases

Barend Petrus Barkhuizen v Ronald Stuart Napier CCT 72/05 [2007] ZACC 5

Chapter One

Introduction

This thesis examines the doctrine of unconscionability; it further focuses on its treatment of unfairness issues in online contracting. The initial aim is to propose a reform of the law of unconscionability in Libya, because of its current deficiency and its prospective application to online contracts.

To achieve this aim, this thesis examines unconscionability through the lens of English and California law, with reference to a sample of case law, to identify a sufficient approach to adopt in Libya. This research investigates the doctrine's ability to manage unconscionable bargains in online contracts. It achieves this by exploring the doctrine's application to traditional written contracts. In contributing new insights to the doctrine, this study employs a comparative methodology, with a view to bringing out the different dimensions of the doctrine of unconscionability in more detail.

This chapter begins with an overview of the background that frames the current research. It then proceeds to outline the essential problems that this research attempts to address. This chapter proceeds to outline research rationale, objectives and significance. This is then followed by a statement of the key research questions and methodology. It concludes by outlining the thesis structure.

1.1 Research Background

The Libyan Law Commission recently issued a Draft E-Commerce Bill[1] in which it proposes how to regulate contracts that are formed online. The Bill covers most issues of formation without determining how to treat unfair online contracts.[2] Therefore, the matter remains within the traditional jurisprudence of contract law. This thesis is about treating unfairness in online contracts.

Generally, there are two ways to regulate unfairness in contracts in Libyan law. Article 149 of the Civil Code gives judges the power to nullify or modify unfair terms in accordance with principles of equity.[3] Article 149 holds that: "[w]hen a contract of adhesion contains leonine conditions, the judge may modify these conditions or relieve the adhering party of the obligation to perform these conditions in accordance with the principles of equity. Any agreement to the contrary is void." However, in practice this rule is only applicable to contracts related to necessaries, which are very narrowly defined.[4] Therefore, it cannot be applied to the vast majority of online contracts.

This thesis does not propose an amendment of this rule in order to solve the issue of unfaireness in e-wraps, as the undemocratic system of government and corrupt nature of governance in Libya would not allow such a proposal.

[1] This Bill was first put forward in 2015. The author obtained this draft from a member of the Libyan Law Commission Prof. Al-Koni Abuda.
[2] This Bill is mainly concerned with the procedural aspects of electronic transactions. This includes issues such as the legal significance of the electronic signature (Article 8-9). Most notably its legally binding effect (Article12 and 18), the time and place when the contract was entered into (Artile 52), the sharing of relevant contract with all online users within a specified timeframe and a range of other procedural issues.
[3] Article 149, Libyan Civil Code. Meredith O Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code an English Translation and a Comparison with the Egyptian Civil Code* (The Oleander Press).
[4] The Libyan High Court, Appeal no 38/39 civ, 29/01/1995 [157]; The Libyan High Court, Appeal no. 68/40 civ, 18/10/1979. Mohammad Al-Azhari, *The General Theory of the Law of Obligation* (Libya, The National Books Press 2013) 67 (author's translation). See also: The Libyan High Court, Appeal no 68/40 civ, 18/10/1979 The Libyan High Court, Appeal no 191/39 civ, 04/07/1994 (author's translation).

This proposal would put limits to the absolute power of the ruling elite and harm its interests. In practice, certain state-owned organisations are the providers of major services that are considered necessaries by the Libyan High Court.[5] Persons and entities that are part of the regime's inner political and tribal circle and those favoured by it, are in control of those service organisations, largely for their personal gain. It would therefore be virtually impossible for this rule to be amended. After the Libyan revolution in 2011, there was hope by some parties in the legal community that Article 149 would be more effective. However, this has not happened, and the same corrupt practices have continued. The country is in a state of chaos and far from achieving a democratic system of government, equal opportunities and good governance. Major services continue to be operated as state monopolies run by a new elite, largely in the service of their personal gain. Therefore amending Article 149 in a way that may help to solve the unfairness issue in e-wraps continues to be a remote possibility; a different approach is needed.

The second way to regulate unfairness in contracts is via unconscionability, which is regulated in Article 129 of the Civil Code. This doctrine seems the most promising means for regulating unfair online contracts. Closer inspection of this doctrine in Libyan law shows an absence of jurisprudence related to this doctrine, although it was enacted in 1954. This suggests some form of deficiency in the law of unconscionability in Libya. Hence, a better understanding of this doctrine would allow its development, which provides a timely opportunity to investigate how online transactions in Libya are regulated.

Libya currently operates a civil law system that indirectly borrows from the French Civil Code, through Egyptian law, except for unconscionability, where

[5] The communications sector for example was controlled by Gathafi's son.

the rule was inserted into the Code. This insertion could be a reflection of the fact that before the enactment of the Civil Code, Libya had experienced, during the period of the British Administration (Cyrenaica 1942-1949; Tripolitania 1942-1951), the application of English law in Tripoli and Cyrenaica alongside French and Italian law in Fazzan.[6]

The main drafter of the Civil Code, Al-Sanhori, explains that although this Code mainly depends on the French Civil Code (the middle of twentieth century version), there are some rules that are based on the provisions of other laws.[7] Resorting to laws other than the French Code was done in a restrictive manner in order to correct and fill gaps where necessary.

Al-Sanhori emphasised that the Civil Code rules should be treated separately from their origins, as these rules were adapted to meet the traditions of local society.[8] However, in cases of ambiguity and for interpretation purposes, French jurisprudence and scholarly works should be the reference point.[9] In cases where these resources fall short of providing any explanation, resorting to other jurisprudence is recommended, especially for methodological purposes.[10]

Accordingly, because unconscionability was not enacted in the French Civil Code; in addition to the fact that Libyan law, in its enactment, relied on other countries legislation, this, when coupled with the Libyan experience during the British Administration of Cyrenaica and Tripolitania, resorting to the common law experience with regard to unconscionability is important.

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[6] Nikola Ziyada, *Libya in 1948, Official Transcript* (American university Press, Bairut 1966) 162-165, 71-73 (author's translation).
[7] Abd Al-Razig Al-Sanhori, *A Guide on Explaining the Civil Code* , vol1 (Lebanon: Dar Ihyaa al-Turath al-Arabi 1952) 51 (author's translation).
[8] Ibid 56.
[9] Ibid 54, fn:1.
[10] Ibid.

Relying on English law in this thesis is further supported due to its influence in developing common law worldwide[11] and for its significant case law on unconscionability. Reliance on California law, which is also a common law jurisdiction, is supported by the fact that it adopts a different approach to unconscionability and for the big volume of e-commerce in this state, which, consequently, has many cases on unfair online contracts.

This thesis argues that understanding the different approaches to unconscionability in English and California law, where the former adopts a subjective party-oriented approach, while the latter adopts an objective contract-oriented approach, would give Libya a choice to adopt one of the investigated approaches, or deriving lessons from both approaches, whichever suits Libyan law best.

1.2 E-Wraps: An Overview

It is generally recognised that contracts can be formed orally or in writing (traditional contracts) (hereafter will be referred to as traditional contracts). In the contemporary period, electronic contracts have emerged as a new method of contracting.

The term 'electronic contract' will be understood to refer to contracts that are formed over the Internet. These contracts are usually standard form contracts, which speed up the contract process and reduce costs.[12] As a result, the use of

[11] Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law* (first published 1977, 3rd edn, Oxford Clarendon Press 1998) 41.

[12] Abd Alfttah Hijazi, *An Introduction in Intellectual Property and Consumer Protection in E-commerce Contracts* (1st edn, Dar Alfikr, 2005) 6 (author's transaltion). The benefits of the use of standard form contracts are frequently acknowledged in the literature. See Clarisse Girot, *User Protection on IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology* (Kulwer Law International 2001) 4; Robert A Hillman and Jeffrey J Rachlinski 'Standard-From Contracting in the Electronic Age' (2002) 77 NYU L Rev 429 <intl.westlaw.com> accessed 22 October 2015, 437.

Internet websites in trading has become a clearly established attribute of the Internet, with a direct impact on electronic contracts.

In a modern world where internet-based transactions and exchanges of goods and services occur on a massive scale on a daily basis, electronic contracts assume considerable importance.[13] It is reasonable to assume that this rapid increase will be sustained and will in turn trigger a broad range of legal issues. Fairness issues are foremost in this respect, as they are a natural result of the peculiar character of these contracts.

Electronic standard contracts can be traced back to written standard form contracts, which were already well established prior to the invention of the Internet. Standard form contracts, which are also known as adhesion contracts,[14] have been subject to close scholarly attention.[15] Lord Dunpark in

[13] This growth has been particularly rapid in Europe. In 2011, an estimated 32 million UK consumers engaged in internet transactions. Statistics also suggest that, in 2010, global e-commerce grew at an annual rate of 19%, In the first quarter of 2012, e-commerce accounted for around 5% ($53 billion (USD) of total commerce – see OECD (2012), "Internet trends and development", in OECD Internet Economy Outlook 2012, OECD Publishing. <http://dx.doi.org/10.1787/9789264086463-5-en> accessed 6 October 2015, 93. Unfortunately, there are no comparable statistics for Libya. While it may be assumed that the actual figure would not be high, it is important to acknowledge that Libya has just begun to recognise the importance of e-commerce – this is clearly indicated by the establishment of a Libyan Law Commission, tasked with developing legislation that relates to e-commerce and electronic contracts.

[14] The French use the term 'adhesion contracts' to refer to these contracts. Other researchers have instead drawn a clear distinction between standard forms and adhesion contracts, and have sought to sustain it upon the grounds that the latter is a type of standard form contract in which the superiority of one party's bargaining power is extremely obvious and is preponderant to the extent that the other party has "no choice but to adhere to the terms". This suggests that unfair terms are most likely to appear in adhesion contracts. See Sinai Deutch, *Unfair Contracts The Doctrine of Unconscionability* (Lexington Books 1977) 3,5. For the purposes of the current thesis, standard forms and electronic contracts can be taken to be synonymous; the terms 'standard form contracts' and 'adhesion contracts' can also be used interchangeably.

[15] Friedrich Kessler, 'Contracts of Adhesion--Some Thoughts About Freedom of Contract' (1943) 43 Colum L Rev 629<http://heinonline.org> accessed 7 February 2019; Albert Ehrenzweig, 'Adhesion Contracts in the Conflict of Laws' (1953) 53 Colum L Rev 1072.
Arthur Leff, 'Contract as Thing' (1970) 19 (131) Am UL Rev <http://heinonline.org> accessed 1 October 2014, 140; Batya Goodman, 'Honey, I shrink-wrapped the consumer: the shrink-wrap agreement as an adhesion contract' (1999) 21 Cardozo L Rev 319 <http://heinonline.org> accessed 7 Februry 2019; Michael Furmston, *Law of Contract* (16th ed, Oxford University Press 2012) 27; Amos, Maurice Shedon, *Amos and Walton's Introduction to French Law* (3ed, Oxford: Clarendon Press1967) 152; J Beatson, *Anson's Law of Contract* (New York, NY: Oxford University Press 2016); Deutch (n 14) 1.

McCrone, [16] observes that standard form contracts are "any contract, whether wholly written or partly oral, which includes a set of fixed terms or conditions which the proponer [the party who proposed the terms] applies, without material variation."[17]

To put it differently, their terms have been prepared previously by one party (the strong party) and are subsequently accepted by the other party (the weaker one), under circumstances where the latter is forced to adhere to the contract. Accordingly, the contract has been offered on a 'take it or leave it' basis. While this contract is legally valid, it should be subject to closer scrutiny by the courts,[18] for lacking a negotiations stage.

Electronic standard contracts follow the same model, and adopt two forms – click-wrap and browse-wrap contracts[19] (henceforth referred to as e-wraps.)[20] The acceptance of the former is indicated by clicking upon an 'I agree' (or similar expression) button. Clicking the button indicates the user's assent to the

[16] *McCrone v Boots Farm Sales Ltd* [1981] SLT 103.
[17] Ibid at [105].
[18] Lord Diplock in *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 at [1316]. Similarly see: Graham v Scissor-Tail, Inc 28 Cal 3d 807 (1981) at [817-818].
[19] The word 'wrap' can be traced back to shrink-wrap contracts, which were also the historical origin of the words 'click-wrap' and 'browse-wrap'. 'E-wrap', meanwhile, originally derived from software contracts. In such contracts the customer purchases a copy of software from a retailer. The software usually comes in plastic wrapping and the terms and conditions of use are contained inside the wrapped box. When the wrap is torn, this is generally considered to indicate an acceptance of the contract and the terms of use within the box. The main difference between shrink-wrap contracts and on-line contracts is that, in the case of the former, there is no direct contact between the software producer and the user; this clearly contrasts with online contracts – here there is direct, albeit non-physical, contact with the supplier – see Girot (n 12) 285-287; Alberto De Franceshchi (ed), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution* (Intersentia Ltd 2016) 192.
[20] Online contracts are also known as 'sign-in-wrap'. See Berkson v Gogo LLC, 97 F Supp 3d 359, 366 (E.D.N.Y 2015); click wraps are referred to as 'click-through' agreements; meanwhile, browse wraps are also known as 'click-free', 'web-wrap' or 'browse-through' agreements – see L Kunz, Maureen F Del Duca, Heather Thayer and Jennifer Debrow, 'Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent' (2001) 57 Bus Law 401, 401; Melissa Robertson, 'Is Assent Still A Prerequisite for Contract Formation in Today's E-Conomy' (2003) 78 (265) Wash L Rev 265, 266. There are also 'scroll-wrap' agreements – these are sometimes categorised as a type of click-wrap as they require the user to scroll through the contract terms before clicking 'I agree' at the end. See Hancock v Am Tel & Tel Co 701 F 3d 1248 1257-58 (10th Cir 2012).

presented terms, which may appear in a scrollable box or subsequent to the clicking of a hyperlink.

In browse-wraps the user indicates his/her acceptance by continuing to browse the website or by downloading the digital content. Browse-wraps terms and conditions can be viewed through a hyperlink that is usually placed at the bottom of the webpage.[21] Browse-wraps are usually used to approve logging onto some websites (terms of use),[22] while click-wraps are usually related to the purchase and downloading of software and other goods and services. E-wraps are usually used to gain access to digital content.[23] However, it is also conceivable they may be used to obtain other types of goods and services.

Both types of e-wraps can be distinguished on the basis that click-wraps request positive action[24] while browse-wraps require no such action,[25] as the mere usage of the website is understood to indicate acceptance. Usually, websites include a notice that establishes this point "by merely using the services of, obtaining information from, or initiating applications within the website – the user is agreeing to and is bound by the site's terms of service."[26]

However, conceivably, awareness of the existence of a contract is higher in click-wraps than in browse-wraps, because "the user can continue to use the

[21] Nguyen v Barnes & Noble Inc, 763 F 3d 1171 (2014) at [1175-1176]. Affirmed in Rodriguez v Experian Services Corp, Not Reported in F Supp 3d (2015) at [1]; Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016) at [4].
[22] Nguyen v Barnes & Noble Inc, 763 F 3d 1171 (2014) at [1176]; Graf v Match.com, LLC, Not Reported in F Supp 3d (2015) at [4].
[23] De Franceshchi (n 19) 191. Digital content is defined in section 2(9) of the Consumer Rights Act 2015 as "data which are produced and supplied in digital form." See also Robert L. Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated' (2005) 42 Hous L Rev 1041 <intl.westlaw.com> accessed 8 November 2016, 1051-1055; Jonathan Bick, 'Unconscionable Terms Prevent Enforcement of E-commerce Contract Clauses: Fairness Comes with a Fair Presentation of the Terms' <http://www.bicklaw.com/Publications/UnconscionableTermsandE-contracts.htm> accessed 12 November 2016 (no page numbers from the resource).
[24] Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016) at [4].
[25] Ibid.
[26] Ibid (citation omitted).

website or its services without visiting the page hosting the browse-wrap agreement or even knowing that such a webpage exists."[27] It has therefore been argued that browse-wraps are not enforceable while click-wraps are.[28] Conversely, in practice, browse-wraps have been enforced just as much as click-wraps as long as terms were adequately communicated to online users.[29]

Both forms of e-wraps have the same legal effect in English law. The Law Commission therefore observes that electronic documents, such as e-mails and website trading, "will generally satisfy the Interpretation Act definition and the functions of writing." [30] It also provides that "[d]igital signature, scanned manuscript signature, typing one's name (or initials) and clicking on a website button are, in our view, all methods of signature which are generally capable of satisfying a statutory signature requirement."[31]

Likewise, California Civil Code Section 1633.7 (b),[32] states that: "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation."[33] Therefore a "signature may not be denied legal effect or enforceability solely because it is in electronic form."[34] In *Mikhak*

[27] Nguyen v Barnes & Noble Inc, 763 F 3d 1171 (2014) at [1176]. See also: Moule v United Parcel Service Co, (Not Reported in F Supp 3d (2016) at [4]; Phillip Neghiem v Dick's Sporting Goods, Inc, Slip Copy (2016) at [2].
[28] Leon E Trakman, 'The Boundaries of Contract Law in Cyberspace' (2009) International Business Law Journal 159, 216. California law makes it clear that browse-wraps are enforceable. Nguyen v Barnes & Noble Inc, 763 F 3d 1171 (2014) at [1177]; Graf v Match.com, LLC, Not Reported in F Supp 3d (2015) at [4].
[29] PDC Laboratories Inc v Hach Co No 09-1110 (2009) US Dist Lexis 75378. There were three blue underlined hyperlinks to the terms on three pages of the order process and a note on the last page of the order that provides "Review terms, add any comments, and submit order." This note was followed by a hyperlink to the terms.
[30] Electronic Commerce: Formal Requirements in Commercial Transactions. Advice from the Law Commission (December 2011).
[31] Electronic Commerce: Formal Requirements in Commercial Transactions. Advice from the Law Commission (December 2011) para.3.39.
The Electronic Communications Act 2000, Part 2 (7).
[32] Adopting the Uniform Electronic Transactions Act (UETA)
[33] California Civil Code § 1633.7(b), adopting the Uniform Electronic Transactions Act (UETA).
[34] California Civil Code § 1633.1, adopting the Uniform Electronic Transactions Act (UETA).

it was asserted that clicking on a webpage click-wrap manifests the online user's acceptance of the terms. [35]

Consequently, contracts that are concluded on website trading pages are treated as traditional written documents. [36] More specifically, they are considered to be signed contracts. As with any other signed traditional contract, they are legally binding, because a signature acts to incorporate terms whether they are read or not. [37]

In addition, the manner in which e-wraps are concluded suggests that the main issue is that users are unaware of the fact that, in clicking or continuing to surf webpages, they are contracting. This raises many issues in e-wraps, most of which are related to matters of contract formation. This explains the usual focus upon contract formation requirements [38] (specifically offer, acceptance, consideration and legal intention to contract).[39] Courts also highlight sufficient notice (to the e-wraps terms) as an important preoccupation.[40]

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[35] Mikhak v University of Phoenix, Slip Copy (2016) at [6].
[36] Kunz, Del Duca, Thayer and Debrow (n 20) 401; Saul Squires, 'Some Contract Issues Arising from Online Business-Consumer Agreements' (2000) 5 Deakin L Rev 95, 102.
Examples of click wrap agreements: Click wrap agreement to use iCloud products at http://www.apple.com/legal/icloud/ww/ ; the legal agreement fot PatPal at http://www.paypal.com/cgi-bin/webscr?cmd=_home.
Examples of browse wrap agreements: The ETSY agreement at https://www.etsy.com/uk/help/article/479 ; The terms of use of Lexis library website at http://www.lexisnexis.com/uk/legal/auth/checkbrowser.do;jsessionid=9C045D916DB41ABB244AD4EE76A0CBC4.iSqDUmefTxTFrIW259uBg?t=1382096085627&bhcp=1; the ITUNS Terms and Conditions at http://www.apple.com/legal/internet-services/itunes/ukr/terms-en.html
[37] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 at [403] (Scrutton LJ).
[38] See for example: the Libyan Draft E-Commerce Bill; The Electronic Commerce (EC Directive) Regulations 2002, section (9); Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016) at [4]; Zappos.com, Inc, Customer Data Security Breach Litigation, 893 F Supp 2d 1058 (2012) at [1064]; Nguyen v Barnes & Noble Inc, 763 F 3d 1171 (2014) at [1177]; Graf v Match.com, LLC, Not Reported in F Supp 3d (2015); Phillip Neghiem v Dick's Sporting Goods, Inc, Slip Copy (2016) at [2-3].
[39] Waisman explains how e-wraps came to inherit a number of consent-defeating features. See Dov Waisman, 'Preserving Substantive Unconscionability' (2014) 44 Sw L Rev 297 <intl.westlaw.com> accessed 8 November 2016, 305.
[40] Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016) at [4]; Specht v Netscape Communications Corp, 306 F 3d 17 (2002).

California law clearly establishes that "the Court must examine how the terms of an agreement were presented to a user, and how a user indicates his or her consent to the terms."[41] This is supplemented by a clear reiteration of the importance of reasonable notice[42] and a range of factors, which include the conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design"[43] - each contributes to an assessment of whether a reasonable, prudent user would be sufficiently alerted to the e-wrap terms.

However, the fact that individuals have not read standard form terms is not relevant to the enforcement of signed contracts; to the same extent, the complexity of signed contracts is not a relevant consideration.[44] The rule that the individual is bound by what is written[45] is a reflection of the procedural aspect of the law. In other words, when the four elements for the creation of a contract are in place, the legal relation (contract) is established. This applies irrespective of whether the contract substance is fair or not. The contract can only be invalidated if one of the vitiating factors of contracts is proved or *non est factum.*

De Franceshchi (n 19) 195. See for example: Nguyen v Barnes & Noble Inc, 763 F 3d 1171 (2014).

[41] Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016) at [4].

[42] Zappos.com, Inc, Customer Data Security Breach Litigation, 893 F Supp 2d 1058 (2012) at [1064]. In *Specht* a browse-wrap was held to be unenforceable because users had to search before finding the terms and conditions. Specht v Netscape Communications Corp, 306 F 3d 17 (2002).

[43] Nguyen v Barnes & Noble Inc, 763 F 3d 1171 (2014) at [1177]; Graf v Match.com, LLC, Not Reported in F Supp 3d (2015); Phillip Neghiem v Dick's Sporting Goods, Inc, Slip Copy (2016) at [2-3].

[44] Lord Reid observes: "In the ordinary way the customer has no time to read them [standard conditions], and, if he did read them, he would probably not understand them." See *Suisse Atlantique Societe d'Armement Maritime S A v N V Rotterdamsche Kolen Centrale*, [1966] 2 All ER 61 (HL) at [76]. It should also be noted that signing has the effect of incorporating clauses – this applies regardless of the non-drafting party's awareness of the number of clauses. See *L'Esrange v F Graucob Ltd* [1934] 2 KB 394.

[45] *L'Estrange v Graucob* [1934] 2 KB 394 at [406]. For further insight into California law refer to Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016) at [6]; Knutson v Sirius XM Radio Inc, 771 F 3d 559 (2014) at [567].

Lord Denning in *John Lee & Son (Grantham) Ltd.,*[46] states that: "There is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused."[47] Thus, the rigidity of the rule (one is bound by what is written) can be alleviated through the adoption of the unconscionability doctrine, because this doctrine is concerned with contract fairness in both the procedural and substantive senses.

1.3 Terminology: 'Doctrine' of Unconscionability

The need to clarify the terminology of the unconscionability doctrine arises from the fact that the words 'unconscionability' and 'unconscionable' are used interchangeably in literature and in a way that does not promote precise meaning. When unconscionability is engaged at the most general level of analysis, it can be viewed as the description of a situation in which exaggeration or a lack of morality is evidenced. When it is applied to contract law, the doctrine is used to describe unfair bargains or contracts. It depicts agreements that can be described as unfair, unreasonable or unjust. However, while this suffices as a broad overview or starting point, it is important to note that unconscionability can be defined in both broad and narrow terms.

In clarifying this point, Bamforth distinguishes between three senses of unconscionability.[48] In the first, unconscionability is conceived as a vitiating factor. Here unconscionability, by virtue of a defect in the bargaining process, leads to an invalidation of the contract. However, it clearly differs from other

[46] *John Lee & Son (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581.
[47] Ibid at [584].
[48] Nicholas Bamforth, 'Unconscionability as a Vitiating Factor' (1995) Lloyds Maritime and Commercial Law Quarterly 538, 539-540.

vitiating factors such as undue influence that require other elements to be present.[49]

When unconscionability is applied in the second sense, it describes a situation in which one of the vitiating factors can be applied. At this point, Bamforth envisages a scope of application that expands beyond the first sense. For example, while fraudulent conduct can be described as unconscionable, contracts which result from undue influence can also be described as unconscionable.[50]

In conclusion, Bamforth presents a third sense. Here unconscionability exists as an element that is used to invoke another rule or vitiating factor. Unconscionability is applied with a view to determining the level of liability that is appropriate under the rule or vitiating factor. [51] As Fort clarifies, unconscionable contracts pertain to instances in which the traditional factors that would cause a contract to be set aside do not apply. At the same time, however, courts do not agree to enforce them, upon the grounds that this enforcement would be contrary to consensual agreement.[52]

Bamforth's distinction is important because it lends a degree of clarity that is often lacking in the literature. For example, Schelleman, whose thesis engages with unconscionability in California, suggests that unconscionability, prior to its

[49] Ibid 539.
[50] Ibid 540. For a further example of unconscionability in this second sense, refer to *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [151]. Here it was established that "the unconscionability of the transaction remains of direct materiality to the case based on undue influence." This affirms Bamforth's distinction of three different forms of unconscionability.
[51] Ibid.
[52] Jeffrey C Fort, 'Understanding Unconscionability: Defining the Principle' (1978) 9 (765) Loy U Chi LJ 765, 766-767, 770.
John A Spanogle, 'Analyzing Unconscionability Problems' (1969) 117 (7) University of Pennsylvania Law Review 931, 944; Richard A Epstein, 'Unconscionability: A Critical Reappraisal' (1975) 18 (2) Journal of Law and Econmic 293, 302-303.

codification in the California Civil Code, existed as an equitable remedy.[53] After offering this insight, he proceeds to identify the methods through which the doctrine was applied – estoppel was an important innovation in this regard.[54] Here it should be noted that while the application of estoppel is not related to the doctrine of unconscionability that is codified by §1670.5 of the California Civil Code (which presents unconscionability as a vitiating factor), it overlaps with unconscionability in its second and third senses.[55]

While Bamforth's distinction of forms of unconscionability can be broadly welcomed, it can nonetheless be questioned upon the grounds that the second and third senses can be condensed into a single category. Bamforth himself concedes that in some instances this distinction breaks down.[56] It therefore appears that there are some – and even strong – grounds for arguing that unconscionability only applies in two senses: firstly, in a narrow sense (unconscionability as a vitiating factor which requires specific elements for its application) and then in a broad one (where the word is used as a synonym of 'unfair' or 'unjust'). In its narrow form, when it is a vitiating factor, unconscionability is sufficient in itself to invalidate a legally binding contract; when conceived in its broader form, unconscionability instead invokes other criteria.[57]

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[53] Jack Schoelleman,'Reevaluation of the Decision Not to Adopt the Unconscionability Provision of the Uniform Commercial Code in California' (1970) 7 San Diego L Rev 289.
[54] Ibid 296.
[55] Bamforth (n 48) 541.
[56] Ibid citing Grant v Edwards [1986] Ch 638,656, which suggests, with reference to proprietary estoppels and constructive trusts, that "equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner." It appears that this application of the word 'unconscionable' does not significantly differ from Rochin v California, H342 US 165, 72 s Ct 205,96 Led 183 (1952). Here the court ruled that pumping the stomach of a criminal suspect in search of
drugs offended "those canons of decency and fairness which express the notions of justice of E nglish-speaking peoples." It concluded that the reliance upon historical and moral traditions was unconscionable and therefore unconstitutional.
[57] Bamforth (n 48) 542.

Now that this important distinction has been made, it is essential to establish that the current thesis is concerned with the narrow formulation of unconscionability. At this point, two key clarifications, which will help to set out the scope of the doctrine, need to be offered. Firstly, this thesis will refer to the term 'unconscionability doctrine'. The literature frequently uses other words to describe the same concept of unconscionability such as 'unconscionable bargains', [58] 'unconscionable dealings', [59] 'unfair or undue advantage' or 'relations of advantage'[60] and 'unconscientious dealings'.[61] This thesis decided against applying any of these terms as they are closely attached to one aspect of the doctrine. This is shown, for example, in an early case that pertained to expectant heirs, in which 'unconscionable bargain' was used to remark upon substantive unconscionability or transactional imbalance.[62]

As the terms engaged up until this point have often focused upon one aspect, often at the expense of another, this thesis adopts the term 'unconscionability doctrine' to refer to the tool that is used to govern relations of advantage, and which is applied alongside the jurisdiction of undue influence.

One possible limitation that arises from choosing unconscionability as the main terminology is that it may contribute to the confusion of a specific application of unconscionability (e.g. as a vitiating factor) and its more general usage. In seeking to avoid this confusion, this thesis will, when referencing the general application, refer to 'unconscionability as a general principle'.

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[58] Mindy Chen-Wishart, *Unconscionable Bargains* (Butterworths, Wellington 1989).
[59] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2nd Ed, Sweet & Maxwell 2012).
[60] Alexander Kingcome Turner and Richard John Sutton, *Actionable Non-Disclosure* (Butterworths, London 1990) 599, 601.
[61] T Duggan, 'Unconscientious Dealing' in P Parkinson (ed) *The Principles of Equity* (LBC Information Services, North Ryde NSW, 1996).
[62] *Peacock v Evans* [1809] 33 Eng Rep 1079 1557-1865 at [517].

Accordingly, this thesis is concerned with unconscionability that implies the existence of relations of advantage. It also suggests that there are elements of what would otherwise be described as unconscionable.

Adopting Wilkinson J.'s words, unconscionability should be conceived as a bargain that applies in instances "where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would have accepted." [63] Therefore, an unconscionable bargain is classically defined in the following terms:

> It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains.[64]

Hence, other senses of unconscionability are not part of the scope of this thesis, unless in limited situation they may be highlighted to determine the doctrine of unconscionability that is under investigation. Moreover, throughout this thesis the party who takes advantage of the weakness of another party will be called the enforcer, while the weaker party will be called the complainant.[65]

1.4 Research Rationale and Objectives

The fact that the regulations of electronic contracts, specifically the Libyan Draft

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[63] *Multiservice Bookbinding Ltd and others v Marden* [1978] 2 All ER 489 at [502].

[64] Davenport uses the term 'classical definition'. See William B Davenport, 'Unconscionability and the Uniform Commercial Code', (1967) 22 U Miami L Rev 121, 126, citing *James v Morgan* 2 Ves Sen at 155, 28 Eng Rep 100.

[65] These terminologies are used by many legal scholars see for example: Enonchong (n 59); Gareth Spark, *Vitiation of Contracts International Contractual Principles and English Law,* (Cambridge University Press 2013)*;* Nathan Tamblyn, *The Law of Duress and Necessity: Crime, Tort, Contract* (Routledge 2017).
These terminologies were first used by Mindy Chen-Wishart who explains that the use of the word enforcer indicates the fact that the stronger party is the party who usually seeks the enforcement of the unconscionable bargain, while the word complainant indicates the fact that the weaker party is one who complains and seek to escape his/her unconscionable bargain. Chen-Wishart (n 58) 11.

E-Commerce Bill, focus on the formation stage reveals the question of how issues of substantive unfairness in e-wraps will be treated when an e-wrap meets the requirements of its formation. Unconscionability, in Libyan law, seems to offer a suitable solution in this regard.

It is suggested that unconscionability is a "salient kind of wild card"[66] and that "its main field of application is boilerplate [adhesion contracts]."[67] This is derived form the fact that unconscionable bargains present situations in which the weaker party lacks any choice other than contracting. Thus, it appears reasonable to propose that unconscionability is suited to the treatment of unfair e-wraps.

However, it should be noted that the connection between unconscionability and adhesion contracts is clearer in the American jurisdiction. Section 2-302 of the Uniform Commercial Law (which is concerned with unconscionability) was originally enacted with a view to being applied to standard form contracts. Significantly, this connection is not usually highlighted in either English or Libyan law. Unconscionability in these jurisdictions is a doctrine that targets situations of inequality of bargaining power,[68] which is basically a common feature in adhesion contracts.

In other words, unconscionability is linked to adhesion contracts and more generally to contracts where there is strong imbalance between the contracting parties. The court in *Gatto*n [69] declares that: "The inherent inequality of bargaining power supports an approach to unconscionability that preserves the

[66] Margaret Jane Radin, *Boilerplate The Fine Print, Vanishing Rights, and the Rule of Law* (Princton University Press 2013) 124.
[67] Ibid.
[68] Waisman states that "the central idea that the unconscionability doctrine is concerned not with… terms that are unreasonably favorable to the more powerful party." Waisman (n 39) 305.
[69] Gatton v T-Mobile USA Inc, 152 Cal App 4th 571 (2007).

role of the courts in reviewing the substantive fairness of challenged provisions. Otherwise, the imbalance of power creates an opportunity for overreaching in drafting form agreements."[70] It is therefore to be expected that where there is inequality of bargaining power there will be high chances of overreaching.

The court in *Gatton*[71] also observes that the probability of overreaching is higher in contracts that are related to inexpensive goods and services, because "consumers have little incentive to carefully scrutinize the contract terms or to research whether there are adequate alternatives with different terms, and companies have every business incentive to craft the terms carefully and to their advantage."[72]

In the context of growing e-wrap use,[73] unconscionability guards against the possibility that companies will seek to impose overly one-sided and onerous terms.[74] When perceived from this perspective, unconscionability presents itself as a safety valve that ensures the fairness of contracts that are characterised by pronounced inequalities of bargaining power.

Unconscionability, therefore, addresses various unpleasant scenarios that potentially arise from the stipulation that individuals are bound by what they have signed, even when it has not been read or understood.[75] Therefore, the court in *Gatto*n,[76] submits that: "[T]here are provisions so unfair or contrary to public policy that the law will not allow them to be imposed in a contract of

[70] Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007) at [585]. This is consistent with Comment 1 of the Uniform Commercial Code, which states that the ""[t]he purpose [of the] unconscionability doctrine is to prevent 'oppression and unfair surprise.'"
[71] Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007).
[72] Ibid at [585].
[73] Refer to (n 13).
[74] Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007) at [585]. Hillman and Rachlinski (n 12) 440.
[75] Murray presents unconscionability as an exception to the duty to read rule. Refer to John E Murray, 'Unconscionability: Unconscionability' (1969) 31 (1) University of Pittsburgh 1, 15.
[76] Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007).

adhesion, even if theoretically the consumer had an opportunity to discover and use an alternate provider for the good or service involved."[77] In such situations, unconscionability is the only solution for treating such substantive unfairness in e-wraps.

There are some reasons for suggesting that there is a high risk of unfairness in e-wraps due to these contracts' specific attributes which merit closer attention.

The fact that most e-wraps are standard form contracts presents itself as a recommendation, and contrasts with negotiated contracts. Lord Ackner, in referencing the position of the respective parties in negotiated contracts, observes that "[e]ach party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations."[78]

Plausibly, the tendency to pursue individuals' interests is less important in standard form contracts, because the stronger party is more capable than the opposing party of pursuing and realising his/her interests. In seeking to exploit this advantage, he/she may, particularly in instances where it is assumed that the other party will not read the terms, be predisposed to impose unfair terms.

In addition to being standard form contracts, e-wraps demand closer attention because they are concluded via electronic means. The significance of a written signature clearly differs from its electronic counterpart.[79] While the former alerts

[77] Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007) at [585].
[78] *Walford v Miles* [1992] 2 WLR 174 [1992] 2 A C 128 at [138].
[79] Electronic Commerce: Formal Requirements in Commercial Transactions. Advice from the Law Commission (December 2011); Nancy Kim, *Warp Contracts: Foundations and Ramifications,* (Oxford Scholarship Online 2014) 55; Waisman (n 39) 304.

the customer that he/she will be obliged by a contract, clicking or browsing does not serve the same function and is easier to obtain.[80]

The standard behaviour of the weak parties, which is the failure to read or understand the contracts, is another noticeable feature of e-wraps.[81] Although this behaviour is also commonly evidenced in other standard contracts, it more frequently characterises the electronic version because of the various diversions on web pages (e.g. pop-up windows and animations). Consequently, online visitors are predisposed to scan webpages, doing so in the belief that it is not required to read entire webpages.[82]

Both animations[83] and the option to 'opt-out' of terms and conditions hyperlinks,[84] increase the likelihood that legal commitments will remain unread and consequently raise concerns that relate to the issue of fairness. For these reasons, it can be argued that e-wraps contain a number of intrinsic limitations that impede users' awareness and comprehension of contractual terms.[85] However, it should be noted that the existence of notes (which either reiterate the necessity of reading before clicking or which clarify that clicking and browsing will result in the conclusion of the contract) may eliminate the animation effect that is associated with websites.

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[80] For further insight on this point, refer to the following contributions: Laurence Koffman and Elizabeth MacDonald, *The Law of Contract* (7th edn, Oxford University Press 2010) 165; Kim (n 79) 54; Waisman (n 39) 305.

[81] A Guardian survey suggests that just 7% of Britons read the online terms and conditions – almost half (43%) of those that did not justified their actions by claiming that the material was boring or difficult to understand. This position was all the more surprising because just over a fifth (21%) of those surveyed observed that it had resulted in negative consequences. See Smithers (n 28); Waisman (n 39) 305.

[82] Ty Tasker and Daryn Pakcyk, 'Cyber-Surfing on the High Sea of Legalese: Law and Technology of Internet Agreements' (2008) 18 Alb LJ Sci & Tech 79,105-106.

[83] Ibid.

[84] Kim (n 79) 58-65; Waisman (n 39) 307.

[85] Waisman (n 39) 305.

Some commentators have asserted that digital texts present a higher risk of low comprehension than written texts, because the former lacks the spatial markers (which significantly aid memorisation and comprehension) that the latter possesses.[86] This perhaps explains why, even when online users make the effort to read e-wraps, their comprehension tends to be lower.[87]

Hence, it has been suggested that the electronic environment "creates novel opportunities for businesses to take advantage of consumers"[88] because businesses with knowledge and experience have "incentives and abilities to induce consumers to accept standard terms that are not in the consumers' best interest."[89]

While this is not in itself sufficient to justify a refusal to enforce e-wraps, it supports the assumption that their content is likely to produce one-sided terms that require the special scrutiny of the courts; this in turn justifies suggesting unconscionability as a doctrine that is concerned with the formation and substance of contracts, particularly for the Libyan jurisdiction that lacks other means of treating unfairness in e-wraps.

Unconscionability has given rise to many debates. In Libya, Article 129 which is concerned with unconscionability, has not been applied since its enactment in 1954. While this reflects a defect in the law of unconscionability in Libya, it might also be a reflection of a lack of understanding and comprehension of the doctrine. Thus, the current discussion should proceed upon the basis of a prior

[86] Erin Canino, 'The Electronic 'Sign-in-wrap' Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability' (2016) 50 UC Davis L Rev 535 <intl.westlaw.com> accessed 12 May 2017, 556.
[87] Ibid 557.
[88] Hillman and Rachlinski (n 12) 433.
[89] Ibid 433.

acknowledgement that a sounder understanding of the doctrine precedes a fuller comprehension of its potential application to e-wraps.

This thesis progresses along two points. Firstly, it endeavours to provide a fuller comprehension of unconscionability. In working towards this goal, this thesis offer, with reference to both English and California law, a practice-based explanation of unconscionability that will explore approaches to unconscionability. This thesis will then engage with a number of themes that have already been discussed in the literature: these include the doctrine's relationship to key concepts (e.g. freedom of contract, distributive justice and uncertainty in law) and its position within the broader context of contract law.

Due to the fact that English and California law have adopted different approaches, it will be possible to offer a cross-comparison that refers back to the overarching doctrine. In moving along the second track, this thesis will then offer a practice-based analysis, which engages with the application of unconscionability in e-wraps to address how e-wraps would fit into the various approaches identified.

Ultimately, this thesis will enhance understanding of the doctrine's ability to resolve unfairness in e-wraps. At this point, it is still an open question whether the doctrine can serve the same function in both electronic and traditional contracts, and whether the doctrine needs to be adapted, so it could better align with e-wraps. While there is a view which holds that the traditional rules of contract law should be amended and altered,[90] it is now necessary to critically re-engage with this proposition.

[90] See Berkson v Gogo LLC, 97 F Supp 3d 359 (2015) at [382]. This case argues that traditional rules of contract law (specifically unconscionability) should be amended in order to take the

The preceding issues will establish the basis for a proposed solution to unconscionability in Libya that would put the doctrine into effect for treating both traditional and electronic contracts.

1.5 Research Significance

This study could conceivably inspire Libyan legislators to create new laws. This would be achieved by comparing the different experiences of the English and California jurisdictions. This would bring out the advantages and disadvantages of each jurisdiction and also show how Libyan legislators could avoid mistakes made in previous reforms.

The existing literature usually focuses upon explaining the doctrine's elements, definitions and relationship to some of the main rules of contract law (such as undue influence); in contrast, a much smaller section of the literature is engaged with the doctrine's theoretical background. This thesis provides a theory of unconscionability by working across three levels of analysis.

In engaging at the first theoretical level, this thesis works towards a theory that explains the doctrine's ability to serve different rationales (protection of the weaker party, prevention of exploitation or remedying contractual unfairness). This is an important contribution because the literature invariably acknowledges this issue but fails to proceed to an explanation.[91] In addressing this defect, this thesis seeks to analyse the relationship between the doctrine's components. It argues that this relationship is the main foundation of the different rationales that have been attributed to the doctrine.

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online environment into account.

[91] See for example Robert W Clark, *Inequality of Bargaining Power,* (The Carswell Company Ltd 1987).

The literature would clearly benefit from a contribution that observes the relationship between the different elements of the doctrine. Nelson Enonchong provides one of the few such contributions when he observes that English law, in addressing unconscionability, compels the court "to assess the evidence in the round."[92] He then observes that in instances where the unconscionability elements are not separated, they are conjoined by strong ties. This applies to the extent that the existence of one may lead to the other.[93] While no further explanation is provided in this regard, this thesis proposes to take the analysis a step further by explaining this relationship with reference to both English and California law. In addressing this point, the theory will provide a new perspective by explaining why the legal status of the independent legal advice element shifted (at one stage of the doctrine's history of application under English law it was considered to be a main element whereas at another it became one of the complementary elements).[94]

At the second theoretical level, this thesis addresses the position of unconscionability in contract law as a whole. This section addresses the reasoning which led to the doctrine being placed under general principles of unconscionability, or good faith or inequality of bargaining power. This thesis attempts to identify the similarities and differences, which adhere between the doctrine and these general principles. It concludes by recognising that the doctrine of unconscionability is one among a number of piecemeal solutions that are applied to unfairness issues under English law.

[92] Enonchong (n 59) Part III, Chapter 15, Section 15-006.
[93] Ibid.
[94] This thesis divides English law's doctrinal elements into two parts. The first part relates to the 'main elements' (the serious disadvantage, unconscionable conduct and unconscionable terms elements) while the second part pertains to the 'complementary elements' (independent legal advice element and the enforcer's knowledge of the other party's serious disadvantage).

At the third level, it seeks to clarify the doctrine's relationship to freedom of contract, distributive justice and uncertainty. It therefore demonstrates that the relative character of these issues does not act to the detriment of the doctrine's role in contract law.[95]

With regard to the e-wrap component of this study, the literature evidences the formation aspect, along with the value that should be ascribed to acceptance in e-wraps.[96] Two strands can be identified in the literature, both of which are concerned with the treatment of e-wraps' substance and fairness. While the first strand recognises that unconscionability can be applied with a view to controlling this aspect of e-wraps, it does not provide any real analysis of how this might be achieved. [97]

The second strand is concerned with investigating the requirements for an effective role for unconscionability in e-wraps. On this note, Nancy Kim and Dov Waisman[98] propose the adjustment of unconscionability, with a view to making it correspond to the special nature of e-wraps. This thesis examines the proposal and its application to unconscionability in English and California law.

A proposal of a reform that is based on a concrete knowledge and understanding of all of the preceding aspects of unconscionability would provide a sufficient solution for unconscionable bargains.

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[95] *A & M* describes unconscionability as a doctrine that is "fundamental to the operation of contract law, irrespective of the particular application." A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [488].

[96] Canino calls for a stricter approach to the formation requirements in e-wraps to avoid unfairness isues. Canino (n 86); Lemely argues that e-wraps directly contributed to the death of assent and traces a contradiction between e-wraps and will theory. See Mark A Lemley 'Terms of Use' (2006) 91 Minn L Rev 459, 464-466; Radin makes a similar point when she notes that the proposition of consent in e-wraps is fictional. Margaret Jane Radin 'Commentary Boilerplate Today: The Rise of Modularity and the Waning of Consent' (2005) 104 Mich L Rev 1223, 1231.

[97] Erin Canino (n 86); Hillman and Rachlinski (n 12).

[98] Kim (n 79); Waisman (n 39).

If Libyan customers were aware that there was a sufficient solution for unconscionable e-wraps and that issues around the unconscionability doctrine had been resolved, then this could promote trust in these contracts and would consequently lead to expansion of online e-commerce. Moreover, it would serve to deter service providers from including unfair terms in their standard form contracts and would encourage actions that would help consumers to be aware of contract terms. This would include simplifying the terms and explicitly setting them out prior to the creation of the contract. Alternatively, it could extend to the requirement of further procedures before the conclusion of an e-wrap.

1.6 Research Questions

This research thesis investigates the following research questions:

1. What are the various approaches to unconscionability?
2. How would e-wraps fit in such approaches?
3. What lessons can be derived for a reform of Libyan law?
4. What is the theoretical basis of unconscionability?

1.7 Methodology

The literature on unconscionability clearly demonstrates that the determination of this doctrine has given rise to many different perspectives. This thesis has employed the doctrinal and comparative research methods.

Doctrinal research has an added benefit because it helps to overcome legal confusion by signposting the way towards the correct answer;[99] meanwhile, the comparative approach is recommended upon the following grounds: firstly, it establishes that "good laws cannot be produced without the assistance of comparative law, whether in the form of general studies or of reports specially prepared on the topic in question;"[100] thus, comparative law can provide advice on legal policy;[101] secondly, comparative law extends and enriches the 'supply of solutions' because it offers a critical capacity and the opportunity to find the 'better solution'.[102]

Doctrinal Research

Doctrinal legal research "is concerned with the formulation of legal 'doctrines' through the analysis of legal rules."[103] It is undertaken with a view to examining and recognising the idiosyncrasies of legal systems.[104] Because legal rules are allocated within case law and statutes, it was originally envisaged that this research would examine case and statutes that were related to the rule of unconscionability within the selected jurisdictions. However, because case law and statutes do not always sufficiently explain unconscionability, it has sometimes proved necessary to turn to secondary resources.

The collected resources were used to explore the development of the unconscionability doctrine. The doctrinal research was therefore mainly used to

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[99] Mike McConville and Wing Hong Chui (ed), *Research Methods for Law* (Edinburgh University Press 2010) 13.
[100] Zweigert and Kotz (n 11) 16.
[101] Ibid II.
[102] Ibid 15.
[103] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (ed) *Advanced Research Methods in the Built Environment* (2008) available at http://www.sociology.ed.ac.uk/__data/assets/pdf_file/0005/66542/Legal_Research_Chynoweth_-_Salford_Uni..pdf accessed 13 December 2016, 29.
[104] Dawn Watkins and Mandy Burton (ed), *Research Methods in Law* (Routledge 2013) 11, 28; McConville and Chui (n 99) 4.

clarify the law of unconscionability within the selected jurisdictions.[105] In providing this clarification, the research applies "an internal, participant-orientated epistemological approach" to its object of engagement.[106] Accordingly the doctrinal component focuses upon the systematic presentation of the doctrine within the data. This constructs a theoretical framework that evidences the following attributes: firstly, the unconscionability position or hierarchy within contract law is situated alongside other rules and general principles (such as good faith, inequality of bargaining power and unconscionability in its wider sense); secondly, by virtue of a pronounced lack of case law, there is considerable ambiguity as to how the doctrine applies to e-wrap contracts. Much of the discussion of how the doctrine of unconscionability in practice would be determined was therefore highly theoretical in character.

Doctrinal research usually combines quantitative and qualitative methodologies, broadly defining it as "a two-part process of locating 'the law' or doctrine and then analysing the texts."[107] This research does not, however, emphasise the quantity of case law that was collected and examined. It offers an interpretation, which combines the decisions and persuasive theoretical explanation.

Comparative Research

Since doctrinal research is not sufficient to tackle the research, comparative methodology has also been applied. The application of comparative law as a method is useful, because it will assist the emergence of a different view of the doctrine,[108] and would also contribute to a wider understanding. The analysis of the three jurisdictions will bring out important similarities and differences, while

[105] Chynoweth (n 103) 30.
[106] Ibid 30 (citation omitted).
[107] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 (1) Deakin Law Review 83,116.
[108] Watkins and Burton (n 104) 100-101.

shedding some light onto anticipating or sustaining factors. Results obtained from three jurisdictions will also have a greater purchase and significance.[109]

Comparative law in this thesis is approached on two levels. The first level is based on the dissatisfaction with unconscionability as determined in Article 129 of the Libyan Civil Code motivated, conducting comparative research. Therefore this thesis adopts a positivist and utilitarian method that seek to "identify better legal solutions in foreign legal systems and then recommend their incorporation into domestic law."[110] Therefore, because of issues of Libya's ability to give meaning to imported laws; legal transplantation is investigated to ensure its efficiency.

However as this stage needs to be preceded by a determination of the best solution for Libya. The second level of comparison, involves a comparison between English and California law.

The methodological principle of comparative law that is adopted at this level is functionality, which is based on the idea that "things that are comparable are those which fulfil the same function."[111] This method is based on the fact that although different legal systems face the same problems, they solve them through different means that produce comparable results.[112]

Accordingly, the focus of this thesis is on how unconscionability fulfils the protection of weaker parties in each of the compared legal systems.

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[109] Ibid 101.
[110] Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11 Oxford J Legal Stud 396, 397.
[111] Zweigert and Kotz (n 11) 34, 39.
[112] Ibid. Peter De Cruz, *Comparative Law in a Changing World* (London, 3rd, Routledge-Cavendish 2007) 237.

To bring this focus into investigating the process of comparison involved: firstly the determination of the systems that will be compared; then a preparation of separate reports on unconscionability in each jurisdiction; at this stage the comparison starts by adopting an approach that views unconscionability in light of its function to satisfy a specific need.

In doing so, a specific approach under functionality was adopted, namely, epistemological functionalism. This method understands elements "in relation to specific aspects, as different results to the same function."[113] This method requires viewing elements in their totality, and understanding them "as variable result of a functional connection with another variable element."[114] While this method allows the identification of similarities, it also helps in signifying differences. This is exemplified by explaining that this method allows identification of "differences between a1 and a2, and b1 and b2 respectively"[115] while in turn these differences are explained "as a function of the differences between legal systems."[116]

Accordingly, when unconscionability is compared, by viewing its elements in English and California law, the elements are viewed in their totality. For example procedural unconscionability is recognised in both jurisdictions. It encompasses different sub-elements in each jurisdiction, while substantive unconscionability is the same in both jurisdictions.

The sub-elements of procedural unconscionability are described through their functions that point out a defect in contract formation, instead of describing

[113] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmerman (ed), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 355.
[114] Ibid.
[115] Ibid 356.
[116] Ibid.

them through their common traits. This keeps a focus on their relation with the whole that is procedural unconscionability at one level and substantive unconscionability at the second.

As an example, a serious disadvantage (a1) and unconscionable conduct in English law functions to remark the impairment of the complainant's ability to make a rational decision. This is because the disadvantage caused a serious weakness and relational inequality. Whereas oppression (a2) in California law functions to indicate that the complainant had no choice other than to contract. This is because of the way the terms were presented to the complainant left him/her without any choice.

When these sub-elements are viewed in abstraction, that is through their common traits, it can be noted that they are different, but in their function they achieve the same function, that is: proving the impairment of an ability to make a rational decision, which in turn indicates a defect in contract formation (procedural unconscionability as a whole). Therefore, according to epistemological functionalism they should be viewed as a whole, that is, procedural unconscionability; procedural unconscionability is understood as a variable result of a functional connection of other sub-elements that are also variable.

The same process of comparison is adopted in investigating the interaction between the elements of unconscionability that function to produce a positive case of unconscionability.

This process of comparison was preceded by the determination of jurisdictions that would be under comparison.

In identifying suitable jurisdictions, the current research focuses on English, California and Libyan law. The current political turbulence in Libya has created a political and legal vacuum – there is a clear and on-going need for legal scholarship that contributes to the peaceful resolution of disputes and tensions.

The choice of English law was based on a number of factors. Firstly, the Libyan experience of applying English law during the British Administration of some parts of Libya, in addition to the fact that unconscionability in the Libyan Civil Code was inserted into the Code rather than borrowed from the French Civil Code. Secondly, English law is the parent of the common law system that has a worldwide impact. Thirdly, English law has considerable case law and academic commentary, therefore it is a fruitful source of ideas. Finally, the fact that this research was conducted in England meant that it was, primarily for reason of access to research materials, logical to focus upon English law.

The United States recommends itself as the third jurisdiction because a substantial part of the American literature engages with the theme of unconscionability. One of the main debates, which animates this literature, pertains to the enactment of unconscionability by the 1952 Uniform Commercial Code. §2-302 of the Code, which is concerned with unconscionability,[117] proved to be particularly contentious, giving rise to profound debates about the nature of the doctrine. The debates were far-reaching, and touched upon normative (e.g. what the doctrine could be) as well as empirical (e.g. what the doctrine was) themes. It is clear that the doctrine has 'settled' to the point where it is welcomed and applied by courts.

[117] Refer to Section 2-302 of the Uniform Commercial Code.

This ‘resolution’, however, leads into the question of how the English and American application of unconscionability differs. While early cases in the United States referenced English case law, there are substantial grounds for believing that these two paths have since diverged. This ‘puzzle’ (the extent to which divergence has occurred) provides the final justification for focusing upon the United States.

The benefits of a comparative engagement with each jurisdiction are further accentuated by two additional observations. Firstly, the application of unconscionability within each jurisdiction has given rise to debates that are unique to each context. Secondly, the comparative approach is beneficial, as it will contribute clear and transferable insights that can be applied to the reform of existing laws in Libya.

Selection of Research Materials

This thesis refers to a number of different sources because unconscionability has given rise to wide-ranging debate. Hence, legislation, cases and many secondary resources will be subject to closer attention. In addition, some statistical information will be referenced; this helps to define the research scope and the standard behaviour of online users.

The case law cited in this thesis is analysed in chronologic order. The main benefit of this approach is that it enables the doctrine’s development to be traced over time (this proved to be particularly beneficial in analysing English law). However, the chronological review of cases did not prove to be beneficial in analysing California law, in large part because the treatment of unconscionable bargains in California evidenced considerable inconsistencies

In addition, the chronological approach did not provide a sufficient basis to investigate the argument that there is a significant difference that distinguishes the treatment of unconscionability in arbitration and non-arbitration terms in California. [118] In seeking to answer this question, a thematic review of California case law has been undertaken.[119]

As to the selection of case law in England it was not possible to bring together all the relevant authorities that have contributed to the development of unconscionability. This thesis includes most unconscionability cases from 1750 onwards. This is despite the fact that the concept only attained greater prominence after the usury laws were repealed in the 19th century.[120]1750 has been identified as the critical date because it coincides with *Earl of Chesterfield*.[121] This was a significant case because it was the first instance in which a refusal to enforcement a contract was justified "in conscience-oriented terms".[122] Some academics even claim that *Earl of Chesterfield* established the unconscionability doctrine.[123] Its significance is further attested to by the fact that it is frequently cited by American and English cases.[124] In addition, it has also played a central role in determining the unconscionable conduct element, which is one of the main elements of unconscionability in English law.

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[118] Stephen A Broome develops this argument in more depth. See Stephen A. Broome, 'An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act' (2006). 3 Hastings Bus. L.J. 39 is discussed in Chapter Four of this thesis.
[119] Refer to Chapter Three of this thesis.
[120] *Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd* [1983] 1 WLR 87 at [94] (Peter Millett Q.C).
[121] *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 at [1557-1865].
[122] Hila Keren, 'Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity' (2016) 2 (1) CJCCL 339, 341.
[123] Ibid.
[124] For American cases see: Magniac v Thomson, 32 US 348 (1833); Scott v Lloyd, 34 US 418 (1835); Eyre v Potter, 56 US 42 (1853); Phelps v Peabody, 7 Cal 50 (1857); Hume v US, 132 US 406 (1889). For English cases see for example: *Nevil v Snelling* [1880] 15 Ch D 679.

With a view to identifying all the cases during the relevant period, the *JustCite* research engine was used. While the initial search successfully identified a large number of cases, it also overlooked some unreported cases. Therefore, some cases identified in case law and principal academic commentary were added.

For California, the thesis examines case law from 1979 until the present date. This timeframe reflects the fact that 1979 is the year when Section 1670.5 of the California Civil Code concerned with unconscionability was first enacted. While California courts applied the doctrine of unconscionability as an equitable remedy before this date, its specific significance reiterated in *West.*[125] In this case the court counselled against referencing a case that pre-dated 1979, because it did not apply the unconscionability test as enacted in §1670.5 of the California Civil Code.[126]

Moreover, the number of cases identified when the *Westlaw International* search engine was used suggests that it is appropriate to begin with the year 1979. This search produced nearly 3000 cases. The discrepancy between this figure and ongoing time limitations meant that it was necessary to select cases. This selection had three stages: firstly, it excluded cases that were concerned with unconscionability in its wider sense; secondly, it excluded cases that were negatively treated in subsequent cases; thirdly it directly engaged the most cited cases.

All of the e-wrap cases that resulted from a search of *Westlaw International* were initially acknowledged. However, this list was then shortened into eight cases because most e-wrap contracts were – by virtue of defects in the contract

[125] West v Henderson, 227 Cal App 3d 1578 (1991).
[126] Ibid at [1586].

formation stage – declared void. Hence, the courts did not proceed to investigate their unconscionability.

With regard to Libya the lack of resources was one of the main factors that inhibited the study of this jurisdiction. The only available database for Libyan cases *Al-Bahith,* pertained to the decisions of the Libyan High Court,[127] failed to reference a single unconscionability case. Further investigation, through four Libyan law firms produced no information on any cases of unconscionability. This confirmed the results of the *Al-Bahith* database that there was no case law on unconscionability. This shortcoming reinforces the need to remedy a clear deficiency in the law of unconscionability in Libya.

Both time constraints and the overall research focus meant that it was impossible to examine all the literature. However, the main literature on the three jurisdictions was examined in more depth.

While the data collected from secondary resources proved to be satisfactory, the initial assumption - that English and California law jurisdictions involved substantial numbers of e-wrap cases – was not borne out: in fact, a total of eight cases were decided by California courts and no single case was decided by the English courts. It was therefore necessary for this thesis to construct a hypothetical model that would address the question of how an English court would have applied unconscionability to e-wrap cases had they been confronted with such a case. Even in California there was still, by virtue of case law inconsistencies in the application of the unconscionability doctrine, a need to undertake this innovation, albeit to a lesser extent.

Jurisdiction: Selection and Cross-Comparison

[127] This court is the highest court in Libya.

Upon examining the US jurisdiction, one is confronted by a number of obstacles. Firstly, the number of states; secondly, the length of the proposed time period; and finally, the level of variation between different legal systems within the country. When assessing which US state could provide the basis of the current study, three different factors are considered.

Since this study is concerned with identifying the differences between two jurisdictions (England and the US) that follow a similar legal system, it was appropriate to select a state, which applies the common law system. In the US, the only exception in this regard is Louisiana, which applies the civil law system.[128]

Furthermore, the selected state should have adopted Article 2 of the Uniform Commercial Code, which is concerned with unconscionability.[129] A state with a high volume of online transactions will provide a more fertile point of engagement; there would be a commensurate number of legal issues and precedents, which would create a clear need for appropriate legislation and remedial action.

With regard to the volume of online business, US Federal Government resources do not disaggregate data upon a state-by-state basis – this applied to the Internet site which is explicitly tasked with 'measuring the electronic economy (the US Census Bureau's E-Stats). While a number of other sources (such as the BRASS guide, Mintel, IBIS and Passport) provide online shopping reports, none contains a state-by-state breakdown.

[128] http://www.slate.com/articles/news_and_politics/explainer/2005/09/louisianas_napoleon_complex.html

[129] For more details in regard to the states which adopted various Articles of the Uniform Commercial Code, see: http://uniformcommercialcode.uslegal.com/states-adopting-the-ucc/

A number of sources reference Jirafe, the leading e-commerce intelligence company which provides a state-by-state breakdown of online (B2C) shopping behaviours. Jirafe has conducted a study of online spending habits of 97 million Americans during a one-year period (which began on August 1, 2011). In the view of Market Wired, who was writing during October 2012, this study provided a sufficient basis for the determination of the top-ranking states and the associated volume of on-line business.[130]

The Jirafe study observed that seven states (California, New York, Florida, Texas, Pennsylvania, Georgia and Illinois) accounted for just over half (52%) of America's total online shopping. California (13.3% of the total figure, with an average of $123 being spent on each transaction) was closely followed by New York State (8.5% of the total and an average of $107 per transaction). Florida then followed in third place (6.3% of total purchases at an average of $125 per transaction). The following table (1) provides further clarification of the results. For the purpose of the current analysis, it is important to note that California is top for both the number and total value of purchases. New York, meanwhile, is second in the number of purchases and third in the total value of purchases.[131]

Table (1)

Ranking By Number of Transaction	State	Per Cent of Total USA On-line Transactions,	Average Value Per Transaction, US$, V	Relative Value Of Purchases, T×V	Ranking By Total On-line Business

[130] Available at: http://www.marketwired.com/press-release/study-reveals-ca-ny-fl-tx-pa-ga-and-il-make-up-52-of-americas-online-shopping-1716889.htm.
See also: http://www.businessinsider.com/online-spending-habits-2012-10?op=1
[131] Ibid.

		T			Value
1	California	13.3	123	1,636	1
2	New York	8.5	107	630	3
3	Florida	6.3	125	788	2

In addition, another study provides insight into sales tax. This is a particularly important contribution because governments (both state and local) are still grappling with the question of how e-commerce can be appropriately taxed. While this is an ongoing issue for electronic and non-electronic purchases, the figures clearly demonstrate that the former poses a more formidable challenge. In addition, the figures also demonstrate that, in 2012, California had an estimated uncollected business-to-consumer (B2C) use tax of $1,904,500,000 – this was the highest of all surveyed states.[132]

California is a state that has adopted the common law legal system. In addition, it also accounts for an unparalleled amount of the overall volume of online business – as such, it presents itself as the obvious state that should be examined for the current study. While California does not adopt Article 2 of the Uniform Commercial Code, the unconscionability doctrine is nonetheless codified in Section 1670.5 of the Civil Code which is identical to Article 2 of the Uniform Commercial Code.

[132] Available at: http://www.ncsl.org/research/fiscal-policy/collecting-ecommerce-taxes-an-interactive-map.aspx.

1.8 Thesis Structure

This thesis is divided into seven chapters. This first chapter introduces the unconscionability doctrine and electronic wrap contracts and provides the research background, problems, questions, objectives, significance and methodology.

The second chapter focuses on Libyan law. It provides an overview of the application of the doctrine to this law. It places particular emphasis upon the Libyan Civil Code and Islamic law, the second resource of Libyan contract law. This overview identifies problems in the current law of unconscionability in Libya.

Chapter Three examines existing rules and practices of the unconscionability doctrine in English and California law. It compares the application of the unconscionability test in both jurisdictions, and brings out relevant similarities and differences, with specific attention to relevant weaknesses and strengths of each law. In engaging with each jurisdiction, this chapter considers the relationship between the elements of unconscionability.

The fourth chapter examines e-wraps and how they might fit in the different approaches to unconscionability that are signified in Chapter Three. The analysis in this chapter provides a theory for English law for the absence of case law. As to California law, this chapter analyses the available e-wraps and critically views theories that call for a reconstruction of unconscionability in the e-wraps context.

Chapter Five is an extensive critical evaluation of the findings of the previous chapters. This is done in light of the research questions that this thesis aims to

answer. It provides theoretical pronouncements that explain various issues identified in the jurisdictions compared. It finally fashions a reform of Libyan law that proposes a better practical rule that would activate unconscionability in both traditional and e-wraps contracts. The proposed legal reforms draw upon the experiences of English and California laws.

Chapter Six provides a context by addressing unconscionability in the existing knowledge. It situates unconscionability within the wider context of contract law. It addresses claims that unconscionability is not compatible with freedom of contract, legal certainty and the contract law's approach to issues of distributive justice. This chapter engages with different definitions and different scholarly perspectives.

Chapter Seven concludes the thesis and reiterates the key themes, issues and findings in the preceding chapters. It emphasises the key finding that the existing unconscionability law provides a sufficient basis upon which unfairness issues associated with e-wraps can be resolved. The main merit of the doctrine derives from the fact that it provides a flexible tool through which substantive unfairness in contracts can be governed. In addition, in allowing room for procedural unfairness, unconscionability can facilitate the emergence of new contracts, commerce methods and technologies. In most situations, this can be achieved without significant adjustments to the law. If a change is required, it would most likely relate to the way the courts approach or apply the doctrine; it is substantially less likely that substantive changes would be required.

Chapter Two

Unconscionability in Libyan Law

2.1 Introduction

This chapter initially explains unconscionability in Libyan law, examining both the Civil Code and Islamic Law as a second legal resource. Therefore, this chapter is the starting point to answering the research question: what are the various approaches to unconscionability? In noting deficiencies in Libyan law, this chapter calls for law reforms.

Lack of resources is a substantial limitation to the analysis provided in this chapter. This limitation derives from continued violent conflict in the country, along with a pronounced lack of electronic databases that pertain to Libyan case law. The Al-Bahith database[1] is the only database that is currently available. However, it only summarises the Libyan High Court's (the highest court in Libya) decisions.

The initial plan was to draw on the database, with a view to investigating the position that the law adopts towards unconscionable bargains. When examining unconscionability, however, there was a surprising absence of decisions. Further search, via contacting four Libyan law firms, shows an absence of unconscionability cases. This absence revealed the question: why have Libyan courts not applied the doctrine, even once, since the enactment of the Civil Code in 1954?

[1] A privately owned database that is introduced by Al-Marghani Legal Firm.

Hence the analysis in this chapter is based on some law books and the Civil Code. While the Civil Code itself manifests to some extent the law of unconscionability, it was of limited assistance when it came to clarifying issues such as the type of test adopted; whether it was subjective or objective; the doctrine rationale; the significance of each of the elements of unconscionability, and many other aspects which, especially after the examination of English and California law, clarify to what extent the law of unconscionability in Libya is unclear.

As to the law books, they provide clarification of some aspects of the unconscionability test that are not covered in the Civil Code. Those clarifications are either based on the work of one of the main drafters of the Civil Code (Abd Al-Razeg Al-sanhuri) or on Egyptian Supreme Court decisions, which have a persuasive value and are sometimes referred to by Libyan courts.

This chapter begins by providing a statement of the current law of unconscionability in Libya. It investigates the doctrine of unconscionability or 'exploitation' as addressed in the Civil Code. Because the Civil Code applies unconscionability in very narrow terms, the second step attempts to identify whether Islamic law provides a possible alternative within Libyan law for the treatment of unconscionable bargains. The discussion will place a particularly strong emphasis upon unconscionability within the Maliki Islamic School of thought, which is one of four such schools in Sunni Islam; the other three schools being Shafi'I, Hanafi and Hanbali.

This chapter concludes that, while the Libyan Civil Code, in its adoption of unconscionability as a visiting factor, was a step ahead of its roots as embedded in the French Civil Code, Libyan legislators fell short of adequately

articulating unconscionability. Therefore, a proposal for law reforms is needed, not just for treating unconscionable e-wraps, but also for the application of unconscionability in traditional contracts.

2.2 Exploitation

The Libyan Civil Code acknowledges the unconscionability doctrine under the heading of 'exploitation'.[2] While this may give rise to the understanding that the rationale of unconscionability in Libyan law is the prevention of unconscionable conduct (taking advantage of the other party's disadvantage or exploiting the other party), this is not certain. For some commentators, the rationale of unconscionability is the protection of the weaker party in contracts.[3] If this is taken to be true, unconscionability in Libyan law comes closer to the early perception of unconscionability in English law when unconscionability was mainly concerned with the protection of expectant heirs.

It is consistently apparent that unconscionability in Libya reflects a defect in the consent of one of the contractual parties. It is classified as a vitiating factor.[4] The inclusion of unconscionability under vitiating factors has been viewed[5] as a response to the fact that neo-classical theory has emerged as the main deriving theory in Libyan contract law.

With regard to the elements recognised for unconscionability, Article (129-1) of the Libyan Civil Code establishes that:

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[2] While the Libyan Civil Code entitles unconscionability under the rule of exploitation. This thesis will hereafter use the word unconscionability, as exploitation causes confusion with exploitation in English law that is part of the unconscionability doctrine.
[3] In the Civil Code, exploitation is referred to in the 'Vitiating Factors' section (18) titled 'The Vices of Consent'. Mohammad Al-Azhari, *The General Theory of the Law of Obligation* (Libya, The National Books Press 2013) 126 (author's transaltion).
[4] Libyan contract law establishes that the other vitiating factors are duress, fraud and mistake.
[5] Al-Azhari (n 3) 125.

> If the obligations of one of the contracting parties are out of all proportion to the advantages that he obtains from the contract or to the obligations of the other contracting party and it is established that the party who has suffered prejudice entered into the contract only as a result of the other party exploiting his obvious levity of character or his unbridled passion, the judge may, at the request of the party so prejudiced, annul the contract or reduce the obligations of such party. [6]

Before proceeding to analysing this article it is important to flag that while this is the translation of Article 129-1 which is usually referred to by Libyan lawyers, it is inaccurate in describing levity of character as 'obvious', because the original Arabic script does not provide obvious as a condition of levity. This variation is alerted because the usage of the word 'obvious' implies that the law requires the stronger party's knowledge of the other party's levity, which is not the case.

This text establishes that, unconscionability has three elements. These are substantive unconscionability, psychological element [7] and unconscionable conduct.

2.2.1 Substantive Unconscionability

The substantive part of unconscionability focuses upon a gross inadequacy in the values exchanged in the contract or upon the resulting contractual rights and obligations.[8] The imbalance in the rights, obligations or values must be significant.[9] For this reason, the mere existence of a bad bargain does not satisfy the substantive element. [10] The determination of this significant inadequacy seems to be subject to the judge's discretion since the law does not

[6] Art 129-1, Libyan Civil Code. Meredith O Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code an English Translation and a Comparison with the Egyptian Civil Code* (The Oleander Press).
[7] This is the literal translation, by the author, of the Arabic description of this element.
[8] Abd Al-Razig Al-Sanhori, *A Guide on Explaining the Civil Code,* vol1 (Lebanon: Dar Ihyaa al-Turath al-Arabi 1952) 362 (author's transaltion).
[9] Ibid.
[10] Ibid.

articulate what might be considered substantively unconscionable, which will vary according to the circumstances of each case.[11] Thus, there is no fixed rule of what might be considered substantively fair.[12]

However, it has already been established that the evaluation of the unfairness of the exchanged values does not relate to the market price; rather, it is directed to the complainant's personal value and the precise circumstances of the case.[13] This means that a finding of substantive unconscionability depends on a subjective assessment. Whether it is possible to include an objective test is not clear, however, Al-Sanhori's explanation does not imply such inclusion.

Moreover, while unconscionability can be applied to all contract types such as annuity, it is also applicable to gifts. The assessment of substantive unfairness in the latter type of contract does not relate to the gross inadequacy in the exchanged value, because there is no bilateral obligation in gifts; rather unconscionability in gifts can be found when the object that was given as a gift is of much greater value than the complainant's possessions.[14] The assessment also takes into account the complainant's motivation for giving the gift.[15]

Just as in California and English law, as shown in the next chapter, the assessment of the value or price relates to the contracting time and not to any

[11] Ibid 363.
[12] The Libyan Civil Code recognises the rule of 'equivalence' in specific types of contracts. This rule gives courts the power to amend or void onerous contracts that are characterised by extreme imbalances in exchanged rights and obligations. It will be noted that this rule is equivalent to substantive unconscionability. Article 414 of the Civil Code, for example, establishes that: "When an immovable belonging to a person who is legally incapable has been sold with a 'lesion', of more than one fifth of its value, the vendor will have a right of action with a view to make up the price to four-fifth of the normal price." Meredith O Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code an English Translation and a Comparison with the Egyptian Civil Code* (The Oleander Press).
[13] Al-Sanhori (n 8) 126.
[14] Ibid 364-365.
[15] Al-Azhari (n 3) 127.

inadequacy that is subsequent to the formation of the contract.[16] For the establishment of unconscionability and the consequent nullification of the contract, the substantive element is not in itself sufficient; to this extent, the psychological element is also required.

2.2.2 Psychological Element

Article 129-1 expresses this element in terms of "the party who has suffered prejudice entered into the contract only as a result of the other party exploiting his levity of character or his unbridled passion".[17] This envisages that the psychological element constitutes two sub-elements: serious disadvantage and unconscionable conduct.

Serious Disadvantage

This element is concerned with the impairment of the complainant's ability to make a wise decision because of his/her weakness or serious disadvantage. Accordingly, the complainant's consent is impaired[18] therefore; the contract can be nullified at his/her will.

Libyan law restricts types of weakness or serious disadvantages that may trigger allegations of unconscionability to levity and unbridled passion.

Levity of character refers to a situation in which the complainant is controlled by his/her lack of discipline. Levity may lead to a lack of discretion in contracting,

[16] Ibid 126; Art 129-1 the Libyan Civil Code.
[17] Art 129-1 Libyan Civil Code. Meredith O Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code an English Translation and a Comparison with the Egyptian Civil Code* (The Oleander Press).
[18] Al-Sanhori (n 8) 78.

which might result from the distress of the complainant or the incitement of the other party's distress.[19]

Unbridled passion, meanwhile, presents a situation in which the action (contracting in this instance) results from the fact that the complainant was controlled by a very strong desire to will or do something. This severely restricts his/her ability to make a rational decision.

Unfortunately, no further elaboration of these two types of disadvantages can be provided for the lack of case law, therefore whether they should be interpreted restrictively or not is not clear.

However, according to Al-Sanhori the main drafter of the Civil Code, a determination of what constitutes a situation of levity or unbridled passion should be guided by: precedents and judges' discretion which should rely on local traditions in our societies.[20] Al-Sanhori in this regard asserts that judges should remind themselves when they confront a case that might constitute levity and unbridled passion with traditional instances in our societies in which an old man is controlled by a young wife, and situations in which a young man was pressed by moneylenders or tricked into selling his annuities.[21]

Al-Sanhori's examples of cases of levity and unbridled passion, coupled with his assertion that the test should rely on precedents, judges' discretion and local traditions could be understood in terms of a preference for a relaxed definition of levity and unbridled passion. However, there is no confirmation of this deduction because of the lack of precedents.

[19] Al-Azhari (n 3) 128.
[20] Al-Sanhori (n 8) 38.
[21] Ibid.

Moreover, the fact that Article 129 limits cases of unconscionability to levity and unbridled passion, instead of opening the door to other types of disadvantages by using expressions such as 'a party that is seriously disadvantaged', suggests an attempt to limit the application of unconscionability. This is further asserted by the fact that unconscionability in the Bill of the Civil Code prepared by the Law Commission provides that:

"the party who has suffered prejudice entered into the contract only as a result of the other party exploiting his distress, levity of character, inexperience and ignorance, or for any other reason that shows that the decision was not based on a meaningful choice."[22]

The limitation of unconscionability to levity and unbridled passion indicates the legislator's intention to limit the scope of unconscionability. Al-Sanhori further explains that the use of the word 'unbridled' is to restrict unconscionability to a narrower sense.[23]

Unconscionable Conduct

The recognition of the psychological element requires in addition to the levity or unbridled passion of one party, that the other party exploits this disadvantage to his/her advantage.

According to Al-Sanhori, the recognition of unconscionable conduct signifies two things. Firstly, the enforcer's will is unlawful because it unlawfully exploits the other party's disadvantage.[24] While this is the literal translation of his words, plausibly it does not seem that he meant that the exploitation itself should imply

[22] Ibid 365.
[23] Ibid.
[24] Ibid 368.

illegal action; most likely he meant that this exploitation indicates the enforcer's bad conscience, or impropriety, as expressed in English law. However, presuming that Al-Sanhori meant that the enforcer's bad conscience implies that he/she knew that the other party would suffer a serious disadvantage, this is not supported by Al-Sanhori's explanation, therefore the issue remains unclear.

Secondly, unconscionable conduct signifies that the complainant's will is defective, because it is a result of levity or unbridled passion and the other party's exploitation. Hence it is expressed under what is called psychological element.

Proving that the exploitation was the cause of contracting is a matter of fact therefore cannot be appealed, while proving what constitutes levity and unbridled passion is a matter of law therefore can be appealed.[25] The burden of proving the psychological element is on the complainant.[26]

2.3 Presumed Unconscionability

The Libyan Civil Code does not recognise presumed unconscionability. However, the Law Commission Bill of the Civil Code provides that "the presence of substantive unconscionability coupled with unconscionable circumstances raise a presumption of the psychological element."[27] The fact that the final version of the Civil Code altered Article 129 to negate presumed unconscionability also asserts preference for a restrictive approach to unconscionability.

[25] Ibid.
[26] Ibid 369.
[27] Ibid.

2.4 Remedies

When unconscionability is compared with other vitiating factors in Libyan law, its result stands out as a unique attribute. To this extent, a finding of vitiating factors other than unconscionability (mistake, fraud and duress) results in the contract being voidable. In contrast, a finding of unconscionability also results in the contract being voidable, however, the remedy might be amending the disputed contract to limit its unfairness instead of nullifying it.

Accordingly, there are two possible remedies for a finding of unconscionability and the determination of the remedy depends on the complainant's requests.

If the complainant files an action to nullify his/her unconscionable contract, the court has the discretion to either nullify the contract or limit its unfairness. This is achieved by restoring the balance between the benefits and the undertakings that result from the contract.

In elaborating how a judge would decide to amend an unconscionable contract instead of nullifying it, Al-Sanhori clarifies that in cases where a judge finds that the complainant would have contracted even if he/she were not exploited and the judge's discretion to amend or nullify an unconscionable bargain, depends on the circumstances of each case.[28]

This clarification sounds inadequate, viewing the fact that Article 129 requires the establishment of the psychological element of unconscionability that the complainant's contracting decision was caused by exploitation, which means that had the decision been made, without the exploitation, the psychological element would have not been established. Therefore it is better to suggest that

[28] Ibid 373.

the matter should be left for judges' discretion without further elaboration, since Article 129 leaves the matter unarticulated.

However, Article 129-3 is clear in stating that "In a contract entered into for valuable consideration the other party may avoid annulment proceedings by making such an offer as the judge may consider adequate compensation to cover the lesion."[29] Thus, the enforcer can restore the balance or make the contract fair[30] and may ultimately salvage the contract. If in the course of an undervalued sale, for example, the enforcer offered a payment that reflects a fairer price, the court has the discretion to uphold the contract or nullify it.

Thus, when the complainant plea is the nullification of his/her unconscionable contract, the remedy might be nullifying the contract or amending it to make fairer. The decision in this regard is left to judges' discretion.

However, if the complainant's plea requests amending the unconscionable contract instead of nullifying it, judges' discretion would be to some extent restricted.

In such situations, the court cannot nullify the contract. Such a decision would be unlawful for the reason that it exceeds the parties' requests. This is contrary to the civil procedure rule, which restricts judges from putting forward rulings that exceed the requests put forward by the disputing parties.[31] In this situation the judge does not have the power to restore the balance by increasing the obligations of one party, because judges do not have the authority to rewrite the contract. It is instead the case that his/her discretion is limited to decreasing

[29] Article (129-3) of the Libyan Civil Code. Meredith O Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code an English Translation and a Comparison with the Egyptian Civil Code* (The Oleander Press).
[30] Al-Azhari (n 3) 129.
[31] Alkoni Ali Abuda, *The Law of Civil Procedure* (Naser University Press 1991) (author's transaltion).

obligations.[32] The extent to which such amendments take place depends on judges' discretion and the circumstances of each case.

Providing courts with the discretion to uphold contracts by limiting their unfairness when the plea is for nullifying the unconscionable contract, and restricting courts' powers to nullify unconscionable contracts when the complainant's claim requests bringing back the balance into the disputed contract, demonstrates legislators' preference to uphold contracts, which corresponds to freedom of contract and certainty concerns.

Al-Sanhori justifies the differences in the remedies between unconscionability and other vitiating factors which render contracts nullified, by explaining that unconscionability cases imply that the complainant, in making a decision to contract, was under mistake or fraud in cases of levity, or of being the victim of duress in cases of unbridled passion. However, mistake, fraud and duress in unconscionability cases cannot be proved by the related vitiating factors of mistake, fraud and duress, because the requirements of these vitiating factors are not met. According to Al-Sanhori, mistake, fraud and duress under unconscionability are presumed, and this presumption arises by proving the two elements of unconscionability: substantive unconscionability and the psychological element.[33] Therefore, according to Al-Sanhori, there are two types of remedy in unconscionability, to distinguish it from other vitiating factors of mistake, fraud and duress.[34]

The language of presumption that Al-Sanhori uses in this justification is not preferable, because it raises possible confusion with presumed

[32] Al-Azhari (n 3) 130; Al-Sanhori (n 8) 373.
[33] Al-Sanhori (n 8) 370.
[34] Ibid.

unconscionability as identified in English and California law. Moreover, Al-Sanhori's justification of providing two types of remedy under unconscionability does not seem sufficient, because the application of unconscionability according to Article 129 does not require proof of mistake, fraud or duress, which is basically what Al-Sanhori suggests when he considers the variation in remedies under unconscionability as a tool to help distinguish it from other vitiating factors. Article 129 is clear in specifying substantive unconscionability and the psychological element as mere requirements to apply the doctrine.

Moreover, there is another difference between unconscionability and other vitiating factors in the statutory limitation. For unconscionability claims the period of this statutory limitation is a single year that commences from the time of the contract formation.[35] While the comparable limitation of legal proceedings for other vitiating factors of mistake, duress and fraud is fifteen years from contracting time.[36] Again, specifying a period of one year as a statutory limitation for unconscionability adopted at a later stage of the enactment of the Civil Code, as the Civil Code Bill provided a period of fifteen years as a statutory limitation for unconscionability just as other vitiating factors.[37]

Al-Sanhori justifies this difference by observing that cases of unconscionability are hard to prove, compared with cases of other vitiating factors, therefore, for the sake of providing certainty for contractual parties the statutory limitation in unconscionability was restricted to one year.[38]

The previous assessment of unconscionability suggests some salient features in the test of unconscionability. Firstly, the test has many restrictions that limit

[35] Article 129-2 of the Libyan Civil Code.
[36] Article 140-2 of the Libyan Civil Code.
[37] Al-Sanhori (n 8) 371, fn: 1.
[38] Ibid 371.

the application of unconscionability to the minimum. These constraints embodied in: limiting the type of disadvantages that may trigger a test of unconscionability into levity and unbridled passion; basing the unconscionability test on proving its element without allowing cases of presumption contrary to the Bill of the Civil Code; the statutory limitation of one year to pleas of unconscionability is another aspect that shows a general preference to constraint cases of unconscionability.

Nonetheless, it might be argued that these restrictions are counterbalanced by the fact that substantive unconscionability in Libyan law is assessed subjectively which, to some extent, would widen the application of unconscionability.

Secondly, although Al-Sanhori suggests that the unconscionable conduct that is addressed under the psychological element of unconscionability signifies the enforcer's bad conscience, there is no sign that the enforcer's knowledge of the other party's disadvantage is a prerequisite for the application of unconscionability. However, it might be argued that the fact that the complainant has to prove that the other party exploited his disadvantage implies that he/she knew of this disadvantage. Certainty in this regard is impossible in light of the absence of case law.

However, it is certain that there is some form of defect in the law of unconscionability as enacted in the Libyan Civil Code in 1954. This is evidenced by the absence of cases since then. This thesis argues that the observed restrictions are the main reason for this absence. Lack of articulation might be another reason. However, had Libyan courts faced cases of unconscionability, their tests would have become clearer. In support of this is

the fact that Libyan High Court' precedents are considered law in the Libyan Civil system. In other words, the Libyan High Court has the power not just to interpret the law, but also a power that is similar to legislator's power by adding to the law in cases of ambiguity.

The deficiency of unconscionability in the Libyan Civil Code invokes the possibility that in cases where there is an unconscionable contract that cannot be governed by Article 129 for any reason, a Libyan judge may resort to Islamic Law as a second resource of law after the Civil Code. Which, brings up the question of whether Islamic law is a better solution in such cases, to the extent that it may govern unconscionable e-wraps too.

2.5 Islamic Law

The Libyan Civil Code establishes that Islamic law is the second resource of the law; it also establishes that courts draw upon this resource in the absence of a rule that can be applied to the situation under dispute.[39] Al-Sanhori asserts that a resort to Islamic law rules is conditional upon an absence of any contradiction between its rules and the Civil Code.[40] This shows that in cases of conflict between the rules the Civil Code rules would prevail. However, generally resorting to Islamic law in Libya, by virtue of the fact that no such application

[39] Article 1 of the Libyan Civil Code establishes the following: "1- Provisions of law govern all matters to which these provisions apply in letter and spirit. 2- In the absence of applicable legal provisions, the judge shall pass judgment in accordance with principles of Islamic law. In the absence of Islamic legal precedent, he shall pass judgment according to prevailing custom, and in the absence of precedents in customary procedure, he shall pass judgment according to the principles of natural law and the rules of equity." Translation of Meredith O Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code an English Translation and a Comparison with the Egyptian Civil Code* (The Oleander Press). Furthermore:
1- Legislative provisions (stipulations) apply to all issues treated by those provisions in letter and content.
2- If no applicable legislative provision exists, the judge shall rule in accordance with the principles of Islamic Sharia; if [this] does not exist, [then] in accordance with tradition or custom law [;] if such does not exist, [then] in accordance with the principles of natural law and justice."
[40] Al-Sanhori (n 8) 49.

can be identified in case law, may be deemed to be a radical departure from established practice.

A general view of Islamic law shows that it does not contradict the Civil Code in objecting to the enforcement of unconscionable contracts.

Islamic law places great emphasis upon the enforceability of contracts. The Holy Quran, which is the first main resource of Islamic law, commands that: "O you who believed, fulfil contracts."[41]

Islamic law, in addition to stressing the sanctity of contracts, also strongly emphasises rules that seek to uphold fairness and the protection of weaker parties. In addressing itself to debt contracts, the Holy Quran therefore commands that: "And if someone is in hardship, then [let there be] postponement until [a time of] ease. But if you give [from your right as] charity, then it is better for you, if you only knew."[42] This clearly underlines a prior predisposition to consider the circumstances of contractual parties. In addition, the same Sura of the Holy Quran outlines the procedures that should be followed in debt contracts. The Sura states:

> [W]hen you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice…and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. *But if the one who has the obligation is of limited understanding or weak or unable to dictate himself,* then let his guardian dictate in justice.[43]

This text demonstrates how special rules may govern situations of weakness or disadvantage in contracts. It is therefore conceivable that the provision of a

[41] Holy Quran Surat: Al-Maida, Verse No 1 This translation was taken from the Holy Quran Audio English Translation, an IPad application.
[42] Holy Quran Surat: Al-Baqara, Verse No 280.
[43] Holy Guran Surat: Al-Baqara, Verse No 282 (emphasis added).

similar law would prohibit unconscionable bargains. The rationale that underpins the Holy Quran's prevention of unconscionable bargains and its rules is clearly set out in the statement: "O you who have believed, do not consume one another's wealth *unjustly but only [in lawful]* business *by mutual consent*."[44]

This text brings to light some elements that closely resemble unconscionability aspects that can be observed in Libyan, English and California laws. Firstly, it is apparent that the benefits or profits gained through the contract must be justly achieved (in other words they must be free of unconscionable conduct). Secondly, the obtained profits must be preceded by the consent of both parties; to borrow the precise language of unconscionability, the decision to contract must be an informed one.

While this rule clearly depicts the psychological element of unconscionability, there are other rules in Islamic law, which instead pertain to substantive unconscionability. It is generally the case that Islam requires the contract substance to be just. This is why the Holy Quran advises Muslims, in the course of their transactions, to: "Give full measure and do not be of those who cause loss [do not cheat]. And weigh with an even balance [accurate scale]."[45]

Two specific rules should however be referenced at this point. The first pertains to the Islamic law prevention of usury, which it views as undeserved and therefore unjust. In addressing this point, the Holy Quran states:

> Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, *'Trade is [just] like interest.' But Allah has permitted trade and has forbidden interest*. So whoever has received an admonition

[44] The Holy Quran, Surat: An-Nisa, Verse No 29 (emphasis added).
[45] The Holy Quran, Surat: Ash-Shuare 26, Verse No 182-183.

> form his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury]- those are the companions of the Fire; they will abide eternally therein.[46]

This text makes it quite transparent that any amount of interest is prohibited. The benefits that derive from bargains or trade are permitted, insofar as they are not excessive or unjustified (or to borrow the precise terms of English law, as long as they are not unconscionable or inexplicable). The second rule that pertains to substantive unconscionability is instead concerned with the prohibition of repugnant contracts (which Islam describes as contracts of 'Gubn Fahish').[47]

At this point it is important to acknowledge that the Holy Quran is not the only source of Islamic law.[48] The relevant rules, a number of which have been referenced above, are interpreted and determined in Sunni Muslim communities through the adoption of one of the four main Islamic schools of thought and jurisprudence. If unconscionability in Islamic law is to be determined, then it is first necessary to refer to one of these schools. In acknowledging established practice within Libya, the current discussion of the determination of Islamic law within the country will refer to the 'Maliki School'.[49]

The rules that are included in this school, which this thesis maintains closely resemble unconscionability, mainly derive from a single source – the main resource which anticipates Maliki law is '*Muwatta Imam Malik'*, which accounts

[46] The Holy Quran, Surat: Al-Baqara, Verse No 275 (emphasis added).
[47] In Libyan law, the substantive unfairness element of the exploitation factor is referred to as 'Substantive Gubn'.
[48] The other resources are Sunnah, which is the traditional practice of the Prophet Mohammad; Ijma (consensus) which derives from the consensus of scholars within Muslim society. It is applied in the absence of an applicable rule in the Quran or Sunnah; Qiyas (analogy) is the fourth resource, which is applied in instances where a judge makes a decision upon the basis of analogy, situation or rule.
[49] Each of the four schools is named in accordance with the expert or jurist who established the school. Al-Imam Malik Bin Anas is the jurist or 'faqih' of the 'Maliki School'.

for many of its different attributes. In the aftermath of Imam Malik's main work of *Muwatta*, several Islamic jurists, each of whom are considered to be part of the Malikya school, offered further explanation, thereby substantially developing some of the thoughts and rules that were initially presented in *Muwatta*. The following discussion extensively references these scholars.

Unconscionability within Malikya can be recognised in two distinct rules. These are *ghubn* and *gharar*. Both of which can be placed under the broad umbrella of *riba* because *riba* is mainly based on substantive unfairness[50] (which is one of the *ghubn and gharar* elements).

2.5.1 Ghubn

Ghubn is a rule that closely resembles unconscionability within modern jurisprudence. As with *riba, ghubn* focuses upon substantive unfairness. *Ghubun* has been determined as "buying something for more or less than the cost that it is settled and known between people in the community".[51] This suggests that an allusion to the market place price is a key feature of such discussions. Within Malikya, a contract is null if the complainant was ignorant of the real price or if the other contractual party informed him/her of the selling price.[52]

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[50] *Riba* refers to "all kinds of excesses above the value of a thing." See Masudul Alam Choudhury and Uzir Abdul Malik, *The Foundation of Islamic Political Economy* (Palgrave Macmillan 1992) 103.
Riba reflects the general value of Islamic law, which upholds the principle that contracts must reflect the equilibrium of countervalues. Any contract that lacks this equilibrium must contain elements of *riba* and can, by virtue of this feature, be declared invalid. However, values do not need to be equivalent but must instead be fair. Fairness is achieved where the values exchanged are reasonably proportionate. While this acknowledges substantive unconscionability, it should be recognised that this does not, in itself, extend recognition to any of the other elements of unconscionability. See: Hideyuki Shimizu, *Philosophy of the Islamic Law of Contract* (The Institution of Middle East Studies 1989) 53.

[51] Abu Adu Allah Al-Fasi, *al-Itkan wa al-Ihkam Sharh Tuhfat al-Hukkam fi Nukat al-Ukud wa al-Ahkam* (vol ii, Cairo: Dar al-Hadeeth 2011) 94.

[52] Ibid.

Based on this definition, *ghubn* recognises unconscionable conduct and the serious disadvantage elements.

Ghubn recognises the unconscionable conduct of the enforcer when its application is conditioned upon the requirement that the enforcer informed the complainant of the unconscionable price. This indicates that one of the core issues in *ghubn* is the quality of the enforcer's conduct, because informing the complainant of a price that is unconscionable entails either misrepresentation or deception.

Ghubn, also recognises the serious disadvantage element in requiring that the complainant was ignorant of the real price. Some scholars maintain that the central issue is the complainant's ignorance and the trust that he/she invests in the other party.[53]

In more detail, three requirements for the application of *ghubn* are determined: firstly, the claim should be issued within a year from the contract formation time; secondly, the complainant must be ignorant of the price of the counter-values exchanged; thirdly, the substantive unconscionability or *ghubn* must account for one-third or more of the market value.[54] If these requirements are met, the contract is rendered null.

However, some Islamic scholars have suggested that the contract might be upheld if, in instances where the paid price was less than the market price, the enforcer offered to complete the unfair price (e.g. increasing to meet the market price).[55] This solution is especially important in situations where the contract subject-matter has already been consumed and cannot be returned. This,

[53] Ibid.
[54] ibid 95.
[55] Ibid referring to al-Meknasi judge.

furthermore, establishes a clear resemblance with unconscionability as specified in the Libyan Civil Code.

While *Ghubn* provides a clear application of unconscionability in Islamic law it has three main limitations that significantly disadvantage it. Firstly, *ghubn* appears to be restricted to the price element in contracts. This seems to be the case because literature does not reference any other terms in contracts that might be tainted by *ghubn;* secondly, rules of *ghubn* are mentioned in contracts of sale and are not extended to other contracts. This may be read as indicating a preference to restrict this rule to sales. However, in debates among Islamic scholars that pertain to rules other than *ghubn*, it has been established that contracts of sale are the typical type of contracts. They are "the one on which other contracts are modelled."[56] By logical extension, its rules are applicable to all other types of contracts. Adopting this understanding would extend the application of *Ghubun* to contracts other than sales; third, the content of the *ghubn* rule clearly indicates that its application is limited to instances in which the complainant is afflicted by ignorance. It does not extend to any other type of weakness or disadvantage that the complainant may incur. *Ghubn* is also limited to specific situations in which the enforcer takes active action in circumstances where the complainant misunderstood or is ignorant of the actual price.

Ghubn, as just explained, presents a case of unconscionability in terms that are similar to unconscionability in the Libyan Civil Code. However, under Islamic

[56] Nabil A Saleh, *Unlawful gain and legitimate Profit in Islamic law* (Cambridge University Press 1986) 50. For further insight, refer to Shimizu who clarifies that contract of sale is defined as "the delivery of a definite object which possesses legal value in exchange for something 'equivalent' in value." Shimizu also clarifies how the contract of sale in Islamic law has exerted a formative influence upon the Islamic law of contracts. He observes: "[T]he various categories of contracts have been evolved into a sale contract. [F]or example, the contract of hire (ijara) is also a sort of sale, because it is an exchange between labor and remuneration." See Shimizu (n 50) 55.

law it is limited to ignorance, with this being the single disadvantage under which the rule is applied. This condition requires that the enforcer informed the other party of the wrong price. Just as in English law, this implies the recognition of an unconscionable conduct.

2.5.2 Gharar

Gharar is also concerned with substantive unfairness in contracts. Therefore *gharar* could be placed within *riba*. *Gharar* is generally recognised as a rule that is concerned with "protecting human beings from their own folly and extravagance."[57] Upon this basis, it can be argued that its key rationale is the protection of the complainant.

With regard to its determination, "[t]he literal meaning of the word *gharar* is fraud (*al-khida'a*), but in transaction the word has often been used to mean risk, uncertainty and hazard."[58] This uncertainty or hazard might be attached to the contract subject-matter, the price or any other material term in the contract.[59] It will therefore be noted that *gharar* presents protection from risks of uncertainty that may affect any of the aforementioned aspects of a contract. Here again, while the *gharar* rules are conceived with reference to sales, they are applicable to all types of contracts.[60]

In the view of Islamic scholars, even those from outside the Malikya School, there are three views of *gharar.* The first view mirrors the traditional understanding of *gharar.* It refers to *gharar* in terms of a "sale that consists of doubt about the existence of its subject matter".[61] It should be noted that this

[57] Saleh (n 56) 49.
[58] Mohammad Hashim Kamali, *Islamic Commercial Law* (The Islamic Texts Society 2000) 84.
[59] Saleh (n 56) 50; Kamali (n 58) 85.
[60] Refer to (text to n 51-56).
[61] Kamali (n 58).

view is limited to situations in which there are doubts with regard to the existence of the contract subject matter. There is nothing in this understanding that connects *gharar* to unconscionability.

A second view maintains that *gharar* involves ignorance of the material attributes of the subject matter.[62] This, rather than doubt about its availability and existence, is the preponderant preoccupation. A third perspective combines both of the two preceding contributions to determine that *gharar* is a situation that includes "both ignorance of the material attributes of the subject matter of a sale, and also uncertainty regarding its availability and existence."[63] From this perspective, *gharar* refers to any situation in which "a contract or transaction exists when its consequences [cannot] be foreseen [by] the contracting parties."[64]

The second and third interpretations of *gharar* are, to some extent, the ones that most concern us in the current analysis of unconscionability, because they appear to provide the clearest application of the doctrine. Malikya recognised this when it engaged with the contribution of Ibn Rushd, the prominent Maliki scholar. According to Ibn Rushd:

> *Gharar* in sale transactions causes the buyer to suffer damage (*ghubn*) [substantive unconscionability] and is the result of a want of knowledge (*jahl*) which affects either the price or the subject-matter. *Gharar* is averted if both the price and the subject-matter are known to be in existence, if their characteristics are known, if their amount is determined, if the parties

[62] Ibid 84.
[63] Ibid 84-85.
[64] Ibid.

have such control over them as to make sure that the exchange shall take place and, finally if the date of future performance, if any, is defined.[65]

In cases where there is a lack of knowledge of the attributes of the subject-matter or price combines with substantive unfairness, a case of *gharar* is established. This rule essentially establishes that, in valid contracts, both parties should be acquainted with the contract, which indicates that relational equality is required. This is embodied in proper knowledge of what both parties are contracting to. In *gharar* this knowledge does not exist and therefore the contract should not be allowed to stand.

This understanding of *gharar* closely resembles the form of unconscionability that applies within California law. Chapter Three of this thesis will explain that the unconscionability test in California law does not focus on the enforcer's knowledge of the weakness of the other party.

The preceding account of *gharar* has similarly strongly emphasised the complainant's knowledge (whether of the price or contractual subject–matter), as opposed to the enforcer's knowledge of the other party's ignorance.

There is a further point of similarity that brings together California law and *gharar*. *Gharar* may render a contract null if it is rendered to an exorbitant extent (*gharar fahish*).[66] This also brings to mind the requirement, which is instituted in both Libyan and English law, that unconscionability must be significant if it is to be effective. It is therefore established that an effective

[65] Saleh (n 56) 52. Hassan observes that Malik defines *gharar* as: "[T]he sale of an object which is not present so that the quality being good or bad is not known to the buyer. These are sales where there is an element of chance." The review of Muwatta and Maliki Law did not find a similar definition, and it therefore appears most likely that the inclusion of the given situations (in which there was ignorance of the attributes of the subject matter) occurred during the period of time that followed Imam Malik's era. See Abdullah Alwi Haji Hassan, in *Sales and Contracts in Early Islamic Commercial Law* (Islamic Research Institute 1986) 47.

[66] Abd Arazzag Al-Sanhori, *The Theory of Obligations* (Lubnan: Dar Ihyaa al-Turath al-Arabi 1952) (author's transaltion).

gharar must: a) be excessive in contrast, a slight *gharar* has no legal effect; b) be in cumulative contracts (and is therefore not applicable in gifts;[67] c) directly affect the subject-matter of contracts.[68] Finally, it is also the case that those concerned with the disputed contract should not be in need of contracting[69] (this applies because *gharar* has no effect in situations where parties were in a situation of need or necessity) which is contrary to the situation in English and California law, where necessity triggers a suspicion that the complainant had no choice other than contracting, which is a sign of oppression.

The identification of each of these conditions does not, however, help to answer the question of how an exorbitant extent of *gharar* can be determined. The answer in this instance closely resembles the one that was provided in response to the question that is usually asked in the context of substantive unconscionability, namely what degree is required for its establishment (this question is also raised in California and English laws).

A starting point is provided by the insight that minor *gharar* is "that which is found in nearly all contracts but does not feature prominently therein, whereas excessive *gharar* is that which overwhelms and dominates a contract or transaction to the extent that it becomes a salient feature thereof."[70] This is roughly equivalent to the 'shock to the conscience' that modern laws require to sustain substantive unconscionability.

Furthermore, it has been submitted that it is "not feasible to give precise definitions of what is excessive as opposed to what may be said to be minor

[67] Kamali (n 58) 85; Saleh (n 56) 56.
[68] This condition applies to a situation in which the contract subject-matter becomes attached to another object. For instance, in the sale of a pregnant cow, the affected subject matter would be the cow and not its unborn calf. See Kamali (n 58) 85.
[69] Ibid.
[70] Ibid 88.

gharar. This is particularly due to the circumstantial aspect of *gharar,* which may be seen as excessive and unacceptable in a certain setting but judged differently under different circumstances." [71] This brings out other clear resemblances between *gharar* and unconscionability, specifically, its dependency upon circumstances of each individual case, customs and social conditions within each community.

One final point, which takes into account *ghubn*, *gharar* and even the aider concept of *riba,* needs to be addressed. It is noted that all of these rules are substantive-unfairness based. While this may create doubts that risks in commercial transactions are not allowed in Islamic law, they are ultimately without foundation. The risk that is prevented in Islamic law pertains to the danger of *riba,* ghubn or gharar. This applies because, in such situations, injustice and inequity results from the contract itself. Saleh accurately explains this point:

> Sharia [Islamic law] concedes risk from 'the without' i.e. risk generated by financial and commercial factors and elements extrinsic to the formation of the transaction, namely 'business risk', whereas risk from 'the within' i.e. risk accompanying the inception of the transactions penalized.[72]

It is accordingly the case that contracting parties are allowed to include risks that are extrinsic to their contracts. This applies as long as they are sufficiently equipped with the knowledge that is required to conduct their contracts.[73] This clearly reiterates that Islamic law is concerned with protecting contracting parties and addressing issues of fairness.

[71] Ibid.
[72] Saleh (n 56) 64.
[73] Ibid.

It is now necessary to reiterate the points that have been made with regard to similarities between Malikya law and unconscionability. Firstly, it appears appropriate to exclude *riba* from the analysis of unconscionability, because *riba* focuses on the substantive part of unconscionability; furthermore, there is no authority within any of the examined jurisdictions that permits unconscionability to be applied only upon a substantive basis.

This leads to the question of how it has been established that unconscionability resembles rules of *ghubn* and *gharar* in key respects. It has already been noted that *ghubn* closely resembles unconscionability in its limited application to cases in which there has been unconscionable conduct by the enforcer. This refers to instances in which incorrect information about the price has been given to the other party. which might be addressed as an unconscionable conduct in English law as will be elaborated in Chapter Three. This establishes that the Islamic rule of *ghubn* is akin to unconscionability in English law but considerably more limited, because English law recognises other forms of unconscionable conduct in this respect.

With regard to *gharar*, it has been noted that it closely resembles substantive unconscionability in its requirement that an excessive degree of *ghubn* should be present for the rule to be applied.

Its emphasis upon the knowledge element closely resembles unconscionability under California law as will be explained in the next chapter, as both *gharar* and unconscionability in California law are concerned with the complainant's knowledge of the *contract* attributes (as opposed to the enforcer's knowledge of the complainant's weakness or disability in English law).

It has also been acknowledged that the application of *gharar* in Islamic law is somewhat limited just as unconscionability in Libyan Civil Code.

When these limitations of *ghubn* and *gharar* are registered, they may be assumed to imply that Islamic law falls short in dealing with unconscionable bargains. However, Islamic law adopts other rules that are effective to deal with some situations of unconscionable bargains. Firstly, it is important to note that the presence of *riba* within Islamic law is intended to cover unjustified profits gained in contracts. This, it should be noted, provides considerable insurance to the government of substantive unconscionability – this is especially so by virtue of the fact that its application does not require evidence of procedural defects in contracts to be present. However, it should be noted that the fact that *riba* only governs consideration considerably decreases its effectiveness.

Secondly, Malikya recognises Intoxication as a case of incapacity that renders a contract void. [74] Intoxication might be considered a type of serious disadvantage under unconscionability in English law. Upon these grounds, contracts by intoxicated people are held to be void in Islamic law, and voidable in English law if the other requirements of unconscionability are met.

Thirdly, the main concern of Islamic contract law is "that no party should be allowed to suffer any undue burden from a given transaction when it is possible with extra care and proper investigation to dispel all risks of *riba* and *gharar*".[75] This emphasises that the general concern of the Islamic legal system is to institute and uphold equality, fairness and justice. It is difficult, or even impossible, to sustain the claim that a system underpinned by these values will fail to provide solutions to unconscionable bargains.

[74] Muhammad Rahimuddin (tr), *Muwatta Imam Malik* (SH. Muhammad Ashraf 1980) 364.
[75] Saleh (n 56) 116.

However, while this value reflects the essence of unconscionability, it is hard to allege that when judges resort to Islamic law as a second resource for the Civil Code, they will apply such a rule to nullify a contract, because of its overgenerality that may be seen as resorting to rules of natural law and justice, which are already the fourth resource of Libyan law.

Rules of *ghubun* and *gharar* in Islamic law address its recognition, at a very early stage, of certain situations that are governed in modern laws by unconscionability. However limited situations that both rules may govern uncovers the question of how unconscionable bargains would be addressed in Islamic law in the absence of a broad-reaching doctrine (e.g. that extends beyond cases of ignorance).

It has already been noted above that the main source of Islam is the Holy Quran, which provides a variety of rules that emphasise fairness and the protection of the weaker parties in contracts. *Sunnah* or *hadith* is the second source. It includes the Prophet Muhammad's words and practices and reiterates the same values that are upheld by the Holy Quran and the Islamic legal system as a whole. Most of the rules outlined by Muwatta Imam Malik were mainly derived from *hadith.* By virtue of the fact that these two resources are fixed, it is plausible to argue that unconscionable bargains would be governed via the other resource of *ijtihad*. This includes consensus (*ijma*) and analogy (*qiyas*).

Ijma (consensus), which is the third resource in Islamic law, refers to "the universal and infallible agreement of the Muslim community, especially of

Muslim scholars, on any Islamic principle, at any time."[76] It has previously been presented as a principle of toleration (that is hospitable to different traditions within Islam), a democratic institution and an instrument of reform.[77] By virtue of these positive attributes, it may conceivably provide a solution to cases that fall beyond the scope of *riba, gharar* or *ghubn.*

Qiyas is an "analogical reasoning [that is] applied to the deduction of juridicial principles from the Quran and the Sunnah."[78] Historically, *qiyas* has helped to resolve situations that fall beyond the Holy Quran and the Sunnah, the two main resources of Islam.[79] It has previously been observed that "[*qiyas*] was used to deduce new beliefs and practices on the basis of analogy with past practices and beliefs."[80] It is therefore reasonable to assume that *qiyas* can be applied to cases of *ghubn* or *gharar;* in this respect it would help to include other types of serious disadvantage other than simply ignorance or unconscionable conduct that are not covered by the aforementioned rules.

However, recent developments within the Islamic world, many of which can be traced back to civil wars, suggest the heightened ascendance of those who adopt a literal reading of sources of Islamic law. This has in turn resulted in the strengthening of restrictive approaches and interpretations, as evidenced by the direct contestation of rationales and justifications that do not directly derive from the Quranic text and Sunnah. This may in turn complicate attempts to bring forward an Islamic law solution to unconscionable bargains in traditional and e-

[76] Encyclopedia of Britannica (Encyclopedia Britannica, inc 2015) <https://www.britannica.com/topic/ijma> accessed 2 December 2016.
[77] Ibid.
[78] Encyclopedia of Britannica (Encyclopedia Britannica, inc 2016) <https://www.britannica.com/topic/qiyas> accessed 2 December 2016.
[79] Ibid.
[80] Ibid.

wrap contracts. Any proposed reform of Libyan law must take these developments into account.

As such, it appears to be open to question whether, during the course of future litigation, Islamic law would provide a solution to unconscionable bargains. Moreover, the fact that Libyan law has never been confronted with a situation in which the lack of rules within the Civil Code has compelled it to refer to Islamic law may be presumed to create doubts about the practicality of this expectation.

It is therefore the case that the proposal for the reform of Libyan law appears to be accurate in this regard.

2.6 Conclusion

This chapter has clarified the law of unconscionability in the Libyan Civil Code and, based on the deficiency proved in this law, it was necessarily to investigate whether Islamic law could provide a solution for unconscionable bargains that is more sufficient than the one observed in the Civil Code.

The analysis of Islamic law focused on the Malikya Islamic school of thought, because it is the school that is followed in Libya.

The analysis of Islamic law shows that this law also falls short of addressing unconscionability in traditional contracts let alone e-wraps.

Viewing the deficiency of the current law of unconscionability in Libya, this chapter concludes that there is a need for a reform of Libyan law. To ensure that any proposed reform would overcome the current problems of Libyan law, an investigation of other different approaches to unconscionability is needed.

Therefore, the next chapter compares English and California law approaches to unconscionability.

Chapter Three

Unconscionability in English and California Law

3.1 Introduction

This chapter aims to demonstrate the different approaches to unconscionability in English and California law.

While unconscionability is codified in California the discussion will in fact depend on case law because California Civil Code section 1670.5[1] is vague and does not clarify the test of unconscionability and its elements. It merely clarifies that the test of unconscionability requires considering the prevailing circumstances when the contract was drafted; the effect of finding unconscionable terms ultimately renders them null.[2]

Therefore the analysis in this chapter depends on case law where California courts have adopted a test that is similar to the one utilised in other states when §2-302 of the Uniform Commercial Code is applied; a test that depends on investigating the elements of procedural and substantive unconscionability to nullify unconscionable bargains.[3]

Procedural unconscionability is concerned with "procedural deficiencies in the

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[1] Identical to §2-302 of the Uniform Commercial Code. Enacted in 1979. Hereafter referred to as C.C.1670.5.

[2] C.C. 1670.5 reads as follows: (a) If the court as a matter of law finds the *contract* or *any clause* of the contract to have been *unconscionable at the time it was made* the court may *refuse to enforce the contract,* or it may *enforce the remainder* of the contract without the unconscionable clause, or it may *so limit the application* of any unconscionable clause as to *avoid any unconscionable result.*
(b) When it is *claimed or appears* to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a *reasonable opportunity to present evidence* as to its *commercial setting, purpose,* and *effect* to aid the court in making the determination.

[3] A & M produce Co v FMC Corp (1982) 135 Cal App 3d 473,486, 186 Cal Rptr 114 at [486] citing William v Walker-Thomas Furniture Company (D C Cir 1965) 350 F 2d 445, 449.

contract formation process."[4] It appears as "the manner in which the contract was negotiated and the circumstances of the parties." [5] Procedural unconscionability is further explained as a defect in the process of contract formation, which takes "the form either of deception or a refusal to bargain over contract terms".[6]

Meanwhile substantive unconscionability corresponds to agreements that are "overly harsh or one-sided [in their] allocation of risks or costs [and are] not justified by the circumstances in which the contract was made." [7] Thus, substantive unconscionability focuses upon the fairness of contract substance.[8]

In contrast, English law recognises unconscionability as an equitable remedy and adopts a more detailed approach that identifies three elements for unconscionability. *Alec Lobb* clarifies that:

> [T]hree elements have *almost invariably* been present before the court has made its inference. First, one *party has been at a serious disadvantage* to the other…secondly, this *weakness of one party has been exploited* by the other in some morally culpable manner…thirdly, the resulting transaction has been, not merely hard or improvident, but overreaching and *oppressive*.[9]

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[4] Carboni v Arrospide, 2 Cal App 4th 76 (1991) at [848].
[5] American Software, Inc v Ali, 46 Cal App 4th 1386 (1996) at [1390].
[6] Carboni v Arrospide, 2 Cal App 4th 76 (1991).
[7] Dean Witter Reynolds, Inc v Superior Court, 211 Cal App 3d 758, 769, 259 Cal Rptr 789 (1989) at [768].
[8] Substantive unconscionability is also expressed as terms that are: 'overly harsh' Stirlen v Supercuts, Inc, 51 Cal App 4th 1519 (1997); 'unduly oppressive' Perdue v Crocker Nat'l bank 38 Cal 3d 913 (1985); 'shock the conscience' Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005); California Grocers Assn v Bank of America, 22 Cal App 4th 205 (1994); American Software, Inc v Ali, 46 Cal App 4th 1386 (1996); 'unfairly one-sided' Little v Auto Stiegler, Inc, 130 Cal Rptr 2d 892 (2003); Sanchez v Valencia Holding Co, LLC, 61 Cal 4th 899 (2015) at [748]; 'terms that reflect the lack of mutuality', Bragg v Linden Research, Inc, 487 F Supp 2d 593 (2007) at [607]; Comb v PayPal, Inc, 218 F Supp 2d 1165 (2002) at [1173-74].
[9] *Alec Lobb (Garages) Ltd and Others v Total Oil Great Britain Ltd* [1983] 1 WLR 87 at [94-95]. See also: *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 (Dusangh); *Boustany v Piggott* [1993] 69 P & CR 298, 302-303.

The function of each of these elements shows that the serious disadvantage and the unconscionable conduct components refer to the formation of the contract, therefore relies on procedural unconscionability, while the unconscionable terms references substantive unconscionability.

As English law recognises the same elements as California law,[10] though under different headings,[11] the analysis of unconscionability can be characterised under both procedural and substantive unconscionability.

However, the analysis will show that procedural and substantive unconscionability in English law are different to their counterparts in California law. This is clearly shown in the variation of the conception of exploitation that is usually attached to unconscionability. While exploitation in California law is established solely through the presence of oppression, in English law it requires the existence of both serious disadvantage and unconscionable conduct. Still the fact that the different sets of sub-elements under procedural unconscionability in English and California law serve the same function of forming a contract establishing, makes it plausible to classify and compare these sub-elements under the heading of procedural unconscionability.

In addition to procedural and substantive, this chapter recognises other sub-elements herein called complementary elements. Their presence may have a crucial impact on negating or applying the doctrine, however, their absence does not necessarily negate the doctrine application. Moreover, this chapter demonstrate cases in which the presence of some of the unconscionability elements raise a presumption of the rest.

[10] In English law Lord Brightman explicitly recognises and explains procedural and substantive contractual unfairness in *Hart v O'Connor* [1985] 2 All ER 880 at [887].
[11] *Alec Lobb (Garages) Ltd and Others v Total Oil Great Britain Ltd* [1983] 1 WLR 87 at [94-95].

For reasons of space the focus in this chapter is on the way in which the procedural and substantive interact to produce a case of unconscionability with special focus on presumed unconscionability, because in English law this is the aspect of the doctrine that shows how the elements function together. In California law, presumed unconscionability is the aspect that shows how adhesion contracts may facilitate the application of unconscionability which may in turn ease its application in e-wraps as they are mainly adhesion contracts.

However in order to put these topics in context, a brief account of these elements which in turn stresses differences between both jurisdictions that demonstrate what is recognised in this thesis as party-oriented and contract-oriented approaches to unconscionability. The object reference of the former is the contractual party while the latter approaches the object reference in contractual terms.

This chapter concludes that the recognised approaches adopted for unconscionability in each jurisdiction is the main reason of the variation in the content of the elements of unconscionability. It notes that while English law is more concerned with contractual parties (party-oriented approach), California law is more concerned with contracting terms (contract-oriented approach).

3.2 Procedural Unconscionability

Serious disadvantage and unconscionable conduct present procedural unconscionability in English law. In contrast, in California law procedural unconscionability comprises oppression and surprise. [12]

[12] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [486]. Affirmed and followed in several cases see for example: Patterson v ITT Consumer Financial Corp, 14 Cal App 4th 1659 (1993).

When these elements are viewed in an attempt to conduct a comparison, serious disadvantage appears closer to oppression while the unconscionable conduct element is closer to surprise.

3.2.1 Serious Disadvantage and Oppression

Serious disadvantage in English law implies that one of the contractual parties suffers a 'disadvantage' or 'special disability', [13] or more than one type of disadvantage.[14] Serious disadvantage is an open ended element that is subject of development[15] and may include ignorance, poverty,[16] lack of advice[17] age,[18] mental disability,[19] drunkenness,[20] emotional distress,[21] lack of information or experience[22] and general distress or constraint[23] or "otherwise".[24] Therefore, the list of possible disadvantages is unlimited and any type of disadvantage that may impair the complainant's ability to protect his/her interests might be considered a serious disadvantage. Hence, this element is not concerned with protecting a party from the folly of his/her actions or from contracts that were

[13] Chen-Wishart uses the expression 'special disability'. Mindy Chen-Wishart, *Unconscionable Bargains* (Butterworths, Wellington 1989).
[14] *Dunnage* involved mental imbecility, intoxication, and extreme ignorance of the heir at law and lack of understanding. *Dunnage v White* [1818] 37 Eng Rep 25 1557-1865. *Hartog* involved mental infirmity; the vendor's age and the desire to obtain a quick sale were the types of disability that were considered. *Hartog v Colin & Shields* [1939] 3 All ER 566. See also: *Ayres v Hazelgrow* [1982] unreported 1982/NJ/1003 (QB) (Russell J). Source pages are not numbered. In *Clark v Malpas* the complainant was poor, ill and lacked education. *Clark v Malpas* [1862] 4 De GF & J 401, 45 ER 1238.
[15] *Backhouse v Backhouse* [1978] 1 WLR 243 at [251].
[16] *Clark v Malpas* [1862] 4 De GF & J 401, 45 ER 1238; *Haygarth v Wearing* [1871] LR 12 Eq 320; *Evans & Ors v Lloyd &Anor* [2013] at [48] (Keyser J).
[17] *Errington v Martell-Wilson* [1980] Lexis Citation 591.
[18] *Filmer v Gott* [1774] 2 Eng Rep 156 1694-1865; *O'Rorke v Bolingbroke* [1877] 2 App Cas 814; *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at [110]; *Schroeder Music Publishing co v Macauley* [1974] 1 WLR. 1308; *Everitt v Everitt* [1870] LR 10 Eq 405. See also: Robert W Clark, *Inequality of Bargaining Power,* (The Carswell Company Ltd 1987) 50.
[19] *Errington v Martell-Wilson* [1980] Lexis Citation 591.
[20] *Cooke v Clayworth* [1811] 34 Eng Rep 222 1557-1865; *Dunnage v White* [1818] 37 Eng Rep 25 1557-1865.
[21] *Backhouse v Backhouse* [1978] 1 WLR 243.
[22] *Dunnage v White* [1818] 37 Eng Rep 25 1557-1865.
[23] *O'Rorke v John Joseph Bolingbroke* [1877] 2 App Cas 814 at [823] (Lord Hatherley).
[24] *Alec Lobb (Garages) Ltd and Others v Total Oil Great Britain Ltd* [1983] 1 WLR 87 at [94-95]; affirmed in [1985] 1 WLR 173. See also: *Fry v Lane*, [1887] 40 Ch D 312 [319] (Kay J); *Nevill v Snelling* [1880] 15 Ch D 679 at [703] (Denman J).

entered into with 'eyes open'.[25]

The determination of serious disadvantage is subject to judges' discretion as normal disadvantage does not invoke a test of unconscionability. [26] This discretion may rely on: the contracting circumstances; [27] the party's own circumstances;[28] the reasonableness of the complainant's action;[29] evidences;[30] testimonies [31] such as of doctors [32] and solicitors.[33]

Although judges consider the relative position of the parties by comparing the advantages and disadvantages of both contractual parties and the circumstances of the case, [34] individuals, [35] businesses [36] and state owned

[25] *Nesbitt v Berridge* [1863] 55 Eng Rep 111 1829-1865 at [288-289]; *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at [111]. See also: Halsbury's Laws of England/ Misrepresentation, Volume 76 (2013) 4. Undue Influence and other voidable Transactions (1).
[26] *Osmond v Fitzory* [1731] 3 P Wms 129 at [129-130]. See for example: *Alec Lobb (Garages) Ltd and Others v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at [189] (L.J Dunn); *Heathcote v Paignon* [1787] 29 Eng Rep 96 1557-1865 at [174]. See also: Chen-Wishart (n 14) 43.
[27] In *Alec Lobb*, the primary requirement for financial funding was the expansion of the business – upon these grounds that unconscionability was rejected for the absence of a proper form of disability. See *Alec Lobb (Garages) Ltd and Others v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173. In *Mountford* it was observed that: "[the plantiff] was operating his own business but he was living hand to mouth. He is illiterate and, despite that fact that he by no means lacks business acumen, the Court should be concerned, in my view, to offer such a man the protection of this investigation." *Mountford v Callaghan* [1999] Lexis Citation 3124 at [12] (Christopher Moger QC).
[28] In *Bawtree v Watson,* the complainant was heavily in debt. In order to liberate himself from returning to prison he agreed to make a sale of undervalued goods. Therefore, the fact that he had previously been in prison was of crucial importance. *Bawtree v Watson* [1834] 40 Eng Rep 129 1557-1865.
[29] In *Evans v Llewellyn,* the amount of money that was offered to the complainant was not substantial. However, once the party's ongoing circumstances were taken into account, the offer was considered influential. *Evans v Llewellyn* [1787] 1 Cox's Chancery Cases 333, 29 ER 1191 at [340].
[30] In *Harrison v Guest* a conflict of evidence that is related to the mental state of Hunt was observed. *Harrison v Guest* [1855] 43 Eng Rep 1298 1557-1865 at [427].
[31] In *Earl of Chesterfield* different assessments were offered of the plaintiff's state of mind. *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865 at [157]. In *Cooke v Clayworth* three witnesses agreed that the plaintiff was able to contract while one witness testified that he was not. *Cooke v Clayworth* [1811] 34 Eng Rep 222 1557-1865.
[32] *Errington v Martell-Wilson* [1980] Lexis Citation 591; *Ayres v Hazelgrow* [1982] unreported 1982/NJ/1003 (QB) (Russell J). Source pages are not numbered.
[33] *Errington v Martell-Wilson* [1980] Lexis Citation 591.
[34] *Jones* declared that: "[i]n my view the defendants were indeed at a serious disadvantage viz-a viz Mr Tudor Jones [the enforcer]." *Jones v Morgan* [2001] EWCA Civ 995 at [33]. Similarly: *Haygarth v Wearing* [1871] LR 12 Eq 320 at [327]; *Longmate v Leger* [1860] 66 Eng Rep 67 1815-1865 at [163]. See also David Capper, 'The Unconscionable Bargain in the Common Law World', (2010) 126 LQR 403 <login.westlaw.co.uk> accessed 8 May 2014, 403, 403.
[35] See for example: *Cresswell v Potter* [1978] 1 WLR 255.

institutions[37] might be seriously disadvantaged and consequently become complainant parties in unconscionable bargains.

In summary, the category of serious disadvantage in English law is unlimited and its identification depends on the circumstances of each case and judges' discretion. Unconscionability requires serious operational disadvantage, that is the disadvantage that affects the contractual party's ability to protect his/her interests.

Oppression in California law, like serious disadvantage, also emphasises inequality of bargaining power "which results in no real negotiation and an absence of meaningful choice".[38] However, in this law relational inequality is not the result of some form of special disadvantage as in English law, it is the result of the way the terms were presented. Therefore oppression is usually linked to adhesion contracts, because they entail strong inequalities of bargaining power in which the stronger party drafts contractual terms and the other party is not in a position to negotiate them 'take it or leave it'.

This explains why California courts recognise two approaches to the investigation of oppression: in the first courts start by investigating whether the disputed contract is an adhesion contract;[39] in the second courts examine the presence of oppression without any emphasis on the presence of

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[36] *Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd* [1983] 1 WLR 173; *Burmah Oil Co v Bank of Engalnd* [1979] 3 All ER 700.

[37] *The Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) 2016 WL 05930073.

[38] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982). See also: Patterson v ITT Consumer Financial Corp, 14 Cal App 4th 1659 (1993) at [1664]; Dean Witter Reynolds, Inc v Superior Court, 211 Cal App 3d 758, 769, 259 Cal Rptr 789 (1989) at [767].

[39] This adhesiveness approach is generally recognized as an extension of the application of unconscionability in the period prior to 1979, the year when unconscionability was codified. See Graham v Scissor-Tail, Inc 28 Cal 3d 807 (1981). While this case was ultimately resolved in 1981, it was in process prior to 1979 – upon this basis it can be equated with the first approach.

adhesiveness.[40] It is established that both approaches have the same result.[41]

Although the recognition of adhesiveness in some cases is considered sufficient for the recognition of procedural unconscionability,[42] it is submitted that adhesion contracts are generally enforceable unless the disputed contract was proven to be unconscionable or demonstrably fell short of the reasonable expectations of the weaker party.[43] It has also been asserted that adhesiveness should not be equated to oppression, because an undue reliance on adhesiveness would obscure the broader picture of unconscionability.[44]

Consequently, adhesion contracts are not a prerequisite to the determination of unconscionability.[45] Courts therefore tend to investigate oppression even if the disputed contract is an adhesion contract by investigating factors such as inequalities of bargaining power, the presence of market alternatives and the degree of necessity of contracting.

In *Ellis,*[46] for example, inequality of bargaining power was first established by remarking that the contract disputed was between an employee and a corporation (TV station). The court also observed that the employee Ellis moved

[40] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [488]; Patterson v ITT Consumer Financial Corp, 14 Cal App 4th 1659 (1993) at [1664].
[41] Perdue v Crocker Nat'l bank 38 Cal 3d 913 (1985) at [925] approved in Armendariz v Foundation Health Psychcare Servs Inc 99 Cal Rptr 2d 745 (2000). See also Patterson v ITT Consumer Financial Corp, 14 Cal App 4th 1659 (1993) at [1667]; California Grocers Assn v Bank of America, 22 Cal App 4th 205 (1994) at [213]; Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005) at [805].
[42] Nagrampa v MailCoups, Inc, 469 F 3d 1257 1282 (9th Cir 2006) at [32-35]. See also Bragg v Linden Research, Inc, 487 F Supp 2d 593 (2007); Martinez v Master Prot Corp, 118 Cal App 4th 107, 12 Cal Rptr 3d 663, 669 (2004).
[43] Graham v Scissor-Tail, Incc28 Cal 3d 807 (1981) at [820].
[44] Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005) at [1318]. *California Grocers Assn* also stated that: "[t]o speak in terms of 'procedural' unconscionability is to elevate the fact of adhesiveness, which is not per se oppressive, to the same level as 'substantive' unconscionability, thus tending to obscure the real issue." California Grocers Assn v Bank of America, 22 Cal App 4th 205 (1994) at [214].
[45] Harper v Ultimo, 113 Cal App 4th 1402 7 Cal Rptr 3d 418 (2003); Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005) at [805].
[46] Ellis v McKinnon Broadcasting Co, 18 Cal App 4th 1796 (1993).

across the state to work for the station and *had no other job offers*.[47] This lack of alternatives created an "inferior bargaining position."[48] The court then noted that the employment contract was an adhesion one. In conclusion the court found oppression, but it did not limit itself to the observation that the disputed contract was an adhesion contract; rather, the court examined the presence of oppression by highlighting various inequalities of bargaining power (e.g. an individual contracting with a big company, without alternative job opportunities).

Similarly in *Morris,* [49] the court first observed that the complainant was unsophisticated; then that the contract was an adhesion one and signified that the presence of an adhesion contract "heralds the beginning, not the end, of our inquiry into its enforceability."[50] Therefore finding that the complainant was not under immediate pressure to contract and could obtain the merchant credit card services from another source, the court negated the claim of oppression,[51] citing the presence of market alternatives and the lack of a situation of necessity.

The latter case exemplifies what this thesis calls complementary elements, namely: sophistication, necessity and market alternatives. These elements affect a finding of oppression. As demonstrated in *Morris,* the presence of sophistication and market alternatives coupled with the absence of a case of necessity contributed to negating oppression as an element of procedural unconscionability.

While the effect of the complementary elements is not absolute, in other words,

[47] Ibid at [1805].
[48] Ibid (citation omitted).
[49] Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005).
[50] Ibid at [1319] (citation omitted).
[51] Ibid.

they do not necessarily defeat oppression,[52] it is settled that the complementary elements have a general impact on the degree or strength of procedural unconscionability.[53]

In summary, oppression in California law indicates the absence of negotiations and choice. Its test is usually connected to investigations of the presence of adhesion contracts. Proving the presence of market alternatives, sophistication or a situation of necessity might negate this element, however this is not absolute and is left to judges' discretion.

Relational Inequality

Oppression in California law and serious disadvantage in English law meet in the rationale they serve. Both elements function to indicate inequality of bargaining power or 'relational inequality'[54] when they are proved in any disputed contracts.[55] The effect of the presence of this inequality is different in each jurisdiction

In English law the effect of this relational inequality is the absence of an ability to make a rational decision when entering into a contract. In *Clark* a sale was nullified because it was made by an unwell educated elderly man who was

[52] Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006) at [1283]; Villa Milano HomeownersAss'n v IL Davorge, 84 Cal App 4th 819, 827, 102 Cal Rptr 2d 1 (2000) at [5]; Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007) at [583].
[53] Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007) at [583] (citation omitted).
[54] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2nd Ed, Sweet & Maxwell 2012) 16-003.
[55] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [488-489]. See also: Patterson v ITT Consumer Financial Corp, 14 Cal App 4th 1659 (1993) at [1664]; Dean Witter Reynolds, Inc v Superior Court, 211 Cal App 3d 758, 769, 259 Cal Rptr 789 (1989) at [767].
English courts use different expressions to echo inequality of bargaining power that is resulted from serious disadvantage such as 'stronger party' *Earl of Aylesford v Morris* [1873] 8 LR Ch App 484 at [491] (Lord Selborne). Or contractual parties who were not met on 'equal foot. See for example: *Peacock v Evans* [1809] 33 Eng Rep 1079 1557-1865 at [517].

"unable of himself to judge of the precautions to be taken in selling".[56]

Therefore, the complainant in unconscionable bargains is described as "not a *free agent*, and is not *equal to protecting himself*"[57] and serious disadvantage is most likely satisfied whenever there is not an ability to cope "with the individual transaction without independent legal advice." [58]

Accordingly, serious disadvantage tackles the issue of impairment of consent and therefore unconscionability sometimes is determined as "a form of procedural unfairness, namely knowingly taking advantage of impaired consent. Whether the matter be put in terms of impaired consent or some other vulnerability, it is in my view the character of the transaction as unconscionable rather than its legal characterisation that is important." [59] Hence, unconscionability in English law is a vitiating factor.[60]

In California law the effect of the relational inequality is different. *Morris* demonstrates that "[o]ppression refers not only to an absence of power to negotiate the terms of a contract, but also to the absence of reasonable market alternatives",[61] therefore it is about "the ability to obtain goods or services which are subject of parties' contract from others."[62]

Although the key point here is the ability and power of the complainant, it is not, as in English law, about judgment and protecting one's interests. In California it is about the ability to choose contractual terms, therefore, a complainant, in an

[56] *Clark v Malpas* (1862) 4 D F & J 401 at [404].
[57] *Evans v Llewellyn* [1787] 1 Cox's Chancery Cases 333, 29 ER 1191 at [341]. (Kenyon M.R). *Heathcote* establishes this by confirming that: "it must be a distress that destroys free agency." *Heathcote v Paigon* [1787] 29 Eng Rep 96 1557-1865 at [173].
[58] Ibid.
[59] *Evans v Lloyd* [2013] EWHC 1725 (Ch) [2013] 2 P & CR at [52].
[60] See Nicholas Bamforth, 'Unconscionability as a Vitiating Factor' (1995) Lloyds Maritime and Commercial Law Quarterly, 538.
[61] Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005) at [1320].
[62] Kurashige v Indian Dunes, Inc, 200 Cal App 3d 606 (1988) at [614].

unconscionable contract, might be able to reasonably judge that the contract is an unconscionable one, but the fact that alternative terms could not be obtained forced him/her to contract. While the complainant in English law might also not be able to obtain alternative terms, such as in salvage agreements (where service to save or help to save maritime property is rendered),[63] English law has a wider scope than California law due to the recognition of the impairment of consent in unconscionable bargains. Consequently, the absence of legal advice is rarely addressed in California law in contrast to English law. As a result, unconscionability is placed in the California Civil Code under unlawful contracts rather than placing it under vitiating factors.

This shows how English law focuses on the contractual parties while California law focuses on contractual terms. English courts focus on the fact that the vulnerability of the complainant is the reason why he/she took the irrational decision of entering into a contract that is clearly unconscionable (weakness of the acceptor). In California, however, courts focus on the assessment of oppression on the presentation of the unconscionable terms in the dispute contract. This is basically an indication of the opportunism of the offerer, which is assessed through the presentation of the terms rather than his/her actual conduct, because of the contract-oriented approach adopted in California. Therefore, California courts usually start the investigation of oppression by determining whether the contract is an adhesion one or not.

While the approaches of both laws lead to the same result, namely, that the complainant had no choice, the different means of investigating this show the significance of protecting contractual parties in English law, in contrast with the

[63] Jonathan Law (ed), *A Dictionary of Law* (8th edn, Oxford University Press 2015) (online version).

importance given to contracts themselves and the intention of California law to ensure their fairness.

Type of the Test

The investigation of the two issues, serious disadvantage and oppression, seems to be different. It has been alleged that the serious disadvantage test is inherently subjective in character, because it is grounded within the ability of the complainant to make wise decisions.[64] However it is also submitted that the test is not totally subjective, and the general rule of objectivity is still effective.[65]

In contrast, oppression is about the presentation of the terms therefore the oppression test has two forms: one starts by investigating whether the disputed contract is an adhesion or by investigating procedural unconscionability.

Plausibly, the nature of the disability element make it impossible not to resort to a subjective assessment at some point. The assessment depends on judges' discretion.

In *Haygarth*,[66] for example, the state of ignorance of Haygarth, who sold the estate which she had inherited from her brother to his friend, because of his misrepresentation, was proved subjectively. The court observed that she was not motivated by lofty principles, or intention to make a gift to a stranger.[67] The court also observed that "*[s]he seems to have had no idea* that she succeeded

[64] Chen-Wishart (n 14) 50.
[65] *Errington v Martell-Wilson* [1980] Lexis Citation 591. Page numbers is not provided from the resource (Latey J).
[66] *Haygarth v Wearing* [1871] LR 12 Eq 320 at [324].
[67] Ibid.

to anything as his heiress, and did not *know*, probably, that he had anything to leave."[68]

By contrast, in California law, the subjective aspect in the oppression test is not clear, because oppression focuses mostly on the type of the disputed contract and the existence of a realistic alternative choice in the market as a possible factor negating oppression.

Carboni[69] is a rare case in which a subjective sense in investigating oppression could be recognised. This case involved a $4000 note and a deed of trust that carried an interest rate of 200 precent per annum that was due over three months. The court observed that the complainant was under *emotional distress* when he borrowed the money to pay his parents' medical expenses. Clearly, this recognition is subjective in character.

The limited appearance of subjectivity, in addition to the recognition of the objective test under oppression, is a reflection of the contract-oriented approach that has been adopted by California courts. In addition, although the conception of oppression implies the inclusion of an unconscionable conduct of oppressing the complainant to contract, California courts do not dwell on this aspect in their investigation of oppression. This again might be understood as a reflection of the contract-oriented approach.

California law does not recognise unconscionable conduct under surprise either, though surprise implies unconscionable conduct. Meanwhile English law recognises unconscionable conduct as a separate element that is extensively

[68] Ibid (Sir John Wickens V.C) (emphasis added). Similar language of subjectivity can be observed in: *Cooke and Clayworth* [1811] 34 Eng Rep 222 1557-1865; *Errington v Martell-Wilson* [1980] Lexis Citation 591.
[69] Carboni v Arrospide, 2 Cal App 4th 76 (1991).

elaborated in case law.

3.2.2 Unconscionable Conduct and Surprise

An analysis of the unconscionable conduct and surprise elements in English and California respectively, shows that they differ in several ways.

Unconscionable Conduct

Unconscionable conduct (also called fraud) in English law,[70] involves an advantage that was "improvidently obtained" at the expense of the other party.[71]

Earl of Chesterfield observes four species of fraud:[72] 1) actual fraud[73] "Where there is express proof of gross practice or actual imposition."[74] *Haygarth* for example involved a false representation;[75] 2) fraud that appears "from the intrinsic nature and subject of the bargain itself,"[76] is also known as constructive fraud, appears when the contract terms are 'inexplicably unfair'.[77] *Heathcote,*[78] for example concludes that inadequacy of consideration provides a strong evidence of advantage taking of the weaker party;[79] 3) fraud that is presumed

[70] Some judges have noted that the word 'fraud' has been improperly used to describe unconscionable conduct. For example, *Perfect v Lane* [1861] 54 Eng Rep 864 1829-1865 at [202-203]; *Fry v Lane* [1887] 40 Ch D 312 at [324] (Kay J).
[71] *Evans v Llewellin* [1787] 1 Cox's Chancery Cases 333 at [341].
[72] [1750] 28 Eng Rep 82 1557-1865 at [155-156]. Followed with approval by several cases, for example: *Earl of Aylesford v Morris* [1872-73] LR 8 Ch App 484 at [489]; *Nevill v Snelling* [1880] 15 Ch D 679; *Alec Lobb (Garages) Ltd and Others v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173.
[73] [1750] 28 Eng Rep 82 1557-1865 at [155].
[74] Ibid at [145].
[75] *Haygarth v Wearing* [1871] LR 12 Eq 320 at [327]. *Strachan* concluded that the contract had been obtained through undue advantage of necessity and had been furthered through imposition and misrepresentation. *Strachan v Brander* [1759] 28 Eng Rep 701 1557-1865.
[77] Nathan Tamblyn, *The Law of Duress and Necessity: Crime, Tort, Contract* (Routledge 2017) 44.
[78] *Heathcote v Paigot* [1787] 29 Eng Rep 96 1557-1865.
[79] Ibid at [176]. See also: *Baldwin v Rochford*, where the small price that was paid is considered to possibly provide evidence of fraud that had arisen "from the circumstances and nature of the contract." *Baldwin v Rochford* [1799] 95 Eng Rep 589 1378-1865 at [230]. In *Say v Barwick*, a grossly undervalued lease of houses raised the assumption that the complainant "either have acted in total ignorance of the value of his estate, or he must have been *imposed* upon with regard to it." *Say v Barwick* [1812] 35 Eng Rep 76 1557-1865 at [201]. *Dally v Wonham* observed that while there was no imposition or fraud by the defendant, he was sophisticated

from "*the circumstances and condition of the parties contracting*." [80] In *Dunnage* [81] for example, the court acknowledged that the complainant's circumstances (gross ignorance, habitual intoxication and lack of professional advice)[82] was "in itself evidence that advantage was taken of them";[83] 4) fraud that is "mixed cases compounded of all or several species of fraud", [84] such as in expectant heirs' cases.

Consequently, cases of unconscionability, which do not encompass actual fraud always involve presumed fraud that is inferred from parties' circumstances and fraud grounded within the nature of the bargain itself.[85] *Baldwin*[86] is a rare instance in which the court, in addressing oppressive terms, recognised and explained the existence of both actual and presumed fraud. In this case two sailors were awarded a great prize and were unable to receive it, for the reason that they were still on board their ship. They ran into debt, and therefore sent their captain in the expectation that he would advance them part of their shares of the prize. The captain refused and made it clear that if they left the ship they would be regarded as having run away. Being aware of their circumstances, the enforcer offered to buy their shares of the prize.

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enough to know the value of the property. *Dally v Wonham* [1863] 55 Eng Rep 326 1829-1865. In *Portman Building Society,* the transaction was explicable therefore impropriety was rejected. *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221.

[80] [1750] 28 Eng Rep 82 1557-1865 at [155-156].

[81] *Dunnage v White* [1818] 36 ER 329.

[82] Ibid at [151].

[83] Ibid. In *Harrison* the Court of First Instance inferred fraud from the weakness of the complainant . The Court of Appeal later overruled this decision. *Harrison v Guest* [1855] 43 Eng Rep 1298 1557-1865 at [429].

[84] *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865 at [157]. See also: Tamblyn (n 78) 42- 43.

[85] For more insight into the same observation, refer to the comments made by Lord Selborne L.C in *Earl of Aylesford v Morris* [1872-73] LR 8 Ch App 484 at [489]. He explains that catching bargains *always* have two key attributes – fraud presumed from the circumstances of the parties and fraud that derives from the intrinsic character of the bargain. Tmablyn observes that Lord Selborne's suggestion is a new devleopmnet; because viewing the three reports of *Earl of Chesterfield* in which Lord Hardwicke explains the different types of fraud, shows that the word is always used in only one of the three reports. See Tamblyn (n 78) 43- 44.

[86] *Baldwin v Rochford* [1799] 95 Eng Rep 589 1378-1865.

The court acknowledged that: firstly, there was a presumption of fraud that was evidenced in the circumstances of the contract and the value of the shares sold;[87] secondly, there was an actual fraud in the impositions that were made upon the sailors after they had made their situation clear.

Surprise

In California law surprise "involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms."[88] When surprise is expressed with a focus on the enforcer's conduct, it is referred to as a reflection of the "lack of disclosure of material provisions."[89] However, it is more common for courts to address the hidden terms, rather than focusing upon the conduct through which the terms were presented.

Labelling this element 'unfair surprise' indicates that the complainant's reasonable expectations were disappointed.[90] Therefore, in some cases the examination of surprise is summarised by investigating the complainant's reasonable expectations.[91]

Harper, [92] which concerned an adhesion contract to stabilise soil and re-levell a personal pool, referring to terms that limited available damages and remedies to a dissatisfied customer, who cannot, under the established terms, obtain compensation for personal injuries unless the contractual parties agreed to this

[87] Ibid at [229].
[88] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [486] (citation omitted); Perdue v Crocker Nat'l bank 38 Cal 3d 913 (1985) at [927]; Dean Witter Reynolds, Inc v Superior Court, 211 Cal App 3d 758, 769, 259 Cal Rptr 789 (1989) at [767]; Patterson v ITT Consumer Financial Corp, 14 Cal App 4th 1659 (1993) at [1664]; Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007) at [581].
[89] Robison v City of Manteca, 78 Cal App 4th 452 (2000) at [459] (citation omitted).
[90] Graham v Scissor-Tail, Inc [1981] 28 Cal 3d 807; Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005) at [1321].
[91] See for example Harper v Ultimo, 113 Cal App 4th 1402 7 Cal Rptr 3d 418 (2003).
[92] Ibid at [422].

in writing, the court found surprise and observed that "[t]he customer must inevitably receive a nasty shock when he or she discovers that no relief is available…" [93] Here the determination of surprise depended on the disappointment of reasonable expectations.

Unconscionable Conduct and Surprise: Differences

Three differences may be inferred between surprise and unconscionable conduct, all of which are attributable to the approach adopted in each jurisdiction, whether it is a party-oriented or a contract-oriented approach.

These differences can be summarised thus: the moral character of the unconscionable conduct element in English law; the limitation placed on the types of unconscionable conducts that can be addressed indirectly in California law; and, the type of the test adopted to investigate surprise and unconscionable conduct.

Morality

The moral character of the unconscionable conduct element is absent in surprise. In English law "a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a *morally reprehensible manner*; that is to say, in a way which affects his *conscience*."[94] Fraud is further explained as "an unconscientious use of the power." [95]

The expression 'morally reprehensible' reflects the fact that the unconscionable

[93] Ibid at [422] (emphasis added).
[94] *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at [110] (Wilkinson J). Similarly: *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 WLR 173; *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221; *Jones v Morgan* [2001] EWCA Civ 995, [2001] Lloyd's Rep Bank 323; *Howell Evans & Ors v David Edward Ress Lloyd &Anor* [2013] EWHC 1725 (Ch) at [para 76]. In *Humphreys* the court dismissed the case upon the grounds that the contract had not been imposed in a morally reprehensible manner. *Humphreys v Humphreys* [2004] EWHC 2201(Ch).
[95] *Earl of Aylesford v Morris* [1873] 8 LR Ch App 484 at [490-91].

conduct is connected to both the court and the enforcer's conscience. Capper argues that English law by this requirement sets a high standard that is not recognised in other commonwealth jurisdictions, therefore these jurisdictions are more predisposed to find unconscionable conduct in the passive receipt of benefits as opposed to active acts of abuse that lead to the victimisation of the other party.[96]

Active extortion of benefits involves any actions that may constitute active fraud that impairs the other party's ability to undertake rational judgement. Therefore, in English law unconscionable terms can be exerted through deceit, taking advantage of the other party's mistake,[97] undue influence,[98] pressure created by threat[99] or distress;[100] additional means include undue haste[101] or the creation of improper understanding.[102]

An attempt to identify any active unconscionable conduct in California law under surprise, concludes that California courts are only concerned with one type of conduct, that is, the concealment of unconscionable terms. Even this type of conduct is not clarified in case law.

Furthermore, courts do not pause to address other forms of unconscionable conduct even if they are present in a disputed case. This lack of attention affirms that the doctrine's rationale, under California law, is not to prevent exploitation.

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[96] *Hart v O'Connor* [1985] 2 All ER 880 at [892].
[97] *Nevill v Snelling* [1880] 15 Ch D 679 at [688-689].
[98] Refer to *Bawtree v Watson* [1834] 40 Eng Rep 129 1557-1865; *Baker v Monk* [1864] 55 Eng Rep 430 1829-1865.
[99] *D & C Builders v Rees* [1965] 3 All ER 837.
[100] *Earl of Aylesford v Morris* [1872-73] LR 8 Ch App 484 at [494]; *Barrett v Hartley* [1866] LR 2 Eq 789 at [797].
[101] *Evans v Llewellin* [1787] 1 Cox's Chancery Cases 333 at [341]; *Clark v Malpas* [1862] 4 De GF & J 401, 45 ER 1238. In *Alec Lobb* the enforcer's conduct was described in the following terms – "[he] did not press Mr Lobb for a quick decision and there was no undue haste." *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at [962]. In *Haygarth* the undue haste was rejected because the defendant proposed the contract in August and did not seek to conclude it until October. *Haygarth v Wearing* [1871] LR 12 Eq 320.
[102] *Haygarth v Wearing* [1871] LR 12 Eq 320; *Nevill v Snelling* [1880] 15 Ch D 679 at [698].

For example, *Ilkhchooyi*,[103] which involved a commercial lease of ten years between Rosenblatts and Westar Management. Rosenblatts sold their business to Ilkhchooyi. For Rosenblatts's bankruptcy the lease was terminated. Waster proposed an adhesion new lease and requested IIlkhchooyi's signature. When Ilkhchooyi refused to sign, he was *assured that the new lease is basically as same as the old one*. Consequently Ilkhchooyi signed the lease. On a dispute related to the profit-shifting clause[104] the court found that the clause "was buried in diminutive print in the middle of one of five lengthy paragraphs."[105] At this point the court did not assert that the assurance (that both leases were identical) constituted a deception or misrepresentation.

Similarly, in *Elli*[106] where the employee did not know that he should sign another contract after the oral agreement. However he had been informed that the second contract was a mere formality. The employee overlooked a term at the end of the contract, which established that the written contract superseded any prior agreements. In assessing surprise, the court maintained that Ellis was not aware of the disputed provision without observing any type of deception in the enforcer's conduct. Whether in the failure to explicitly inform Ellis, prior to the oral agreement, that a further (signed) contract would follow the agreement or in affirming that both contracts are identical. Conversely, the court remarked upon the lack of positive steps that had been taken to bring the employee's attention to the disputed terms.

[103] Ilkhchooyi v Best, 37 Cal App 4th 395 (1995).
[104] The profit-clause states that "[S]hould Tenant receive rent or other consideration either initially or over the term of the assignment or sublease, in excess of the minimum rent called for hereunder, or in case of the sublease of a portion of the Premises in excess of such rent fairly allocable to such portion, Tenant shall pay to Landlord as additional rent hereunder, one-half (½) of the excess of each such payment of rent or other consideration received by Tenant promptly after its receipt."
[105] Ilkhchooyi v Best, 37 Cal App 4th 395 (1995) at [410].
[106] Ellis v McKinnon Broadcasting Co, 18 Cal App 4th 1796 (1993).

A & M is a rare instance in which the unconscionable conduct was explicitly acknowledged when the court voiced a clear suspicion that the seller intentionally buried the terms with a view to ensuring a lack of awareness on the part of the buyer. [107]

The general absence of referencing unconscionable conduct in California case law; coupled with an emphasis on the absence of enforcers' positive steps to bring the unusual terms to the attention of the complainants, makes it possible to argue that unconscionable conduct in California law is always passive. This hypothesis becomes clearer when compared with passive acceptance in English law.

Passive Acceptance

Passive acceptance of benefits in English law implies that the advantages, which result from the other party's disability, are not obtained through an active action.[108] The operation of passive acceptance is conditional upon knowledge or the enforcer's awareness that the advantages gained result from the disability of the other party, in addition to the lack of reasonable steps to defeat the impairment of the other party's consent.

In *Bowes*[109] a moneylender was paid four times the money advanced on the contingency of the borrower, who was entitled in remainder after the death of his two brothers. The enforcer acknowledged that he had been in full knowledge of the brothers' bad health. Passive fraud, serious disadvantage and excessive undervaluing resulted in nullifying the transaction for its

[107] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [490].
[108] *Hart v O'Connor* [1985] 2 All ER 880 at [892].
[109] *Bowes v Heaps* [1814] 35 Eng Rep 423 1557-1865. See also: *Gwynne v Heaton* [1778] 28 Eng Rep 949 1557-1865; *Davies v Cooper* [1840] 41 Eng Rep 373 1557-1865.

unconscionability.

The advantage that is taken through knowledge speaks for itself. If the effectiveness of this type of victimisation is to be offset, the enforcer must demonstrate that they were not aware of the disability; alternatively, they need to undertake a number of corrective steps[110] that mitigate or preclude the impact of knowledge and demonstrate the quality of the enforcer's conscience.[111]

One of these steps is the recommendation of independent legal advice; alternatively, the full disclosure of information pertaining to the unconscionable bargain's content and impact.[112] *Cresswell [113]* exemplifies how disclosure can be applied as a defence. It also demonstrates that the presence of the disclosure qualifies the need to recommend legal advice to the complainant.[114]

While the lack of the enforcer's positive steps to ensure the enforcement of the contract is also addressed in California case law, knowledge is not a factor that needs to be considered. Moreover, the corrective steps are limited to one step, that is, the disclosure of information. This seems to be a result of the contract-oriented approach that is not concerned with the quality of the enforcer's conscience or of the complainant's consent.

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[110] This does not necessarily imply that there is a duty or obligation upon the enforcer to take a specific action. It should instead be conceived as a means through which the contract can be defended. Merriam Webster (an online dictionary) defines 'passive' as 'receiving and enduring without resistance'. These actions should therefore be conceived as a means of confronting the possibility that the contract will be set aside.

[111] *Interfoto Picture Library Limited v Stiletto Visual Programmes Limited* [1987] WL 491981 at [357].

[112] Chen-Wishart (n 14) 83-86. Tunner and Sutton have recognized three ways in which a finding of unfairness can be overcome. These include: 1) allowing sufficient time for consultation; 2) disclosing the information that explains the improvident nature of the transaction; 3) insisting that the complainant should seek legal advice. There is an overlap between each of these points, which obtains to the extent that one can be placed under the other. Alexander Kingcome Turner and Richard John Sutton, *Actionable Non-Disclosure* (Butterworths, London 1990) 646.

[113] *Cresswell v Potter* [1978] 1 WLR 255 at [259].

[114] Ibid (Mergarry J).

In summary, English law identifies various types of conduct that might be considered unconscionable contrary to California law, which does not point out any types of conduct because of its contract-oriented approach. The third difference between California and English law is related to the types of tests.

Types of Test

The third difference between surprise and unconscionable conduct is in the types of test adopted. While the English law test of unconscionable conduct seems to be subjective, California adopted an objective test for surprise.

California Courts do not concern themselves with the complainant 's subjective reading of the contract; rather, they focus on the clarity of the terms. Therefore in *Gutierrez* surprise was found, because the arbitration clause was "inconspicuous [and] printed in eight-point typeface on the opposite side of the signature page of the lease."[115] On the contrary surprise was negated in *Boghos*[116] because the arbitration clause was situated beneath a clear heading and was written in bold font. The objectivity of the surprise test derives from the fact that California courts are concerned with contractual terms rather than contractual parties.

By contrast, English law seems to encourage the subjective test when the assessment of the conduct relates to the enforcer's knowledge. It can also be argued that English law's emphasis on the moral dimension of the conduct (morally reprehensible conduct) underlines the subjectivity of this test.

[115] Gutierrez v Autowest, Inc, 114 Cal App 4th 77 (2003) at [276]. For other cases with similar reasoning see: A & M Produce Co v FMC Corp135 Cal App 3d 473 (1982) at [491]; Higgins v Superior Court, 140 Cal App 4th 1238, 45 Cal Rptr 3d 293, 297 (2006) at [297]; Net Global Marketing, Inc v Dialtone, Inc, 217 Fed Appx 598 (2007) at [601].
[116] Boghos v Certain Underwriters at Lloyd's of London, 36 Cal 4th 495, 30 Cal Rptr 3d 787, 115 P 3d 68, 70 (2005).

Moreover, the unconscionable conduct connection to the standard of shocking the conscience indicates the subjectivity of the test. In *Portman Building Society* the rejection of unconscionability was justified by the lack of shock that had been incurred by the conscience of both the court and the enforcer. [117]

To sum up, this section explored how surprise in California law can be viewed as a parallel with the unconscionable conduct element in English law. It clarified that while surprise focuses on the presentation of unusual elements, it also indirectly suggests the enforcer's misrepresentation. It concludes that both elements are different in their scopes and in the type of test that is objective in California and subjective in English law. All these attributes were viewed as a consequence of the preference of a party-oriented or a contract-oriented approach.

3.3 Substantive Unconscionability

This part of unconscionability is addressed in English law under the unconscionable terms element and provides one of the rare instances in which points of similarity between English and California law are more marked than their differences. The reason for this is that the scope of this element is ultimately contract terms which cannot be altered for one of contracting parties, therefore the effect of the party-oriented approach is not as clear as in procedural unconscionability. Still, there are some differences between both jurisdictions as it will be discussed next.

[117] *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221 at [236]. See also: *Jones v Morgan* [2001] EWCA Civ 995 at [35].

3.3.1 Similarities

There is no acknowledged definition of 'substantive unconscionability'.[118] However, it refers to grossly unfair terms that cannot be justified by the contract circumstances.[119]

Accordingly, a lack of justification at the time of the contract agreement is a prerequisite for a finding of substantive unconscionability.[120] Absence of justification is addressed in English law by describing unconscionable terms as 'inexplicable' or 'terms that cry out for explanation'.[121] English law does not clarify exactly when unconscionable terms are explicable; California law provides further determination by addressing this point under so called 'business reality'. In California terms, which favour the enforcer, these are acceptable insofar as they are justified by 'business reality'.[122] Business reality refers to legitimate commercial needs that negate the unconscionability of the terms disputed.[123] To be accepted this justification must be explicitly mentioned in the disputed contract or established via the facts of the case.[124] Therefore in *Stirlen*,[125] the court rejected a motion to compel arbitration because of the lack of justification.[126]

California courts explain substantive unconscionability as being substantive in

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[118] Kurashige v Indian Dunes, Inc, 200 Cal App 3d 606 (1988) at [613].
[119] Dean Witter Reynolds, Inc v Superior Court, 211 Cal App 3d 758, 769, 259 Cal Rptr 789 (1989) at [768].
[120] Appalachian Ins Co v McDonnell Douglas Corp, 214 Cal App 3d 1 (1989) at [23]; A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [487]; Vance v Villa Park Mobilehome Estates, 36 Cal App 4th 698 (1995) at [730].
[121] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [152] (Millett LJ).
[122] Flores v Transamerica HomeFirst, Inc, 93 Cal App 4th 846 (2001); Gutierrez v Autowest, Inc, 114 Cal App 4th 77 (2003); Rivera v American General Financial Services, Inc, 150 N M 398 (2011).
[123] Stirlen v Supercuts, Inc, 51 Cal App 4th 1519 (1997) at [1536].
[124] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [493]; Flores v Transamerica HomeFirst, Inc, 93 Cal App 4th 846 (2001) at [383].
[125] Stirlen v Supercuts, Inc, 51 Cal App 4th 1519 (1997).
[126] Ibid at [1537].

terms of a 'reallocation of risks'[127] that considerably favours the enforcer and which lacks the support of a sufficiently robust justification.

California cases demonstrate that unconscionable terms are not restricted to one specific type,[128] because unconscionable terms "may take various forms, but may generally be described as unfairly one-sided."[129] However in English law the existence of the fairness test in the Consumer Rights Act 2015, which is similar to the unconscionability test has reduced chances to observe various types of unconscionable terms of unconscionability cases. The similarties between both tests prove this observation.

Firstly, Part 2 of the Consumer Rights Act declares that unfair terms in consumer contracts do not bind consumers.[130] The same rule applies to an unfair consumer notice.[131] This remedy is the same as the unconscionability remedy.

Secondly, the Act determines that a term is unfair "if, *contrary to the requirement of good faith, it causes a significant imbalance* in the parties' rights and obligations under the contract to the detriment of the consumer."[132] Taking

[127] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [487]. This view is based on the study of John E Murray, 'Unconscionability: Unconscionability' (1969) 31 (1) University of Pittsburgh 1, 12-23. It seems that the use of the expression 'reallocation' is to refer to a reallocation of risks from an objective reasonable contract.
[128] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [484]. *Carboni* which addressed a high interest rate in a loan agreement, provides a relevant example. Carboni v Arrospide, 2 Cal App 4th 76 (1991). See also: Washington Mutual Bank which was concerned with choice of law clause. Washington Mutual Bank, FA v Superior Court, 24 Cal 4th 906 (2001); *City of Santa Barbara* addressed waivers of liability provision. City of Santa Barbara v Superior Court, 41 Cal 4th 747 (2007); *Moreno* addressed provision for statutes of limitation Moreno v Sanchez, 106 Cal App 4th 1415 (2003); *Morris* engaged with the price term. Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005).
[129] Walnut Producers of California v Diamond Foods, Inc, 187 Cal App 4th 634 (2010) at [645].
[130] Section 62(2) of the Consumer Rights Act 2015 reads as follows: "An unfair consumer notice is not binding on the consumer."
[131] Section 62(3) of the Consumer Rights Act 2015. A notice, according to section 61(8), "includes an announcement, whether or not in writing, and any other communication or purported communication."
[132] Section 62(4) of the Consumer Rights Act 2015. The same type of test is applicable to consumer notice according to section 62(6) of the Act.

into account the fact that good faith is concerned with the quality of action (something that is in common with unconscionability which heavily relies in its test on conscience considerations), it can be argued that the test of 'significant imbalance' is related to the substantive part of unconscionability[133] while the incompatibility requirement is related to the procedural part of unconscionability. In further advancing this interpretation, Lord Steyn notes that there is a "large area of overlap between the concepts of good faith and significant imbalance."[134]

Thirdly, the Act determines the process through which the assessment of the fariness of terms should be conducted. It holds that the nature of the contract subject should be considered; in addition to referencing all the circumstances that existed during the contracting time.[135] This reliance on the context and surrounding circumstances in which the contract was formed shows a resemblance to unconscionability.

Fourthly, the case of *Director General of Fair Trading*[136] determines that, in the unfairness test, good faith "is one of fair and open dealing."[137] The court proceeds to clarify that "[o]penness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer."[138] This demonstrates that the enforcer should provide the material information of the contract, in addition to ensuring clear terms without

[133] This is further reiterated by the fact that the Act requires this imbalance to be significant to apply the unfairness test. See *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117, [2010] 3 All ER 519 at [21].
[134] *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117, [2010] 3 All ER 519 at [21].
[135] The same rule regarding the process of the test is applicable to consumer notice too according to section 62(7) of the Act.
[136] *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 A.C. 481
[137] Ibid at [17].
[138] Ibid.

traps and the salient appearance of important terms. This last requirement can be understood to include terms that are inexplicable or suspicious. Again resemblance to unconscionability test can be noticed here.

Fifthly, the court in *Director General of Fair Trading*[139] further demonstrates that fair dealing "requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations".[140] This meaning echoes the unconscionable conduct that should be subject to the test of unconscionability. It also clarifies the form that the enforcer's conduct should take if it is not to be contrary to good faith. Incompatibility with good faith has been depicted as taking advantage of the other party's disadvantage – in the example provided, these disadvantages are identical to the one observed under the serious disadvantage element of unconscionability. Moreover, the list of possible disadvantages is left open, just as in unconscionability. Each of these overlaps supports the view of this thesis that unconscionability derives from good faith.[141]

While the resemblance of the fairness test of the Consumer Rights Act 2015 to unconscionability has restricted the latter jurisdiction, the price terms remain under the unconscionability jurisdiction. However in cases where the price term is disputed for its unconscionability, English courts tend to assert that the unconscionability test with consideration in contracts does not undermine the general rule that courts should not inquire into the adequacy of price and that

[139] *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 A.C. 481
[140] Ibid at [17].
[141] Refer to Chapter Five (text to notes 115-269).

contracts cannot be nullified for *mere undervaluing*.[142] Thus, the inadequacy of consideration must be considered in relation to other elements to permit courts' intervention in unconscionability cases.[143]

The investigation of substantive unconscionability relies on the time the contract was created.[144] Therefore later changes that affect contractual terms and render them too harsh or oppressive do not count.[145] Furthermore, there is no case of relief for unconscionability in either jurisdiction without the presence of substantive unfairness[146] and ordinary undervaluing does not count as substantive unconscionability.[147]

To sum up, substantive unconscionability in English and California law meet in several aspects such as being: assessed at contracting time; conditional on being significantly unfair and unjustified and the possibility of targeting different types of terms. Nonetheless, differences can also be observed.

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[142] *How v Weldon* [1754] 28 Eng Rep 330 1557-1865 at [518]; *Gibson v Jeyes* [1801] 6 Ves 266 at [273–274] (Lord Eldon); *Griffith v Spratley* [1787] 1 Cox Eq Cas 383 at [387]; *Naylor v Winch* [1824] 1 Sim & St 555 at [565]; *Harrison v Guest* [1860] 8 HL Cas 481 at [481]; *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 [445]; *Hart v O'Connor* [1985] 2 All ER 880 at [887].
Clark suggests that the following statement is more representative of the real position of equity courts:"[I]f there be a fair and bone fide consideration the court will not enter minutely into it and see that it is full and ample." Robert W Clark, *Inequality of Bargaining Power,* (The Carswell Company Ltd 1987) 41, citing *Grogan v Cooke* 2 Ball & B. 234; L A Sheridan, *Fraud in Equity,* (London, Sir Isaac Pitman 1957) 128.

[143] *Earl of Aylesford v Morris* [1873] 8 LR Ch App 484 at [490]; *O'Rorke v John Joseph Bolingbroke* [1877] 2 App Cas 814 at [828- 829]; *Fry v Lane* [1887] 40 Ch D 312; *Whittet v Bush* [1888] 40 ChD 312 at [324].

[144] *Strydom v Vendside* [2009] 6 Costs LR 886 at [39].

[145] *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at [85] (Wilkinson J).

[146] In *How v Weldon,* Sir Thomas Clarke M.R observed that the unconscionable term "is *very material ingredient,* and, with other things, will go [a] great way towards it." *How v Weldon* [1754] 28 Eng Rep 330 1557-1865 at [518] (emphasis added).

[147] *Gwynne v Heaton* [1778] 28 Eng Rep 949 1557-1865 at [9] (Lord Thurlow); *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at [110]; *Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd* [1983] 1 WLR 87 at [95]. Clark (n 143) 43.

3.3.2 Differences

There are some points of difference between substantive unconscionability in English and California law, namely in the type of test, the evidential value of substantive unconscionability, the level of determination of substantive unconscionability and in observing different degrees of substantive unconscionability.

Type of Test

With regard to the type of substantive unconscionability test, it has been suggested that it can be objective and/or subjective.[148] It is certain that both jurisdictions adopt the objective test of substantive unconscionability. This is clearly demonstrated in: courts' resort to the fair market value or price to assess the adequacy of contract terms;[149] courts' consideration of the commercial settings of the disputed contracts;[150] and the justification of business reality.[151] Additionally, the circumstances of the case may indicate substantive unconscionability such as in cases where the bargain was hawked about and rejected in the market.[152] *Singla* takes this position a step further by providing that any evidence that the complainant would have been unsuccessful if he/she had tried to obtain better terms is sufficient to consider the terms unconscionable.[153] This view might be questionable on the ground that such an instance might be understood as an indication of a lack of alternatives rather

[148] *Multiservice Bookbinding* demonstrated that "to establish that a term is unfair and unconscionable it is not enough to show that it is, *objectively*, unreasonable." *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 [182-183] (emphasis added). Cited with approval in *Alec Lobb (Garages) Ltd and Others v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173. See also Chen-Wishart (n 14) 51-56.
[149] See for example: Carboni v Arrospide, 2 Cal App 4th 76 (1991) at [84].
[150] Chen-Wishart (n 14) 52-53.
[151] Kurashige v Indian Dunes, Inc, 200 Cal App 3d 606 (1988) at [613].
[152] See for example: *Earl of Aylesford v Morris* [1872-73] LR 8 Ch App 484 at [479]; *Jones v Morgan* [2001] EWCA Civ 995 at [39]. However overruled by the court of appeal.
[153] *Singla v Bashir* [2002] EWHC 883 (Ch) at [29].

than of the unconscionability of the terms.

While the subjective test of substantive unconscionability test is not recognised in California law, the matter is not so clear in English law.

Presumably, subjective unfairness is assessed in relation to the particular circumstances of complainants.[154] Thus, a contract might be objectively acceptable in terms of fairness; however, once its improvident impact on the complainant is derived from his/her specific circumstances the contract may be deemed to be unconscionable.

Chen-Wishart provides a detailed explanation of this approach to substantive unfairness by referencing several cases.[155] However, none of the cited cases were English. In addition, the case review for this thesis did not reveal any English cases.

However, *Burch*[156] might be considered an example of a subjective assessment of substantive unconscionability, where Miss Burch guaranteed the debts of the company that she worked for, although she did not have any interest or shares in the company. In addition to the guarantee objective unfairness, it was observed to be subjectively unfair to Miss Burch [157] when the court declared that "Miss Burch committed herself to a personal liability far beyond her slender means, risking the loss of her home and personal bankruptcy, and obtained nothing in return…"[158]

[154] Mindy Chen-Wishart, 'The O'Brien Principle and Substantive Unfairness' (1997) 56 (1) Cambridge Law Journal <http://www.heinonline.org> accessed 1 June 2016, 63.
[155] Chen-Wishart (n 14) 54-56.
[156] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [147-151] (Nourse L.J).
[157] Chen-Wishart (n 14) 63.
[158] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [152-153].

This case provides weak evidence because it was ruled to be undue influence rather than unconscionability. However, the possibility of ruling the case by unconscionability was considered and confirmed in this case.[159]

Consequently, although substantive unconscionability in English case law is usually assessed objectively, [160] it can be argued that substantive unconscionability can be assessed subjectively too. This is consistent with the general approach of English law to unconscionability and some signs in case law that show that courts do consider elements of subjectivity in the assessment of substantive unconscionability.

For example, in *Filmer*[161] a subjective approach can be identified alongside the objective test. In this case, a nephew had purchased an estate worth more than £20,000 for only £1000. His aunt, the seller, was old, bedridden and had not taken any advice. In the assessment of substantive unconscionability, the court first excluded the aunt's affection as a possible explanation for the transaction. This was established through an objective test that examined her will and testimonies. [162] Second, the court, based on witnesses' statements, evidenced that the conveyed property was grossly undervalued. The final stage showed the subjective aspect of the test when the court viewed the circumstances of the complainants and the enforcer and described the transaction as "a bargain that so preposterous in itself, and so greatly to *their* prejudice."[163]

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[159] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [147-151]. Nourse L.J. at [151] stated that "Miss Burch could, directly against the bank, have had the legal charge set aside as an unconscionable bargain."

[160] For example in *Haygarth* the examination of substantive unconscionability was an objective one that was based on witnesses and no assessment in relation to its fairness for the complainant . *Haygarth v Wearing* [1871] LR 12 Eq 320.

[161] *Filmer v Gott* [1774] 2 Eng Rep156 1694-1865.

[162] Ibid at [240-241].

[163] Ibid at [242] (emphasis added).

A further difference between English and California law is in the effect of proving substantive unconscionability on the basis of the existence of other elements of unconscionability.

Evidential Value of Substantive Unconscionability

In English law if unconscionable terms are proven to exist, then they may be taken as evidence of other improprieties in the disputed contract – more specifically, as attesting to a specific disability or fraudulent advantage that has been taken by the enforcer. It has therefore been suggested that in instances when the transactional imbalance is so great a court of equity would be prepared to nullify contracts on grounds of unconscionability.[164] For example, in *Crowe*[165] the price was so outrageously low "that it deserves no other name that of rank fraud."[166] Such cases of presumption will be further elaborated in the following sections.

Determination of Substantive Unconscionability

While in English law there is no precise determination of what can be considered an unconscionable term, because the test of unconscionability is generally a question of justice and fairness, a greater level of determination seems to be achieved in California law.

Although California courts have acknowledged that the substantive element of unconscionability is less easy to explain[167] there are some developed criteria in

[164] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [147-151] (Nourse L.J).
[165] *Crowe v Ballard* [1790] 30 Eng Rep 308 1557-1865.
[166] Ibid at [219]. .
[167] Stirlen v Supercuts, Inc, 51 Cal App 4th 1519 (1997) at [1532]. Similarly: Sanchez v Valencia Holding Co, LLC, 61 Cal 4th 899 (2015) at [824]; Baltazar v Forever 21, Inc, 62 Cal 4th 1237 (2016) at [1243].

some judicial decisions, that provide a degree of clarity to the blurred outlines of substantive unconscionability.

Investigating substantive unconscionability in California is concerned with establishing whether the agreement is one-sided. If the answer is affirmative, the court will proceed to the second step, which breaks down into an investigation of two issues: firstly, whether the one-sidedness was justified; secondly, whether the reallocation of risks in the contract was undertaken in an objectively unreasonable or unexpected manner,[168] that is that the risk has been shifted to the complainant and has been avoided by the enforcer.[169]

These steps of investigating substantive unconscionability test are observed in *Kurashige*,[170] which was concerned with a general release agreement signed by a motorcyclist, who had subsequently been injured in a motorcycle park. The disputed release in capital letters stated that: "Since all motorbike riding is dangerous we require all riders and visitors to assume all risk by signing this general release."[171] This was then followed by 'motorcycling is dangerous' in bold red. Alongside each line of the release there was also a sentence which clearly state 'this is a release'.[172]

The court first asserted that the terms are clearly one-sided, because all the risks had been reallocated to one party. In the second step, the court affirmed the results of the surprise test (earlier conducted), which clarified that the assumed risks were clearly indicated in the agreement and, by implication, that

[168] Kurashige v Indian Dunes, Inc, 200 Cal App 3d 606 (1988) at [613].
[169] Ibid at [614].
[170] Ibid.
[171] Ibid at [609].
[172] Ibid.

the risks were not unexpected.[173] After establishing this, the court proceeded to question whether the reallocation of risks was objectively unreasonable.

Firstly, the court observed that the agreement warned users that motorcycling is dangerous. It then observed that to a certain extent the risk of injury depends on the skills and experience of a motorcycle rider. The court consequently concluded that the risk allocation was not unreasonable.[174]

In this case there was no need to investigate the presence of a justification for the reallocation of risks because it was established that the risk allocation was reasonable. However, in cases such as *Ellis*[175] the justification factor was examined. In this case the court began the substantive unconscionability test by observing that the disputed provision was unusual before noting that it had resulted in an individual employee's forfeiture of substantial income.[176] Then the court reasserted its previous findings on the procedural aspect, noting that the disputed terms were unexpected, unjustified and one-sided. Therefore substantive unconscionability was established.

Other signs of attempts to determine substantive unconscionability in California law are in disputes that are related to arbitration in employment contracts.

The substantive unconscionability test in arbitration requires mutuality and bilaterality to uphold a balance in the arbitration provisions. In addition to this requirement that applies generally in arbitration, the employment context establishes five minimum requirements that must be met in any arbitration of rights to avoid the unconscionability of the contract. These requirements were

[173] Ibid at [614]. The term, which conveyed the risks to the motorcyclist, was clearly presented in red ink, bold type and capital letters.
[174] Ibid at [614-615].
[175] Ellis v McKinnon Broadcasting Co, 18 Cal App 4th 1796 (1993). For the case facts see (text to n 45-47). For further example see: West v Henderson 227 Cal App 3d 1578 (1991).
[176] Ellis v McKinnon Broadcasting Co, 18 Cal App 4th 1796 (1993) at [1804].

first adopted in *Armendariz*, [177] which established lawful arbitration in employment:

> (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.[178]

The recognition of these requirements provides criteria through which the content of substantive unconscionability test can be determined. This means it is possible to determine substantive unconscionability, at least to some extent.

Substantive Unconscionability: Degrees

The last difference between substantive unconscionability in California and English law is in the observation of different degrees of substantive unconscionability in California.

California law recognises different degrees of procedural unconscionability and substantive unconscionability because these elements are on a sliding scale where the stronger that procedural unconscionability is proved the less degree of substantive unconscionability is required to apply unconscionability and vice versa.

Courts maintain that the degree of substantive unconscionability must not be minimised to the extent that bad bargains would be included in the doctrine's scope.[179] The same rule is applied in English law, which requires significance

[177] Armendariz v Foundation Health Psychcare Servs Inc 99 Cal Rptr 2d 745 (2000).
[178] Ibid at [759].
[179] Sanchez v Valencia Holding Co, LLC, 61 Cal 4th 899 (2015) at [821].

imbalance in rights and obligations to apply unconscionability.[180] Nonetheless, English law does not recognise the variation of degrees as in California law.

Thus, substantive unconscionability in California can be situated on a spectrum where at one end substantive unconscionability is situated just above what can be described as a 'bad bargain'. Substantive unconscionability at this end is described as "terms that impair the integrity of the bargaining process."[181] This can be inferred from the submission that substantive unconscionability includes "terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy."[182] As terms that infringe public policy are most likely severely unconscionable, terms that impair contractual integrity would be situated on the other side of the spectrum.

The identification of degrees of substantive unconscionability is problematic, because there is no specific measurement of what term can be considered substantively unconscionable.

Case law establishes that the different expressions used to describe substantive unconscionability (such as 'overly harsh' or 'one-sided terms') are non-exclusive formulations that are used to describe unfairness in terms that fall beyond 'bad bargain'.[183]

Furthermore, "an examination of the case law does not indicate that 'shock the conscience' is a different standard in practice than other formulations or that it is

[180] *The Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch), [2011] ECC 31 at [174].
[181] Sanchez v Valencia Holding Co, LLC, 61 Cal 4th 899 (2015) at [821]. See also *Graham* where the level of substantive unconscionability was expressed as the 'minimum level of integrity' in 'contractual machinery'. Graham v Scissor-Tail, Inc 28 Cal 3d 807 (1981) [825]; *A & M* also referenced *Graham* and clarified that the connection to the integrity examination resembles "substantive unconscionability analysis." A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [488].
[182] Sanchez v Valencia Holding Co, LLC, 61 Cal 4th 899 (2015) at [821].
[183] Ibid.

the one true, authoritative standard for substantive unconscionability, exclusive of all others."[184] Therefore, the conception of 'shock the conscience' does not impose a higher standard than the alternative formulations.[185]

Accordingly, the many expressions used to describe substantive unconscionability are not expressions and all of them have the effect of 'shocking the conscience'. This indicates a level of uncertainty in California law, because it is difficult to determine the degree of substantive unconscionability.[186]

In summary, this section addressed substantive unconscionability in English and California law. It showed that both jurisdictions adopt a similar view of substantively unconscionability. However, both jurisdictions differentiate in: substantive unconscionability types of test; various degrees of substantive unconscionability in California law; criteria for determining substantive unconscionability in California law.

In addition to procedural and substantive unconscionability there are other complementary elements that may affect the test of unconscionability.

3.4 Complementary Elements

Contrary to the essential unconscionability elements, complementary elements are not strictly required to establish the doctrine. However, they are considered elements because their presence or absence significantly affects the test of unconscionability. Their effect in English law is different from California law.

[184] Ibid; Sonic-Calabasas A, Inc v Moreno, 57 Cal 4th 1109 (2013) at [1159].
[185] Sanchez v Valencia Holding Co, LLC, 61 Cal 4th 899 (2015) at [823].
[186] See (text to n 153-161) of this chapter.

In English law the presence of complementary elements may lead to denying unconscionability because it may break the interaction between the essential elements as will be explained later in this chapter.[187] Whereas in California law complementary elements affect the degree of procedural unconscionability and consequently they may disturb the sliding scale, which may lead to negating unconscionability.

These elements in California law are: market alternative, contracting over necessaries and sophistication. While in English law they are knowledge and independent legal advice.

3.4.1 Market Alternatives, Necessity and Sophistication

Generally these elements have been highlighted under the analysis of oppression. Their main feature is that they may affect the degree of procedural unconscionability when they are present. It has been demonstrated through case law that their presence is not always effective and the matter is totally left to judges' discretion.

In *Marin Storage*,[188] for example, procedural unconscionability was limited, because the contractor was sophisticated and experienced in addition to the existence of other market alternatives. However, in *Stirlen* although the complainant was sophisticated, the court remarked that he was governed by business realities and the fact that the disputed contract was an adhesion one, therefore, the court rejected the argument that sophistication defeats procedural

[187] Refer to (text to n 399-404) of this chapter.
[188] Marin Storage & Trucking, Inc v Benco Contracting and Engineering 89 Cal App 4th 1042 (2001).

unconscionability.[189]

In *West*,[190] although the complainant was unsophisticated, the court grounded its rejection of oppression on the fact that the complainant was not in pursuit of life's necessities.

Accordingly, it is impossible to derive specific rules that determine whether a complementary element would be effective or not. This reiterates the fact that the test of unconscionability depends heavily upon the circumstances of each case.[191]

Moreover, it should be acknowledged that the California law complementary elements could be addressed in English law as factors that might be considered by courts to evaluate the relational inequality or the disputed contracts.

In English law the complementary elements are knowledge and legal advice.

3.4.2 Knowledge

Knowledge is related to the enforcer's awareness of the other party's special disability. Some cases expressly assess this element[192] whereas others do not refer to it.[193] However, it has been suggested that knowledge "*should be presumed to be latent and operating in all cases of unconscionability*."[194]

[189] Stirlen v Supercuts, Inc, 51 Cal App 4th 1519 (1997) at [1533-1534]. For a similar decision see: Graham v Scissor-Tail, Inc 28 Cal 3d 807 (1981).
[190] West v Henderson 227 Cal App 3d 1578 (1991).
[191] Sanchez v Valencia Holding Co, LLC, 61 Cal 4th 899 (2015) at [911]; Walnut Producers of California v Diamond Foods, Inc, 187 Cal App 4th 634 (2010) at [644]; Carboni v Arrospide, 2 Cal App 4th 76 (1991) at [849].
[192] *Nevill v Snelling* [1880] 15 Ch D 679 at [695]; *Bawtree v Watson* [1834] 40 Eng Rep 129 1557-1865 at [340-41].
[193] *Baker v Monk* [1864] 55 Eng Rep 430 1829-1865.
[194] Chen-Wishart (n 14) 94 (emphasis added).

Knowledge takes either actual or constructive forms.[195] Actual knowledge is achieved if (1) the enforcer admitted it[196] or a third party testified to it. (2) The enforcer's conduct may objectively evidence his or her actual knowledge.[197] In *Nevill*[198] the moneylender kept a 'Peerage', sent out lithographed circulars to the complainant and arranged loans, which exceeded 5 per cent, were all indications of his knowledge of the complainant's special circumstances.

(3) Wilful blindness[199] is "shutting one's eyes to the obvious."[200] It arises when "a person abstains from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaging is tainted with fraud."[201] In *Earl of Aylesford*,[202] for example, the court addressed the fact that the enforcer did not enquire into the father's health.[203]

The second type, constructive knowledge, is divided into inferred and imputed knowledge. The former arises when the enforcer has knowledge of facts that would suggest the 'serious disadvantage' of the other party to a reasonable person. One example is provided by *Ayres*,[204] in which Russell J. construed the

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[195] In explaining types of knowledge Chen-Wishart references *Baden*. See Chen-Wishart (n 14) 63. See *Baden, Delvaux and Lecuit and Others v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1983] BCLC 325, [1983] Com LR 88. This case explains that knowledge consists of: "(i) actual knowledge (ii) willfully shutting one's eyes to the obvious; (iii) willfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry. More accurately, apart from actual knowledge they are formulations of the circumstances which may lead the court to impute knowledge of the facts to the alleged constructive trustee."

[196] *Bowes v Heaps* [1814] 35 Eng Rep 423 1557-1865 at [120].

[197] Chen-Wishart (n 14) 64.

[198] *Nevill v Snelling* [1880] 15 Ch D 679.

[199] In illustrating 'unilateral mistake' Chitty on Contracts recognises this type of knowledge as actual knowledge, citing: *Commission for New Towns v Cooper Great Britain) Ltd* [1995] Ch 259 applying the analysis of various forms of knowledge made by Peter Gibson J in *Baden*,as demonstrated in (n 365). H G Beale (ed), *Chitty on Contracts,* Vol1 (32nd edn, Sweet & Maxwell 2015) para 3-070. See also *Agip (Africa) Ltd v Jackson and Others* [1991] Ch 547.

[200] *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] *SGCA 2,* [2005] *1 SLR 502* at [42].

[201] *Gutch v Homan* [1835] 10 Eng Rep 752 1694-1865 at [1035].

[202] *Earl of Aylesford v Morris* [1873] 8 LR Ch App 484.

[203] Ibid at [495].

[204] *Ayres v Hazelgrow* [1982] unreported 1982/NJ/1003 (QB) (Russell J). Source pages are not numbered.

enforcer's knowledge of Lady Ayres's disability from the enforcer's own evidence that he was with her for forty minutes. This, according to Russell J, would have made it clear that she suffers some form of mental incapacity.[205]

Imputed knowledge, is determined in cases where the enforcer "is aware of facts which raise the very real possibility to a reasonable person, that the complainant is under special disability at the time of contract, then the enforcer is bound to make inquiry concerning this."[206] This comes about when the facts would raise a suspicion in a reasonable person of possible disability, so the enforcer is required to take positive steps, such as insuring legal advice. There is no recognised English case of imputed knowledge.

The fairness of imputed knowledge might be questioned, as it presents a situation where one does not have knowledge; the court will pretend that he/she does. In this sense it is different from constructive knowledge in which one did not know, but should have done. It criticises someone for behaving unreasonably. While imputed knowledge blames one for having knowledge, which he/she admittedly never had.

The English law position towards the adoption of constructive knowledge is contentious.[207] There are two possible interpretations of this position. In the first interpretation *Ayres*,[208]which is based on constructive knowledge, suggests that English law recognises constructive knowledge. *Burch* [209] might also be considered an example, though it was decided on the basis of undue influence. The fact that there is no authority that explicitly rejects constructive knowledge

[205] Ibid (emphasis added) no page numbers in the original resource.
[206] Chen-Wishart (n 14) 66.
[207] Enonchong (n 53) para 17-007; Turner and Sutton (n 110) 24-29; Chen-Wishart, 'The O'Brien Principle' (n155) 63.
[208] For the facts of the case refer to (text to n 205). *Ayres v Hazelgrow* [1982] unreported 1982/NJ/1003 (QB) (Russell J). Source pages are not numbered.
[209] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144.

supports this interpretation.

The second possible interpretation is that English law does not recognise constructive knowledge, as there is a lack of cases of constructive knowledge after *Ayres*. Duggan argues that "[t]o treat constructive notice as a sufficient basis for unconscientious dealing is to mistake the purpose of the doctrine",[210] because *Hart v O'Connor*[211] determined that unconscionability aims to prevent victimisation of the weaker party. Duggan claims that this aim would not be achieved if constructive knowledge was accepted as sufficient as actual knowledge. Victimisation, according to him, necessitates actual knowledge, because the stronger party cannot victimise the other party without appreciating the relevant facts. [212]

Accordingly, it would be artificial to claim that the stronger party victimised the weaker without actual knowledge of the weaker party's disadvantage.

Duggan therefore concludes that constructive knowledge is not sufficient to claim victimisation and threats the underpinning policy of unconscionability, because constructive knowledge alters the policy from the prevention of exploitation to prevention of substantive unfairness or "to relief of the weaker party's misfortune."[213]

The endorsement of this argument provides a sound justification of the hesitation of English law to adopt constructive knowledge as an operative factor in cases of unconscionability. However three observations need to be made here.

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[210] Anthony J Duggan, 'Till Debt Us Do Part: A Note on National Australia Bank Ltd v Garcia.' (1997) 19 Sydney L Rev 220, 228.
[211] *Hart v O'Connor* [1985] 2 All ER 880.
[212] Duggan (n 211) 228. See also: Tamblyn (n 78) 56- 57; Enonchong (n 53) para17-005.
[213] Duggan (n 211) 228-229.

Firstly, there is a limited need to recognise constructive knowledge, because actual knowledge has been applied in broad terms, when it can be inferred from evidence relating to the enforcer's conduct. This broadens the possibility of cases that can be governed by actual knowledge.

Secondly, English law, in investigating knowledge, adopts a subjective approach. This explains the language used to express the recognition of knowledge in case law, such as 'knew' rather than 'should have known' which entails an objective assessment of circumstances and evidence. Therefore, the possible exclusion of constructive knowledge in English law might be a result of its subjective approach.

Thirdly, the adoption of the principle wilful blindness acknowledges its concern with preventing dishonest behaviour,[214] contrary to constructive knowledge. This observation, in addition to the second observation, emphasise the interpretation that unconscionability is one of the piecemeal solutions that are adopted in English law instead of good faith. As will be explained later in this thesis, honesty under good faith entails both an objective and subjective test. Therefore the absence of constructive knowledge in English law could be construed as further evidence of subjectivity.

Furthermore, the subjective character of knowledge can be extracted from the absence of the language of 'reasonable person' in the assessment of this element.[215]

[214] *Agip* reflects this understanding. *Agip (Africa) Ltd v Jackson and Others* [1991] Ch 547. See also T Duggan, 'Unconscientious Dealing' in P Parkinson (ed) *The Principles of Equity* (LBC Information Services, North Ryde NSW, 1996) 138. For examples where knowledge was connected to honesty see: *Ayres v Hazelgrow* [1982] unreported 1982/NJ/1003 (QB) (Russell J). Source pages are not numbered; *Hart v O'Connor* [1985] 2 All ER 880 at [894].
[215] See for example: *Jones v Morgan* [2001] EWCA Civ 995 at [para 36].

With regard to the value of knowledge, its absence can be crucial in rejecting the application of unconscionability.[216] However, the presence of knowledge does not necessary entail the application of unconscionability, because the enforcer may conceivably take positive steps to avoid this application.[217]

Legal advice as the second complementary element in English law has similar value.

3.4.3 Legal Advice

The absence of legal advice in cases where it is more usual to have advice, will trigger the courts attention and scrutiny."[218] Its presence is effective in cases where "[t]he transaction gives rise to grave suspicion. It cries out for an explanation".[219] However legal advice does not necessarily entail the contract's enforcement.[220]

Legal advice must be independent and competent. Independence is granted when the solicitor works only in favour of the complainant.[221] Competency requires that a qualified person provides the advice.[222] Older cases show that friends' [223] and fathers' advice [224] were accepted. In later cases lack of

[216] See for example: *O'Rorke v Bolingbroke* [1877] 2 App Cas 814 at [835]; *Mountford v Callaghan* [1999] Lexis Citation 3124.
[217] In *Dally,* Sir John Romilly emphasised that had the enforcer informed the other party of the real value of the property, the nullification of the transaction could have been prevented. *Dally v Wonham* [1863] 55 Eng Rep 326 1829-1865 at [159].
[218] *Cresswell v Potter* [1978] 1 WLR 255 at [258] (Megarry J).
[219] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [152] (Millett LJ).
[220] *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) 2003 WL 22187670 at [560]. See also: *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [155-156].
[221] *Clark v Malpas* [1862] 4 De GF & J 401, 45 ER 1238; *Baker v Monk* [1864] 55 Eng Rep 430 1829-1865; *Longmate v Leger* [1860] 66 Eng Rep 67 1815-1865; *Fry v Lane* [1887] 40 Ch D 312 at [323]. For further explanation of this element see Chen-Wishart (n 14) 110-111.
[222] *Errington v Martell-Wilson* [1980] Lexis Citation 591. Page numbers is not provided from the resource.
[223] *Evans v Llewellin* [1787] 1 Cox's Chancery Cases 333; *Filmer v Gott* [1774] 2 Eng Rep156 1694-1865 at [241].
[224] *O'Rorke v Bolingbroke* [1877] 2 App Cas 814.

experience negated competency.[225] Competency also requires the attainment of all the information that is necessary to provide accurate advice.[226]

Plausibly questions of independence and competency will arise in cases where legal advice was present. In instances when no advice was provided to the complainant or in which a particular factor raised the court's suspicion of a defect in the contract (such as exorbitant undervaluation) courts will change the assessment into a recommendation. In other words, did the enforcer recommend that the complainant should consider legal advice?[227] In *Harrison*[228] the contract was upheld because the enforcer advised the complainant to take further time for consultation and to consider the contract.

Traditionally academics recognise an evidentiary role for the absence of legal advice that is limited to evidencing the serious disadvantage and the unconscionable conduct elements.[229] This is further supported by case law.[230] Meanwhile, its presence retains the equilibrium between the parties who did not encounter each other on equal terms. In this respect legal advice helps to counteract the impairment of the complainant's reasonable judgment.[231]

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[225] *Fry v Lane* [1887] 40 Ch D 312 at [323].

[226] *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) 2003 WL 22187670 at [561]; *Wright v Carter* [1901 W 4492] - [1903] 1 Ch 27 at [38-39]; *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) 2003 WL 22187670. See also: Chen-Wishart (n 14) 60.

[227] *Cresswell* clarifies this aspect of legal advice. *Cresswell v Potter* [1978] 1 WLR 255 at [259].

[228] *Harrison v Guest* [1855] 43 Eng Rep 1298 1557-1865.

[229] Chen-Wishart (n 14) 57; Enonchong (n 53) para 19-004; David Capper**,** 'Undue Influence and Unconscionability: A Rationalisation', (1998) Law Quarterly Review 479 <login.westlaw.co.uk> accessed 9 April 2014, 496; Enonchong (n 53) para 19-006.

[230] For evidencing serious disadvantage see: *Cresswell v Potter* [1978] 1 WLR 255 at [259]; *Ayres v Hazelgrow* [1982] unreported 1982/NJ/1003 (QB) (Russell J). Source pages are not numbered. For evidencing unconscionable conducts see: *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) 2003 WL 22187670 at [566]; *Errington v Martell-Wilson* [1980] Lexis Citation 591. No page numbers in the original resource.

[231] *Jones v Morgan* explored the possibility of restoring balance between the parties through legal advice. *Jones v Morgan* [2001] EWCA Civ 995 at [33]. In *Errington* the presence of legal advice prevented the application of unconscionability. *Errington v Martell-Wilson* [1980] Lexis Citation 591. Capper also maintains that legal advice ensures that the complainant genuinely affirmed the contract. Capper (n 35) 405. In *Alec Lobb* absence of fraud, in addition to the fact that the plaintiff received independent legal advice, ultimately affected the decision to proceed with the enforcement of the contract. *Alec Lobb (Garages) Ltd and Others v Total Oil Great*

Chen-Wishart argues that conditions of independence and competency suggest that judges are concerned with the substance of the advice, which indicates that judges are concerned with the fairness of contractual outcomes.[232]

Case law supports this argument. Millett L.J, for example, declared that in cases where the client still wishes to enter the unsound contract, irrespective of whether he/she has been advised not to do so, the solicitor "should ascertain on her behalf whether less onerous terms might be obtained."[233] Substantive fairness can therefore be said to be the key preoccupation.

Likewise, Ward L.J stated that: "It may be that the absence of legal advice is not so much an essential free-standing requirement, but rather a powerful factor confirming the suspicion of nefarious dealing which the presence of advice would serve to dispel."[234] Here, Ward L.J.'s acknowledges that legal advice has an evidentiary role. The word 'nefarious' signifies a moral concern, which is encompassed in unconscionability cases in unconscionable conduct and unconscionable terms.

Accordingly, contractual terms that are excessively unfair may indicate the absence of the legal advice or its inadequacy when it is present. Thus, while substantive unfairness alone cannot nullify a contract, it usually interacts with the lack of independent advice to bring the contract into investigation.[235]

This thesis perceives that the evidentiary role of legal advice in relation to the serious disadvantage element was emphasised in early cases of

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Britain Ltd [1983] 1 WLR 87 at [96].
[232] Chen-Wishart (n 14) 61.
[233] Ibid.
[234] *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221 at [235]. Similarly *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) 2003 WL 22187670 at [566]; *Cresswell v Potter* [1978] 1 WLR 255 at [260]; *Kalsep Ltd v X-Flow BV* [2001] *Times*, 3 May; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173.
[235] *Nevil v Snelling* [1880] 15 Ch D 679 at [703]. Clark (n 143) 45.

unconscionability when unconscionability sought to provide protection to weaker parties.[236] Therefore, cases that followed the line of *Fry v Lane*[237] considered legal advice as an essential element rather than a complementary. This argument is extensively discussed in Chapter Five of this thesis.

The previous determination of the essential and complementary elements of unconscionability does not clarify how these elements function to establish a case of unconscionability. Presumed unconscionability presents one part of this function. The other part, which can be called the classic cases of unconscionability, is discussed in the next section which is primarily concerned with the interaction of elements.

3.5 Presumed Unconscionability

Presumed unconscionability appears in situations where some of the essential elements of unconscionability are not actually proved, but rather presumed by courts and, based on this presumption, courts apply the doctrine.

Investigating presumed unconscionability in English law is a significant aspect of the doctrine, because it distinguishes classic cases of unconscionability and bases the theory of how the unconscionability's different elements function to establish a case of unconscionability. While for California law, an investigation of presumed unconscionability evidences inconsistency in courts' application of presumed unconscionability.

3.5.1 English Law

English law approves two types of presumed unconscionability. The first is

[236] This point will be further elaborated in Chapter 5 of this thesis.
[237] *Fry v Lane* [1887] 40 Ch D 312.

based on the existence of inexplicable unconscionable terms[238] and implies that their existence is an evidence of impropriety in the contract, therefore raising a presumption of a serious disadvantage to one party and unconscionable conduct exercised by the other. The second type of presumed unconscionability suggests that the unconscionable conduct of the stronger party might be presumed because of the existence of inexplicable unconscionable terms or because of the serious disadvantage of the other party.[239] Comparing both types of presumed unconscionability shows a possible overlap between them in specific cases. For now it is sufficient to point out this overlap as it will be further examined in the next section which is concerned with interaction of elements.

An analysis of presumed unconscionability that is based on unconscionable terms, shows that this type of presumption is akin to presumed undue influence. Although "it is not clear that it is helpful to seek to define the development of the one doctrine by reference to that of the other",[240] such a comparison enhances the understanding of presumed unconscionability and emphasises it as legal studies do not give this aspect of unconscionability the weight it deserves, compared with undue influence.

Although undue influence attacks the sufficiency of consent, therefore it is plaintiff-sided, while unconscionability invokes a relief against unfair advantage-taken therefore it is defendant-sided, [241] it is settled that, generally,

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[238] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [101]; *Multiservice Bookbinding Ltd and others v Marden* [1978] 2 All ER 489 at [502]; *Griffith v Spratley* [1787] 1 Cox Eq Cas 383 at [387]; *Baldwin v Rochford* [1799] 95 Eng Rep 589 1378-1865 at [230].

[239] *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865 at [155-156].
Millett LJ in *Alec Lobb* stated that "there must be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself, but added that 'the former may often be inferred from the latter in the absence of an innocent explanation'. *Alec (Garages) Ltd and others v Total Oil Great Britain Ltd* [1983] 1 WLR 173 at [94-95]. Refer to (text to n 71 -87) of this chapter which is concerned with the unconscionable conduct element.

[240] *Evans v Lloyd* [2013] EWHC 1725 (Ch) [2013] 2 P & CR at [52] (Citation omitted).

[241] *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221.

unconscionability is similar to undue influence to the extent that "the two jurisdictions gives to cases arising in the exercise of one jurisdiction an analogous character in cases involving the same points in the other jurisdiction".[242] Consequently, it is submitted that presumed unconscionability "is the rule applied to the analogous cases of voluntary donations obtained for themselves by the donees, and to all other cases where *influence*, *however acquired*, has resulted in gain to the person possessing at the expense of the person subject to it."[243]

Nevertheless, it is also submitted that presumed undue influence is different to presumed unconscionability in their requirements. The following analysis evaluates the accuracy of such arguments by demonstrating both doctrines and investigating differences and similarities in their requirements. It further assesses the ways through which both presumptions can be rebutted.

Presumed Undue Influence

Cases of presumed undue influence envisage that the influence was not exercised directly, as they do not involve "actual pressure or the like",[244] rather its existence is inferred from the assessment of facts that are related to the nature of the relationship between contractual parties and the nature of the disputed transaction.[245]

[242] *Louth v Diprose* (1992) 175 CLR 621 at [628]. See also: *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [101]; *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221 at [225]; *Evans v Lloyd* [2013] EWHC 1725 (Ch) [2013] 2 P & CR at [52].
[243] *Earl of Aylesford v Morris (1873) 8 LR Ch App 484* at [491] (Lord Sleborne) (emphasis added).
[244] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [17].
[245] *Evans v Lloyd* [2013] EWHC 1725 (Ch) [2013] 2 P & CR at [37].

Accordingly, there are two prerequisites for presumed undue influence: "(i) a relationship of trust and confidence[246] and (ii) a transaction that calls for explanation". [247] Proving the two requirements "constitute[s] prima facie evidence that A abused his influence over B in that he preferred his own interests and did not act fairly." [248] Thus, the two requirements have an evidential role of an abuse by one party of the other. As a result, "the evidential burden shifts to A to prove that the transaction was not caused by an abuse of his influence over B."[249] A's failure to discharge this burden in addition to the proof of the above-mentioned two requirements, "will lead to the drawing of the inference that the influence was abused." [250] In other words it raises a presumption of undue influence.

For example, in *Yorkshire Bank Plc,*[251] a mortgage was held to be voidable against a husband and against a bank for undue influence. The two prerequisites were proved, consequently, undue influence was raised and the burden shifted to the husband to prove that the transaction was achieved by free will. As the husband failed to discharge this burden, the court concluded that he had abused his position of trust towards his wife.

Presumed Unconscionability: Overview

In contrast, presumed unconscionability envisages a situation in which the existence of unconscionable terms is considered an evidence of impropriety, that is "an unconscientious use of the power arising out of these circumstances and conditions; and when relative position of the parties is such as *prima facie*

[246] Hereafter it will be referred to as a relationship of trust.
[247] *Evans v Lloyd* [2013] EWHC 1725 (Ch) [2013] 2 P & CR at [41].
[248] Ibid. See also: *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [796].
[249] Ibid.
[250] Ibid.
[251] *Yorkshire Bank plc v Tinsley* [2004] 3 All ER 463.

to raise this presumption."[252] In such a case "the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable."[253] In other words, supported by unconscionable circumstances, evidence of the existence of unconscionable terms triggers a presumption of the unconscionable conduct by one party and the serious disadvantage of the other. No need for further evidence in such a case.

The rise of such a presumption will also assume a contract to be unconscionable unless the enforcer rebuts this presumption. Accordingly, presumed unconscionability shifts the burden of proof to the enforcer who wants to save a contract from being invalidated, contrary to the traditional position that the complainant who seeks the protection of unconscionability needs to prove its three elements to grant its application.

A quick comparison between both types of presumptions in both doctrines shows that they meet in: the requirement related to the nature of the contract is its inexplicability; shifting the *onus probandi* to the enforcer. Still, at least at first glance, they vary in the requirement of the pre-existing relationship of trust that is required for presumed undue influence. This reveals the question of the eligibility of arguing that both doctrines are similar.

Inexplicable Transaction

Although the expression of inexplicable transactions is used in cases of both doctrines. In the unconscionability case of *Multiservice Bookbinding*, Wilkinson J explained that an unconscionable term "is an unusual or unreasonable

[252] *Earl of Aylesford v Morris (1873) 8 LR Ch App 484* at [490-491] (Lord Selborne L.C).
[253] Ibid.

stipulation the reason for which is not explained, it may well be that in the absence of any explanation, the court will assume that unfair advantage has been taken of the borrower."[254] *Dusangh* adds that such transactions almost speak for themselves,[255] which indicates significant unfairness.

By contrast, in undue influence cases inexplicable terms refer to a transaction that "is not readily explicable by the relationship of the parties",[256] which is basically a definition closely related to Wilkinson J's explanation.

Inexplicable terms in undue influence are also described as terms that are "immoderate and irrational"; [257] "highly imprudent"; [258] and a "manifest disadvantage".[259] However, the latter expression was discarded because it causes difficulties,[260] gives rise to ambiguity and has an unrealistic blinkered view[261] of the nature required in a transaction that may raise a presumption of undue influence as outlined in *Skinner*.[262] Therefore, 'manifest disadvantage' was replaced by 'inexplicable transactions'.

Skinner explained that where a gift is made to a person as a party of a confidential relationship, the mere existence of influence is not enough, the gift must be "*so large* as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary

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[254] *Multiservice Bookbinding Ltd and others v Marden* [1978] 2 All ER 489 at [502]. Similarly *Alec Lobb* described the unconscionable terms element in terms of an undervaluation in the transaction that "calls for an explanation, and is in itself indicative of the presence of some fraud, undue influence, or other such feature." *Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd* [1983] 1 WLR 87 at [95].
[255] *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221 at [235].
[256] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [798].
[257] *Bank of Montreal v Stuart* [1911] A.C. 120 at [137].
[258] *Re Morris* [2000] Ch D (unreported). The same expression is used several times in *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773.
[259] *National Westminster Bank plc v Morgan* [1985] AC 686 at [703-707] (Lord Scarman).
[260] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [26-28].
[261] Ibid at [28].
[262] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [29] citing *Allcard v Skinner* 36 Ch D 145.

men act, the burden is upon the donee to support the gift."[263] Thus, to reverse the burden of proof by a presumption of undue influence something significant must be present, something that is inexplicable and "the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted."[264]

Hence, regardless of the expression used to refer to this requirement, it must show disadvantage that is large[265] to the extent it is inexplicable, or, as expressed in the words of Millett LJ, "[t]he transaction was not merely to the manifest disadvantage of the respondent; it was one which, in the traditional phrase, 'shocks the conscience of the court'…The transaction gives rise to grave suspicion. It cries aloud for an explanation."[266] It can be noticed here that even the expressions in cases of undue influence used are identical to the ones that appear in unconscionability cases.

The *Earl of Chesterfield* described a presumed fraud that is based on the intrinsic nature of the bargain in terms that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[267] Similar descriptions can be addressed in undue influence cases. *Aboody*, for example, described the disadvantage of the transaction as obvious "to any independent and reasonable person who considered the transaction at the time with knowledge of all the relevant

[263] *Allcard v Skinner* (1887) 36 Ch D 145 at [185] (emphasis added).
[264] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [24].
[265] *Allcard v Skinner* (1887) 36 Ch D 145 at [185].
[266] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 102.
[267] *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865 at [155-156] (Lord Hardwicke LC). Followed with approval by several cases, for example: *Earl of Aylesford v Morris* [1872-73] LR 8 Ch App 484 at [489]; *Nevill v Snelling* [1880] 15 Ch D 679; *Alec Lobb (Garages) Ltd and Others v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173. See also Tamblyn (n 78) 43.

facts."[268]

Likewise, in *Burch,* which was treated on the ground of undue influence, Thomas LJ commented on the nature of the transaction by stating "[i]t would cause a bank manager to raise his eyebrows more than little…"[269] Or in *Earl of Chesterfield's* words no man in his/her senses would agree to such a transaction.

Burch further supports the argument that inexplicable terms in undue influence[270] are similar to the unconscionable terms in unconscionability, because the court in this case pointed out that this case could have been ruled on an unconscionability basis too.

However, it is suggested in *Humphrey*,[271] that an inexplicable transaction in presumed undue influence is different from its equivalent in presumed unconscionability. In this case a trust deed was challenged on the grounds of undue influence and alternatively unconscionability. Under the heading of undue influence, Mr Justice Rimer concluded that the transaction, affected by the trust deed, calls for an explanation by the defendant, therefore the burden shifted to him to satisfy the court that the claimant entered the trust deed with a free and uninfluenced will. As the defendant failed to discharge this burden, the court concluded that the deed was induced by his undue influence.[272]

In the assessment of the nature of the transaction, the court acknowledged that fact that the gifts were kept secrect was a sign of their unusual nature.[273]

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[268] *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at [931].
[269] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [158].
[270] Ibid at [152] (Millett LJ).
[271] *Humphrey v Humphrey* [2004] EWHC 2201 (Ch).
[272] Ibid at [98].
[273] Ibid.

The court proceeded to evaluate the second argument that the trust deed is unconscionable and submitted that the claimant is poor and of modest education and that the transaction represented by the deed is disadvantageous to the claimant. However, Mr. Justice Rimer questioned whether "it was sufficiently disadvantageous for the invocation of this head of equitable relief [unconscionability]."[274] He signaled that it is essential for unconscionability that the transaction is also unconscionable.[275] In explaining this requirement he stated that "[t]his means that the party benefiting from the transaction must have imposed the objectionable terms in a morally reprehensible manner and that his behavior must be characterised by some moral culpability or impropriety."[276] Mr. Justice Rimer declared that although he concluded that the defendant is to be presumed to have induced the deed by exercising undue influence upon the claimant, this conclusion does not equate a finding that the defendant acted with sufficient moral culpability.[277]

Although, Mr. Justice Rimer "made no further findings which would justify a finding of the requisite degree of moral culpability",[278] it is clear that he considered inexplicable transaction, as a requirement for presumed undue influence, is different to its equivalent under presumed unconscionability. His remarks indicated that inexplicability under undue influence is weaker and insufficient to meet the same requirement under presumed unconscionability.

The main weakness with this remark is that it does not appear to be supported by any other authority. Moreover, it seems that Mr. Justice Rimer misapplied the law, in concluding that inexplicability under presumed unconscionability needs

[274] Ibid at [106].
[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] Ibid.

to be more significant than it is under undue influence, by requiring a conduct that is morally culpable. A morally culpable conduct would arise by presumption in cases of presumed unconscionability. Accordingly, it is a result rather than a prerequisite. In other words, in presumed unconscionability, unconscionable conduct would be presumed because of the existence of inexplicable transaction. Moreover, *Etridge*[279] emphasised that in presumed undue influence there is no need to show misconduct by the defendant.

Therefore, it can be argued that if there is a difference between presumed undue influence and presumed unconscionability, it is not in the inexplicable terms requirement, rather it would be in the requirement of a pre-existing relationship of trust.

Relationship of Trust and Confidence

Relationships that may offer a basis for a case of presumed undue influence are recognised as class 2 cases.[280] This class of cases is divided into A and B.

Under class 2A "[c]ertain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised."[281] Accordingly, the existence of one of these relationships when coupled with an inexplicable transaction, a presumption of undue influence will arise automatically. The complainant in this class of relationships does not need to prove that he/she "actually reposed trust and

[279] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773. See also *Turkey v Awadh* [2005] EWCA Civ 382 at [11].
[280] Class 1 cases are cases of actual undue influence. This classification was criticized in *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773.
[281] *Barclays Bank Plc Appellants v O'Brien* [1993] 3 WLR 786 at [189] (Lord Browne-Wilkinson).

confidence in the other party. It is sufficient for him to prove the existence of the type of relationship."[282]

While in class 2B "if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust in the wrongdoer, the existence of such relationship raises the presumption of undue influence." [283] Accordingly under this class of relationships the presumption will not arise automatically, rather it needs to be proved and shown on the facts. The question here is "whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type."[284]

However, this class of relationships was criticised in *Etridge* and is no longer considered a separate category of cases.[285] Chitty declares that "what was formerly termed Class 2B must now be taken merely as examples of the kind of circumstances in which a combination of the nature of the relationship and the resulting transaction may provide sufficient evidence of undue influence."[286]

Relationships of trust imply the presence of duty of care and giving advice. This is clarified in *Tufton,*[287]which stated that: "the relation must be one which makes it the duty of one party to take care of the other." [288] The Privy Council provided that the duty to take care includes the duty of giving advice.[289] Similarly, *Skinner* stressed that in such relationships "the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to

[282] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [18] (Lord Nicholas).
[283] *Barclays Bank Plc Appellants v O'Brien* [1993] 3 WLR 786 at [189].
[284] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [10] (Lord Nicholas).
[285] Beale (ed) (n 185) para 8-085.
[286] Ibid.
[287] *Tufton v Sperni* [1952] 2 TLR 516.
[288] Ibid at [521] (Sir Raymond Evershed M.R).
[289] *Antony v Weeraskera* [1953] WL R 1007 at [1011].

manage his property for him."[290]

Goldsworthy, in demonstrating how relationships of trust functions in cases of presumption, provides that the presumption does not apply to all relationships of trust, rather the presumption remains inoperative until the party who ceded trust makes a gift that is inexplicable, as clarified above, that cannot be reasonably accounted for on the grounds of any "ordinary motives on which ordinary men act."[291] Although influence in such cases might have been presumed beforehand, it is only when the gift is made that a presumption is established that this influence might have been undue.[292] In other words, it will be established that the enforcer took an "unfair advantage of his [her] influence."[293] This resembles a case of presumed unconscionability in which the presence of unconscionable terms raises a presumption of *advantage taking* by one party to *the serious disadvantage* of the other party.

Accordingly, the presumption, either in undue influence or unconscionability, shows that there is relational inequality between the contractual parties. That is one party is superior upon another, inferior party. As a result, under both doctrines *domination* is an initial factor in most cases. However, a complainant in a case of undue influence does not need to prove the domination of the other party over him, despite the fact that the alleged relationship implies that one party has a duty to take care of the other which naturally indicates domination.

Nourse L.J in *Goldsworthy,* in emphasising that domination does not need to be proved to have a relationship of trust,[294] demonstrated that consistency with case law shows that the standard is that "it is enough to show that the party in

[290] *Allcard v Skinner* (1887) 36 Ch D 145 at [181] (Lindley L.J).
[291] *Goldsworthy v Brickell* [1987] Ch 378 at [401].
[292] Ibid.
[293] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [19].
[294] *Goldsworthy v Brickell* [1987] Ch 378 at [401].

whom the trust and confidence is reposed is in a position to exert influence over him who reposes it."[295] Taking well-defined relationships as an example, according to Nourse L.J, shows that no other standard is required. The presumption applies to these relationships because doctors, for example, are trusted and confided in by their patients to give them "conscientious and disinterested advice on matters, which profoundly affect …their physical and mental…well-being."[296]

Consequently, "[i]t is natural to presume that out of that trust and confidence grows influence. But it would run contrary to human experience to presume that every patient is dominated by his doctor… and while that may not be equally true of other relationships, for example parent and child, it is not the function of a presumption to presume the generally improbable."[297]

Based on this explanation, domination is not a condition to establishing a presumption and is not necessarily evidenced in all cases. However the fact that relationships of trust involve a duty of care and advice, surely implies *relational inequality* between contractual parties. Thus, it can be argued that when courts investigate and uphold the existence of a relationship of trust, they in fact, address relational inequality in the disputed contract.

Relational inequality which is part of serious disadvantage, can be recognised in cases of presumed unconscionability too. Cases show that, although the presence of a specific type of relationship is not a requirement for presuming unconscionability, courts tend to investigate relational inequality in addition to inexplicable terms to apply such presumption. Consequently, the type of

[295] Ibid.
[296] Ibid.
[297] Ibid at [404].

relationship between parties is material in these cases just as in undue influence.

Case law shows that there are three stages to presuming unconscionability. The first stage identifies unconscionable terms that call for explanation, while in the second stage a presumption of unconscientious use of power comes into consideration, which arises when the parties' relative positions is in support of this presumption. As a result, in the third stage the onus of proof shifts to the stronger party.[298]

In this respect, Lord Selborne explained how fraud in unconscionability cases is wanted

> [b]ut it is sufficient for the application of the principle [unconscionability], if the parties meet under such circumstances as, in the particular transaction, *to give the stronger party dominion over the weaker; and such power and influence are generally possessed,* in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility.[299]

Accordingly, when a judge examines the circumstances or the background of a case in which presumption is possible, what is examined in reality is whether the stronger party possesses the power necessary to exercise unconscionable conduct without trying to prove that this power was really exercised.

For example, in *Earl of Aylesford*, Selbornes LJ first observed that the plaintiff entered the disputed transactions without competent legal advice, without "accurate information as to his own means and circumstances".[300] Then he proceeded to say that "this is a state of circumstances which, coupled with the

[298] Refer to Lord Selborne's explanation in *Earl of Aylesford v Morris (1873) 8 LR Ch App 484* at [490-491].
[299] Ibid at [491] (emphasis added).
[300] Ibid at [495].

nature and terms of the bargains themselves (bargains which are in my judgment *prima facie* oppressive and extortionate) casts some *onus probandi* upon the Defendant*".*[301] It can be noticed that the circumstances examined first are to point out the relational inequality as they signify how the claimant was disadvantaged. This, when coupled with an oppressive bargain, fraud was presumed and the burden of proof was shifted to the enforcer.

Multiservice Bookbinding,[302] demonstrated that the process through which a presumption of unconscionability may arise, by stating that "[i]n considering all the facts, it will often be the case that the borrower's need for the money was far more pressing than the lender's need to lend; if this proves to be the case, then circumstances exist in which an unfair advantage could have been taken."[303] This means that when a court is confronted with an allegation that a contract is unconscionable, the parties' contractual position is a central consideration.

By this consideration courts seek to clarify whether there is a relational inequality between the parties or not. When the answer is yes, a presumption arises without further evidence. Whether this presumption is true in fact depends on the circumstances of each case and the enforcer's capability to discharge such a presumption.

Applying these considerations in *Multiservice Bookbinding*, Wilkinson LJ first examined whether the substantive terms are unconscionable or not.[304] In the second stage, he viewed the background to assess if there were relational inequality between parties that was sufficient to raise a presumption of serious disadvantage and unconscionable conduct. In this respect, he addressed that:

[301] Ibid.
[302] *Multiservice Bookbinding Ltd and others v Marden* [1978] 2 All ER 489.
[303] Ibid at [502].
[304] Ibid.

the company as a borrower was a small one; that it was in need of cash to expand; that it could have refused the terms, therefore, it had a choice; there was no evidence of any sharp practice by the defendant.[305] This background, according to the court, "does not give rise to any presupposition that the defendant took an unfair advantage of the plaintiffs."[306]

Following this observation, the court asserted that: there was no compelling necessity; the plaintiffs had had legal advice; there was no appearance of anything oppressive or morally reprehensible; and there was an adequate explanation of all the terms of the mortgage.[307] Therefore, the transaction was not presumably unconscionable.

Similarly, in *Fry v Lane,* which is a case of presumption in the presence of evidence of serious disadvantage and unconscionable terms, the court first determined that the claimants, poor and ignorant, were tempted by the immediate possession of £100 that was a very great sum of money to them. They were not on equal terms with the other party and without independent legal advice. After submitting that the sale was undervalued, Kay J concluded: "I am of opinion that no moral fraud has been proven…but such transactions amount to unfair dealing, which equity considers a fraud".[308] Accordingly, while unconscionability was not proved, the evidence of relational inequality and the undervalued sale raised a presumption of unconscionability.

Burch, a case that was ruled to be presumed undue influence, with the court submitting that, alternatively, it could have been ruled on unconscionability grounds can also be an example here. In this case the court first proved that the

[305] Ibid.
[306] Ibid.
[307] Ibid at [503].
[308] *Fry v Lane* [1887] 40 Ch D 312 at [324].

relationship between the employer and the employee was one that can develop to a relationship of trust, then the court established the unconscionability of the terms to the extent that they raised a presumption of undue influence. Had a case been judged by a presumption of unconscionability, the same steps would have been adopted that are: proving relational inequality, then investigating the unconscionability of the terms (as evidenced in the previous examples).

The above referenced cases prove that although a relationship of trust is not a requirement in cases of presumed unconscionability, this requirement does not distinguish the latter cases from those of presumed undue influence, because relationships of trust imply a domination of one party over the other or relational inequality, which inherently characterises presumed unconscionable bargains. *Relational inequality*, which is usually investigated by courts to justify a presumption of unconscionability, is in fact equivalent to the requirement of a pre-existing relationship of trust that must be present for presuming undue influence.

Even if this argument is challenged, there is other evidence that entrench the argument that presumed unconscionability is similar to presumed undue influence, regardless of the usual submission that they are different because of the requirement of a relationship of trust. [309]

First, presumed undue influence surely overlaps with presumed unconscionability in cases where the complainant was involved in a relationship of trust because of some form of vulnerability such as age, illness, inexperience or any other serious disadvantage.

[309] *Irvani v Irvani* [2000] CLC 477 at [439]; *Lawrence v Poorah* [2008] UKPC 21 at [20].

In re Craig,[310] for example, which is concerned with an action to set aside gifts obtained by an employee from a donor aged 84, the court in investigating whether there was a relationship of trust investigated the donor's health and character. After questioning the defendant, the court concluded that there was a relationship of trust that covered not only running the donor's house but also his financial affairs.[311] Asserting that the donor was a failing and vulnerable old man who placed trust in the defendant who had a duty to advise him and take care of him.[312]

The court described the donor as a "very elderly, weak, a little vacant, courteous, introspective, depressed at times - a gentle old man"[313]who is "in need of and dependent upon women's support for his comforts."[314] The court could not identify the exact point at which the donor, because of the circumstances of deterioration "ceased to be capable of managing his own affairs, whether in detail or, more stringently, even broadly, or when he had reached a stage of not knowing what he was doing."[315]

In contrast, the donee was "physically and mentally tough and powerful, and combines these formidable qualities with a charming manner."[316] The evidence showed that she looked after the donor's physical well-being "competently and successfully, and contributed by her companionship to ease his old age."[317]

Based on the characteristics of each party in addition to some other factswere considered to show his reliance on her, such as: the defendant's threats on

[310] *In re Craig v Middleton* [1971] Ch 95.
[311] Ibid.
[312] Ibid at [120]
[313] Ibid at [108].
[314] Ibid at [109].
[315] Ibid at [108].
[316] Ibid at [107]
[318] Ibid at [113].

several occasions that she would leave the job;[318] the fact that "there was nothing of his affairs which he did not discuss with her and for which he did not rely on her for assistance and, more, co-operation."[319] Thus the court concluded that there was a relationship of trust.

Based on the finding that: the gifts "cannot reasonably be accounted for on the ground of the ordinary motives on which ordinary men act"[320] they were considered inexplicable; no advice was given to the donor; and the defendant could not discharge the onus and show that the gifts were given after "full informed discussion",[321] the gifts were set aside for undue influence.

The grounds on which the court in this case identified a relationship of trust are simply the ingredients required for the serious disadvantage element in unconscionability cases, namely, one or more type of disadvantage and relational inequality.

Although in presumed unconscionability serious disadvantage is inferred from the inexplicable transaction rather than having pre-existed beforehand, courts in presumed unconscionability tend to assess the background of the disputed transaction, which involves an assessment of relational inequality, which in turn implies a covert diagnosis of the serious disadvantage.

Moreover, there are cases of presumed unconscionability in which there was direct evidence of serious disadvantage therefore courts merely inferred the unconscionable conduct element. *Earl of Aylesford*[322] and *Fry v Lane*[323] are instructive in this regard.

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[318] Ibid at [113].
[319] Ibid at [112].
[320] Ibid at [119].
[321] Ibid at [120].
[322] *Earl of Aylesford v Morris* [1873] 8 LR Ch App 484.
[323] *Fry v Lane* [1887] 40 Ch D 312.

As further evidence that presumed undue influence and presumed unconscionability are similar, even though the appearance of their requirements is different, is the unlimited category of relationships that might be considered relationships of trust.

In this regard, *Huguenin*,[324] demonstrates that presumption may apply "to all the variety of relations, in which dominion may be exercised by one person over another."[325]

In further explanation of this point, Lord Nicholls asserted that these relationships are "infinitely various"[326] and further stated that:

> [t]he principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.[327]

Tufton is a direct application of this explanation. It shows to what extent a court may proceed to identify a relationship of trust, because the parties in this case were only co-members of a committee established to create a Muslim center. One of the parties was sophisticated, contrary to the other. The latter sold his house for more than double the market price. Considering the fact that the

[324] *Huguenin v Baseley* [1807] 33 Eng Rep 526 at [286].
[325] Ibid. Similarly *In re Craig* clarifies that "it [undue influence] ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised - those of trustees and cestui que trust - guardian and ward - attorney and client - surgeon and patient - to be merely instances of the application of the principle." *In re Craig v Middleton* [1971] Ch 95 at [102] (citation omitted); and to the same effect in the same case at [98,104]. See also: *National Westminster Bank Plc Appellants v Morgan* [1985] 2 WLR 588, [1985] AC 686 at [709] (Lord Scarman).
[326] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [8].
[327] Ibid at [11]. Affirmed in *Evans v Lloyd* [2013] EWHC 1725 (Ch) [2013] 2 P & CR at [39].

project was for altruistic purposes, the court concluded that one party must place confidence in the other for the issues related to achieving these purposes. Therefore, the transaction was set aside.

In summary, a relationship of trust as a requirement in undue influence cases does not in fact differentiate it from presumed unconscionability, as the latter cases address relational inequality between contractual parties, which in turn includes relationships of trust. Moreover, submitting that the notion of presumption "is descriptive of a shift in the evidential onus on a question of fact."[328] Indicates that the central element in this jurisdiction is the shift of the burden of proof, which is also recognised under presumed unconscionability.

Rebutting the Presumption

To rebut a presumption of unconscionability, the defendant needs to prove that the contract is fair, just and reasonable.[329]

Whereas, to rebut a presumption of undue influence, the defendant needs to prove that the complainant 's contracting decision "was made only after free and fully informed thought about it."[330] This embodies a need to prove that the complainant understood the contract and was not under any from of restraint when contracting it. In *Hammond*[331] the fact that the complainant understood what he was doing was not enough to rebut undue influence, as "it was not shown that the gift arose from the free exercise of his independent will."[332] Accordingly, the central concern is not the complainants' inability to

[328] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [16].
[329] *Earl of Aylesford v Morris (1873) 8 LR Ch App 484* at [491].
[330] *Hammond v Osborn* [2002] 2 P & CR DG20 at [D42]. See also: *Allcard v Skinner,* 36 Ch D 145 at [171] (Cotton L.J).
[331] *Hammond v Osborn* [2002] 2 P & CR DG20.
[332] Ibid at [D42] (Ward L.J).

comprehend a transaction;[333] rather it is "how the intention was produced."[334]

Hence, it is settled that proving that the complainant has received *independent and competent*[335] legal advice would discharge presumed undue influence and the same is applicable for presumed unconscionability.[336] In undue influence cases such advice insures the complainant's understanding of the transaction and its consequences. While under unconscionability legal advice functions as a means to insure fairness of contracts. This function asserts what has been explained in this chapter, that legal advice is an element that has strong ties to all of the essential elements of unconscionability and consequently undue influence too.

Burch, for example, explains in the context of undue influence how to rebut the presumption "by showing that the complainant had the benefit of independent legal advice before entering into it [the contract]".[337]

Powell[338] concerned a voluntary settlement, in favour of a parent by a young lady who had just attained legal age, that was nullified for undue influence, because the legal advice was not competent and independent. Under this settlement, the claimant took only one-third of the income during the joint lives of herself and her step-mother.

Similarly, under unconscionability, *Fry v Lane* states that "the fact that he [the complainant] has had no independent advice is in itself evidence that the

[333] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [11].
[334] *Huguenin v Baseley* [1807] 33 Eng Rep 526 at [300].
[335] Refer to (text to n 219-238) of this chaerpt, which explains the requirement of adequate legal advice.
[336] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at [105].
[337] Ibid at [105] (Millett LJ).
[338] *Powell v Powell* [1900] 1 Ch 243.

bargain was unfair."[339] Moreover, the same case provided a list of cases in which legal advice succeeded in rebutting unconscionability.[340]

However, the way through which a presumption of undue influence and unconscionability can be rebutted is not confined to independent legal advice. They vary according to the circumstances of each case, more specifically according to the nature of the alleged influence, the parties' characteristics, their relationships and the extent to which a transaction is inexplicable.[341] For example in *Johnson*[342] the fact that the complainant was an experienced man was of considerable value in rebutting the presumption although he did not receive legal advice. In *Harrison*[343] the recommendation of legal advice was sufficient to negate unconscionability.

Similarly, providing an explanation for the unfairness of a transaction rebuts the presumption of doctrine. In *Dusangh* presumed undue influence was negated as the transaction could be explained on the grounds of parental affection.[344] *Multiservice Bookbinding*[345] is also an example of an unconscionability case in which the contract was upheld as the lender provided an explanation for the unusual terms.

This overview of ways of rebutting undue influence and unconscionability presumption shows that they are similar although they are signaled under different justifications. In undue influence rebutting the presumption is conditional on illustrating that the complainant's consent was free and informed.

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[339] *Fry v Lane* [1887] 40 Ch D 312 at [319].
[340] Ibid.
[341] *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773 at [796].
[342] *Johnson v EBS Pensioner Trustees Limited* [2002] EWCA Civ 164.
[343] Harrison v Guest [1855] 43 Eng Rep 1298 1557-1865.
[344] *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221 at [224].
[345] *Multiservice Bookbinding Ltd and others v Marden* [1978] 2 All ER 489.

While in unconscionability it is conditional on proving the fairness and reasonableness of the disputed contracts.

It can be argued that the reason for the addressed similarity is the rationale of both doctrines. It is submitted that a presumption of undue influence is authorised to prevent victimisation. Victimisation is about taking advantage of the other party, which is a point of common to both doctrines. *National Westminster Bank* clarifies that undue influence is "not a vague 'public policy' but specifically the victimisation of one party by the other."[346] Prevention of victimisation has been also addressed as a rationale for unconscionability in *Hart v O'Connor.*[347] This seems a natural consequence of the fact that "the doctrines of undue influence and unconscionable bargain share a common root - equity's concern to protect the vulnerable from economic harm."[348]

Hence, unconscionability, like undue influence, cares about the complainant's consent and consequently shares with undue influence ways of rebutting its presumption.

In summary, the previous explanation of presumed unconscionability, especially its comparison with presumed undue influence, shows that it is akin to the latter doctrine. Moreover, it evidences that this part of unconscionability is clear and settled in case law. Whether the same is applicable in presumed unconscionability in California law might be subject to doubts according to the following analysis.

[346] *National Westminster Bank plc v Morgan* [1985] AC 686 at [706] (Lord Scarman).
[347] *Hart v O'Connor* [1985] 2 All ER 880.
[348] *Lawrence v Poorah* [2008] UKPC 21 at [20].

3.5.2 California Law

California law identifies two types of presumed unconscionability, one is clear and certain while the second might be questioned.

The settled presumed unconscionability is related to presumed substantive unconscionability that is limited to arbitration clauses.[349] California courts nullify these clauses by applying the 'mutuality test', [350] which is different to the aforementioned steps that are usually followed to investigate substantive unconscionability in contracts other than arbitration[351] and requires arbitration agreements "to have a 'modicum of bilaterality'."[352]

In *Armendariz,* [353] the disputed arbitration agreement established that an employee cannot file in court, and that he/she should arbitrate wrongful termination or employment discrimination claims. The employees claimed that several provisions in the arbitration were unconscionable because they did not meet the minimum requirements of neutrality and bilateral arbitration. In assessing substantive unconscionability, the Supreme Court concluded that the relevant arbitration clause, which "requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence"[354] was substantively unconscionable, because it failed to meet basic standards of fairness and mutuality.[355]

[349] Stephen A Broome, 'An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act' (2006) 3 Hastings Bus LJ 39, 49.
[350] Armendariz v Foundation Health Psychcare Servs Inc 99 Cal Rptr 2d 745 (2000).
[351] For further insight into the substance of the steps refer to (text to n 168-170) of this chapter.
[352] Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006) at [1281] (citation omitted).
[353] Armendariz v Foundation Health Psychcare Servs Inc 99 Cal Rptr 2d 745 (2000).
[354] Ibid at [772].
[355] For similar examples see: Kinney v United HealthCare Services, Inc, 70 Cal App 4th 1322 (1999) at [1332]; Serpa v California Surety Investigations 215 Cal App 4th 695 (2013) at [703].

Presumed substantive unconscionability shifts the burden of proof from the complainant to the enforcer, who is in turn required to prove the bilateral attributes of the disputed clauses.[356] If this is not the case, then business realities need to be cited in order to justify the unilateral provisions,[357] because "[w]ithout reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose."[358]

Presumed substantive unconscionability supports this thesis's interpretation of the contract-oriented approach adopted in California law, because presumed substantive unconscionability is based on the type of the disputed contractual clause not the complainant's weakness or the enforcer's behaviour.

The second type of presumed unconscionability is related to oppression under procedural unconscionability.

Some case law provides that the mere presence of an adhesion contract is sufficient to establish minimum procedural unconscionability, offsetting the need to undertake further enquiry into the true existence of oppression. Broome contends that this approach is adopted whenever the disputed contractual provisions are arbitration clauses, whether they are positioned in commercial or employment contracts,[359] while in ordinary cases courts tend to assess the circumstances surrounding the formation of contracts. He based this conclusion

[356] Ingle v Circuit City Stores, Inc 328 F 3d 1165 (9th Cir 2003) at [1174].
[357] Armendariz v Foundation Health Psychcare Servs, Inc, 99 Cal Rptr 2d 745 (2000) at [770].
[358] Ibid.
[359] Broome, who generally argues against the presumption of procedural unconscionability in arbitration clauses, acknowledges that this presumption might be logical in an employment contract. This is because, in this type of contract, the rejection of arbitration clauses significantly increass the likelihood that the complainant will be unemployed. See Broome (n 350) 62-63.

on empirical research that investigated case law in the period between 1982 and 2006.[360]

This thesis has also recognised cases in which adhesiveness was equal to procedural unconscionability, and in which courts tended to neglect enquiring further into surprise. [361]

In *Flores*,[362] for example, the court declared that: "A finding of a contract of adhesion is essentially a finding of procedural unconscionability."[363] This case involved a dispute over arbitration clauses contained in a loan agreement and deed of trust in a form of contract of adhesion. This approach has been applied several times recently. [364]

Therefore in some cases the mere presence of an adhesion contract, once combined with proof of substantive unconscionability, precluded the enforcement of the contract, because adhesion contracts are viewed as "quintessential procedural unconscionability."[365]

However, further inspection of cases in which arbitration was disputed in adhesion contracts, casts some doubts on Broome's argument. Most cases

[360] Broome's study lists arbitration cases in which oppression has been presumed in adhesion contracts. Refer to fn: 35-36 in Broome (n 350).
[361] *Nagrampa* declares that "under California law, surprise need not be demonstrated if the court determines that the arbitration provision of an adhesive contract is oppressive." Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006) at [1284]. See also Armendariz v Foundation Health Psychcare Servs, Inc, 24 Cal 4th 83, 99 Cal Rptr 2d 745, 6 P 3d 669, 690 (2000); Nyulassy v Lockheed Martin Corp, 120 Cal App 4th 1267 (2004); Mercuro v Superior Court, 96 Cal App 4th 167 (2002).
[362] Flores v Transamerica HomeFirst, Inc, 93 Cal App 4th 846 (2001).
[363] Ibid at [382]. Likewise, *Little v Auto Stiegler* declares that "[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion." Little v Auto Stiegler, Inc, 130 Cal Rptr 2d 892 (2003) at [897].
[364] Discover Bank v Superior Court, 30 Cal Rptr 3d 76 (2005) at [85]; Little v Auto Stiegler, Inc, 130 Cal Rptr 2d 892 (2003) at [897]; Walnut Producers of California v Diamond Foods, Inc, 187 Cal App 4th 634 (2010) at [647] (citation omitted). See also: Discover Bank v Superior Court, 30 Cal Rptr 3d 76 (2005) at [85]; Armendariz v Foundation Health Psychcare Servs Inc 24 Cal 4th 83 99 Cal Rptr 2d 745 6 P 3d 669 690 (2000) at [767]; Shroyer v New Cingular Wireless Services, Inc, 498 F 3d 976 (2007) at [985]. See also: Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007) at [574].
[365] Aral v EarthLink, Inc, 134 Cal App 4th 544 (2005) at [557].

show that courts in investigating oppression did not rely only on adhesiveness; invariably other factors were investigated, including the inequality of bargaining power[366] and the pressure exerted on the complainant.[367]

For example, the assessment of oppression *Harper*,[368] did not pertain to the question of whether the contract is an adhesion one or not. In this instance Harper signed two *preprinted contracts* to stabilise the soil and re-levell a pool on his property. The disputed arbitration clauses established that all related disputes should be solved in accordance with Uniform Rules for Better Business Bureau Arbitration, the terms of which were not attached to the contract.

The Court of Appeal declared that oppression had been found to be onerous, because the arbitration clauses were unclear and uncertain.[369] While the disputed contracts were pre-drafted by one party, the court did not rely on the availability of the standard form contract to find oppression.[370]

Such an example undermines Broome's contention and supports the view that cases of presumed procedural unconscionability or presumed oppression are not based on their subject or theme (arbitration). It therefore seems more appropriate to conceive of presumed procedural unconscionability as examples that bring to light the inconsistency of the courts' engagement with procedural unconscionability and adhesiveness.[371]

Two cases provide further support for this conclusion. The first is *Marin*

[366] Ingle v Circuit City Stores, Inc 328 F 3d 1165 (9th Cir 2003) at [10-12]; Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007) at [583].
[367] Armendariz v Foundation Health Psychcare Servs Inc 99 Cal Rptr 2d 745 (2000) at [768]. [367] Dotson v Amgen, Inc 181 Cal App 4th 975 (2010) at [981-982].
[368] Harper v Ultimo, 7 Cal Rptr 3d 418 (2003).
[369] Ibid at [422-423].
[370] For similar example see: Parada v Superior Court 176 Cal App 4th 1554 (2009) at [1571-1572].
[371] With respect to Broome's study the fact that it is limited to specific period of time namely to 2006 might be one of the reasons of the lack of adequacy.

Storage.[372] Although this case did not concern a dispute over an arbitration clause, the Court of Appeal found procedural unconscionability upon the basis that the relevant contract was an adhesion one. In this regard, it is interesting to note that Broom mistakenly included this case within the list of arbitration cases.[373]

Morris provides the second relevant reference point.[374] In this instance the court specifically pointed out the different ways in which California courts had treated the adhesiveness in unconscionability cases. The court acknowledged that California courts frequently made the mistake of equating adhesiveness and procedural unconscionability. This mistake still continues to be made despite the fact that the two are quite clearly different.[375] The court did not link the inadequate cases in which procedural unconscionability was presumed by virtue of the presence of adhesiveness to arbitration disputes. Rather it remarked that the confusion and the mixed messages had derived from the application of the two approaches (adhesiveness and procedural/substantive unconscionability approach) adopted in California case law.[376]

This means that presumed procedural unconscionability is not contingent upon the prior presence of an arbitration dispute. Accordingly, countervailing cases[377] ultimately suggest an inconsistency in case law.

However, in this context the main imperative is to observe the ease with which procedural unconscionability can be presumed under California law. This

[372] Marin Storage & Trucking, Inc v Benco Contracting and Engineering 89 Cal App 4th 1042 (2001).
[373] Refer to Broome's list of cases. Broome (n 350) fn: 37.
[374] Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005).
[375] Ibid at [1318].
[376] Ibid.
[377] For example: Marin Storage & Trucking, Inc v Benco Contracting and Engineering 89 Cal App 4th 1042 (2001).

observation is significant for this thesis, because it emphasises the doctrine's flexibility, along with its ability to restrict the enforceability of specific types of contracts.

In summary, this section is principally about presumed unconscionability. It proved that presumed unconscionability in English law is obvious and akin to presumed undue influence. Whereas in California law presumed unconscionability is vague and case law shows a considerable inconsistency in their approach to this part of unconscionability.

The analysis of presumed unconscionability especially in English law was necessarily to understand how the elements of unconscionability function together to establish a case of unconscionability.

3.6 Elements Interaction

To have a case of unconscionability, the approach chosen in English law to the interaction of unconscionability elements is totally different from the one chosen in California law. An analysis of this aspect of the doctrine shows that the English law approach to the issue is more effective in advancing the doctrine's flexibility than the one adopted in California, because the type of relationship between the unconscionability elements in English law advances the doctrine's flexibility and provides more certainty in law compared with its equivalence in California law.

3.6.1 English Law

A classic case of unconscionability in English law is one in which all the main elements of unconscionability are present. It also reflects the rule which establishes that the existence of one of these elements is not sufficient to build

a case of unconscionability. Therefore, serious disadvantage alone does not provide a case of unconscionability, no matter how severe and serious this disadvantage is.[378] The same applies to substantive unfairness as mere undervaluation does not excuse the court's intervention.[379] Similarly, unconscionable conduct, if it is not depicted as taking advantage of serious disability and resulting in unconscionable terms, unconscionability will not be applied.

Treating the main elements of unconscionability neutrally, that is without focusing on any specific element, the following diagram and the elements are to be viewed horizontally.

Diagram (1)

SD: Serious Disadvantage.
UT: Unconscionable Terms.
UC: Unconscionable Conduct.

This diagram does not capture the type of interaction between the elements of unconscionability. If the diagram is read horizontally from the serious disadvantage element, when the court investigation finds this element, it will continue to search for unconscionable terms. Once this is achieved it will then proceed to the unconscionable conduct element.

[378] *Proof v Hines* [1735] 25 Eng. Rep. 690 1557-1865 at [115] (Lord Chancellor Talbot).
[379] *Baldwin* clarifies that: "[A]lthough by the Roman law the contract was void when the price paid was not all the value of the thing sold, yet that law was never established in England, nor does our law fix any certain proportion that the price shall bear to the thing." *Baldwin v Rochford* [1799] 95 Eng Rep 589 1378-1865 at [230]; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at [181-183].

However, this is not the actual practice of courts. A review of cases demonstrates that there is no linear progression through which judges investigate a disputed contract alleged to be unconscionable. Consequently, there is no specific starting point or element that triggers an unconscionability test.[380]

Accordingly, the order in which the elements appear in diagram (1) should be restructured, so as to make it possible to start from any of the three elements of unconscionability before proceeding on to either of the other two. This is depicted in the circular outline presented in diagram (2).

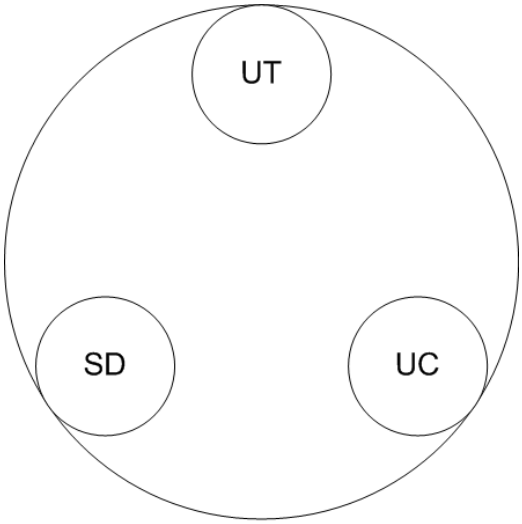

Diagram (2)

UT: Unconscionable Terms.
SD: Serious Disadvantage.
UC: Unconscionable Conduct.

The analysis moves on to begin with cases of presumed unconscionability, because these cases cover a broad number of supposed interactions between the elements. It has already been noted that the presumption of

[380] In the initial stages of this thesis, one of the key intentions was to establish the relative importance of the different elements. The current engagement has, however, revealed that judges do not ascribe a relative importance to the different elements of unconscionability.

unconscionability is raised in relation to the unconscionable terms and unconscionable conduct elements.

Presumed unconscionability that is based on the unconscionable terms element entails the existence of inexplicable gross contractual imbalance, which may trigger a presumption of serious disadvantage and fraudulent conduct. *Heathcote* states that:

> [i]f there is such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which may amount to fraud. If the transaction be such as marks over-reaching on one side, and imbecility on the other, it puts the parties in such a situation, as to shew that it could not have taken place without superior powers on the one side over the other. [381]

This feature was also evidenced in *Say*.[382] Here the extreme undervaluation of a lease was viewed as an indication that the complainant "either have [has] acted in total *ignorance* of the value of his estate, or he must have been *imposed* upon with regard to it."[383] Accordingly unconscionable terms may raise a presumption of the other two elements of unconscionability, as indicated in the following diagram.

[381] *Heathcote v Paignon* [1787] 29 Eng Rep 96 1557-1865.
[382] *Say v Barwick* [1812] 35 Eng Rep 76 1557-1865.
[383] Ibid at [201] (emphasis added).

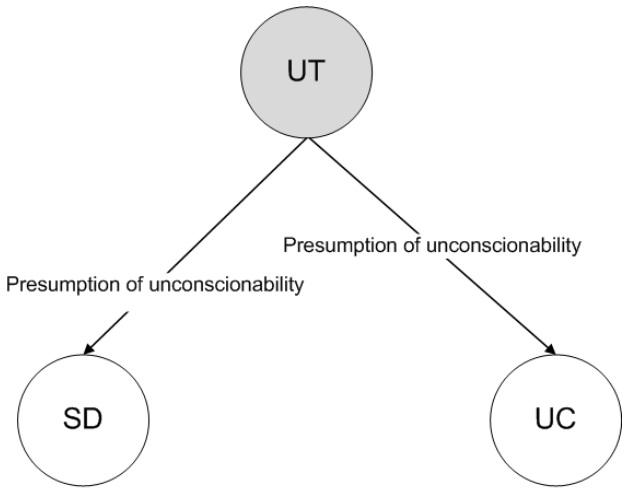

Diagram (3)

A Presumption of Unconscionability Based on the Unconscionable Terms Element

UT: Unconscionable Terms.
SD: Serious Disadvantage.
UC: Unconscionable Conduct.
→: Direction of Presumption of Unconscionability.

However, the presence of a proper explanation for the contract may conceivably break this relationship, because "[u]nequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power".[384] This asserts the importance of the unconscionable conduct element in any equation that seeks the application of unconscionability.[385] Thus, it is not sufficient to infer the serious disability element without the unconscionable conduct element.[386]

Accordingly, the existence of substantive unfairness triggers the presumption of impropriety in the enforcer's conduct and serious weakness in the other party.

[384] *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221 at [231] (citation omitted).
[385] Ibid at [235] (citation omitted).
[386] *Evans* clarifies that "[t]he jurisdiction will not be exercised unless the purchaser was guilty of unconscionable conduct. *This refers not only to the oppressive terms* 'but to the behavior of the stronger party, which must be morally culpable or reprehensible'." *Evans and others v Lloyd and another* [2013] at [para 50] (emphasis added).

These assumptions can be proven to be correct if there is no proper explanation; on the contrary, they can be proven to be incorrect if there is a proper or innocent explanation [387] (e.g. if the complainant knew of the unconscionable terms and intended to make the transaction as a gift).

The second line of cases of presumed unconscionability is premised on the unconscionable conduct element. This element can be presumed from the unconscionability of contractual terms to an exorbitant extent; alternatively, it can be extracted from the parties' characteristics and circumstances. As clarified in *Earl of Chesterfield*,[388] these are categorised as type two of fraud. Accordingly, the unconscionable conduct element can be presumed by inference from the unconscionable terms element or from the serious disadvantage element. Diagram (4) demonstrates the interactions that result from the presumption of fraud.

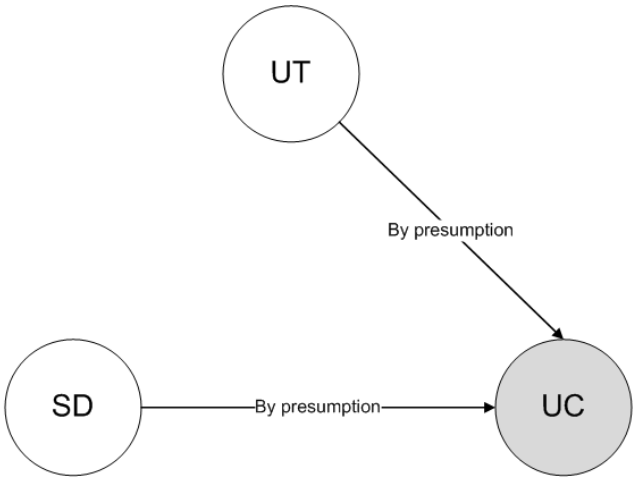

Diagram (4)
Presumption of Unconscionability Based on the Unconscionable Conduct Element.

UT: Unconscionable Terms.
SD: Serious Disadvantage.
UC: Unconscionable Conduct.
→ : Direction of Presumption of Unconscionability.

[387] *Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd* [1983] 1 WLR 87 at [94-5].
[388] *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865 at [155-156].

Evans submits that: “the terms of the transaction may be so oppressive that the court may draw an inference that the defendant behaved unconscionably.”[389] *Port Caledonia*,[390] in which two large laden sailing vessels were sheltering in a harbour because of bad weather, exemplifies the presumption of fraud inferred from serious disadvantage.

In this case one of the ships was dragged down into dangerous proximity to the other and signalled for a tug. A tug arrived, but the master of the other vessel ‘demanded £1000 or no rope.[391] The agreement was ultimately set aside for being extortionate. In this case the master of the first vessel was at a disadvantage compared to the other. The master of the second vessel was aware of this special disadvantage and accordingly a presumption of deliberate fraud was raised.[392]

The superimposing of diagrams (3) and (4) leads to the relationships shown in diagram (5).

[389] *Evans and others v Lloyd and another* [2013] at [para 50]. See also *Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd* [1983] 1 WLR 87.
[390] *Port Caledonia and The Anna* [1903] P184.
[391] Ibid at [184].
[392] Refer to the preceding (text to n 165-167) of this chapter.

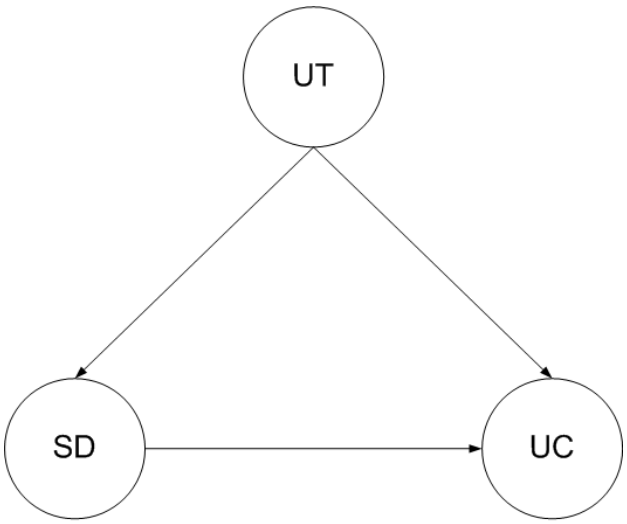

Diagram (5)

UT: Unconscionable Terms.
SD: Serious Disadvantage.
UC: Unconscionable Conduct.
→ : Direction of Presumption of Unconscionability.

Diagram (5) echoes that the interactions do not point in one direction and do not, therefore, present a true circle. This is conceivable, because there is no case of unconscionability that includes both types of presumption. In other words, there is no case in practice that includes both presumptions of the unconscionable conduct and the serious disadvantage that derives from the existence of the unconscionable terms element. Thus, there is a need to analyse a classic case of unconscionability to establish if a true circle can be completed, with all interactions pointing in the same direction.

A classic case of unconscionability can be perceived with reference to the frequent engagements with questions of unconscionability. As Lord Hardwich notes, the unconscionable relationship involves "weakness on one side" and "advantage taken of that weakness"[393] by the other side. It is also noted that in unconscionable bargains "it is necessary for the plaintiff who seeks relief to

[393] *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865 at [155-157].

establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances."[394] This establishes that the unconscionable bargain embodied in *the unconscionable terms is a result of taking advantage 'unconscionable conduct' of the serious disadvantage of the other party.* Thus, in traditional cases, a true circle is always completed, as the following diagram clearly reiterates.

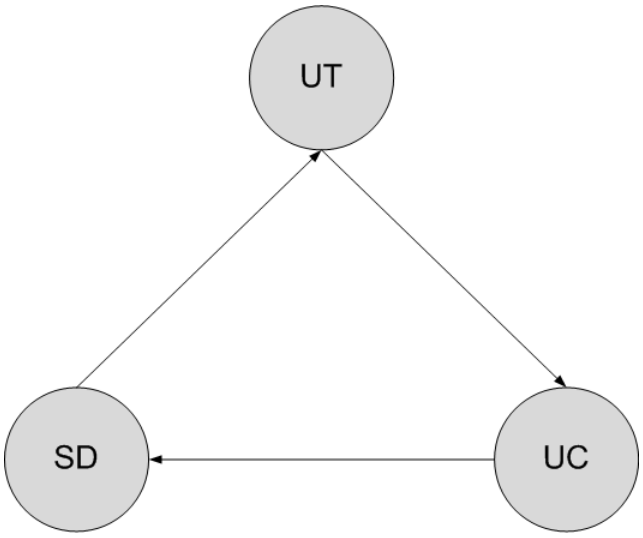

Diagram (6)
Classic Case of Unconscionability

UT: Unconscionable Terms.
SD: Serious Disadvantage.
UC: Unconscionable Conduct.

None of the main elements is a mean through which the next element can be realised because, in classic cases of unconscionability, there is variation in the point at which the judicial assessment starts. This circular relationship among the elements enables and explains this variation in the starting point of

[394] *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221 at [232] citing Mason J. in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at [462-463]. See also: *Perfect v Lane* [1861] 54 Eng Rep 864 1829-1865 at [202-203]; *Multiservice Bookbinding Ltd and others v Marden* [1978] 2 All ER 489 at [110].

examination in cases. It also explains the ease with which the doctrine's rationale is altered.

The circularity that is depicted in diagram (6), when combined with the situations of presumed unconscionability shown in diagram (5), demonstrate that the interaction can go in both directions in some cases as depicted in diagram (7). Although there is an absence of a connection from the unconscionable conduct element to the unconscionable terms element, this connection can be derived from the fact that the unconscionable conduct involves an imposition of the unconscionable terms on the complainant.[395] In *Say*,[396] discussed above, the exorbitant undervaluing of a lease was explained by the fact that either the complainant was ignorant of the real value of his estate "or he must have been imposed upon with regard to it".[397]

[395] *Evans v Lloyd* [2013] EWHC 1725 (Ch) [2013] 2 P & CR at [para 50]. For more examples see: *Pickett v Loggon* [1807] 33 Eng Rep 503 1557-1865 at [234] (Lord Chancellor Eldon); *Nevill v Snelling* [1880] 15 Ch D 679 at [696] (Denman J); Finland Investments Ltd v Pritchard [2011] EWHC 113 (ch) at [72].

[396] *Say v Barwick* [1812] 35 Eng Rep 76 1557-1865.

[397] Ibid at [201] (Sir William Grant M.R). In *Heathcote* the defects of consideration were taken to indicate "that the person did not understand the bargain he made, or was so oppressed that he was glad to make it…" *Heathcote v Paigon* [1787] 29 Eng Rep 96 1557-1865 at [175]. Lord Hatherley also referd to "persons under pressure without adequate protection" in *O'Rorke v John Joseph Bolingbroke* [1877] 2 App Cas 814 at [823].

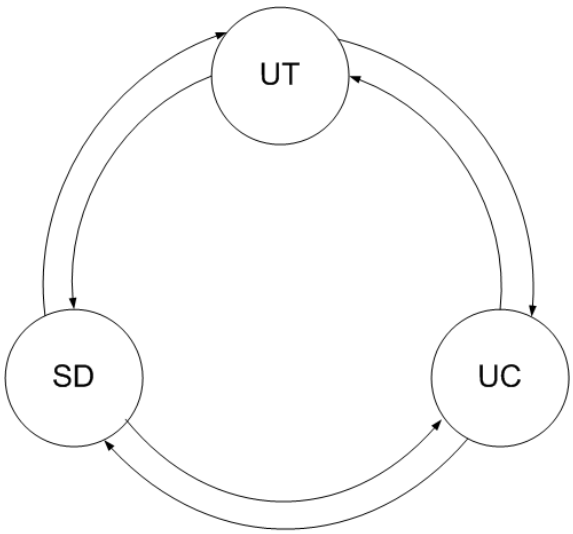

Diagram (7)

UT: Unconscionable Terms.
SD: Serious Disadvantage.
UC: Unconscionable Conduct.
-▸ : Direction of Proving Unconscionability.

This, in other words, demonstrates what can be called a 'mutually dependent' relationship between the constitutive elements of the unconscionability doctrine. This relationship has been interpreted as evidence of the doctrine's flexibility, as there are three ways of proving unconscionability, in addition to its ability to adapt to policies set by decision-makers.

This theory suggests that unconscionability is applicable only when the circle is fully continuous. However, if the circle is broken then unconscionability would no longer apply. This would most likely[398] occur in instances where one or both of the 'complementary elements' (independent legal advice and lack of knowledge) are present especially in cases of presumed unconscionability.

[398] Here it should be noted that there is a margin of other possibilities that may conceivably break the circle. This chapter already observed that if the enforcer provides the other party with sufficient time to carefully consider the contract, this will culminate in the rejection of unconscionability. In addition, the disclosure of material information and a full explanation of the contract's effect may also save the contract from unconscionability.

Independent competent legal advice will most likely interrupt the circle between the elements and contribute to the disputed contract being upheld as in *Pritchard.*[399] The claim in this case was for an order of specific performance. The defendant argued that he was a young man who was not acquainted with business and that the terms of the contract were unfair and not exactly what he thought them to be. In taking into account the fact that he had competent advice and that his partner was quite well acquainted with business, the court rejected his defence of unconscionability and upheld the contract.

The central role of legal advice and lack of knowledge in unconscionability decisions is elaborated in *Jones.*[400] In this case the complainant and his solicitor misunderstood the disputed term. The enforcer took this misunderstanding into account and sought to gain an unfair advantage from it. The Court of First Instance decided that this was morally reprehensible. The Court of Appeal reversed this decision on the grounds that there was no evidence to affirm that the enforcer was fully aware of the solicitor's misunderstanding. Moreover, it was not "open to the judge to hold that, in executing a document prepared by the [weaker party's] solicitor … the [stronger party] was guilty of morally reprehensible conduct".[401]

In this example legal advice was inadequate and the Court of First Instance therefore nullified the contract upon the basis of unconscionability. However, negating the enforcer's knowledge of the other party's misunderstanding was sufficient for the Court of Appeal to reject the plea of unconscionability. This means that, in the wording of this thesis, the circularity was broken by the absence of knowledge.

[399] *Pritchard v Ovey* [1820] 1 Jaob & Walker 396 37 ER 426.
[400] *Jones v Morgan* [2001] EWCA Civ 995.
[401] Ibid at [para 38].

It can also be argued that knowledge has a significant impact in cases of presumed unconscionability by asserting or negating the presumption.[402] This was illustrated in *Errington*[403] where the complainant was of advanced age and deemed to be mentally incapable of managing his own affairs. While the transaction was substantially undervalued, the court did not presume fraud by the other party, as he was not aware of the disability of the other party or price undervaluation and had no reason to suspect the inadequacy of the legal advice. Each of these factors was crucial in the rejection of unconscionability, as the circularity was broken.

The previous analysis explained how the interaction between the different elements in English law was key to the doctrine's particular merits of flexibility. Whether the same applies to California law might be questioned.

3.6.2 California Law

In California law, the elements of unconscionability are tied by a 'sliding scale', which is the equivalent of the circularity in English law. Case law presents this sliding scale in the following terms:

> [e]ssentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves. In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is

[402] *Evans v Lloyd* states that "[a]lthough the terms of the transaction may be so oppressive that the court may draw an inference that the Defendant [advantaged] behaved unconscionably, a court will not find unconscionable conduct if D was unaware that C was acting under a special disadvantage..." *Evans v Lloyd* [2013] EWHC 1725 (Ch) [2013] 2 P & CR at [50]. In *Davies v Cooper* the presence of knowledge supported the application of unconscionability. *Davies v Cooper* [1840] 41 Eng Rep 373 1557-1865 at [280]. See also: *Perfect v Lane* [1861] 54 Eng Rep 864 1829-1865 at [203, 205].

[403] *Errington v Martell-Wilson* [1980] Lexis Citation 591.

unenforceable, and vice versa.[404]

This explains that the gross unfairness in the unconscionable terms results from defects in the contractual process and the sliding scale is based on this link. It is therefore submitted that the "*enforceability of the clause is tied to the procedural aspects of unconscionability.*"[405]

It has also been observed, with reference to the analysis of the substantive unconscionability element, that the findings of the surprise investigation, which is a component of procedural unconscionability, are usually reconsidered or revised within the substantive unconscionability test,[406] as one of the steps through which substantive unconscionability is investigated. This could be considered as a further embodiment of the link between procedural and substantive unconscionability.

However, this aspect does not appear to be significant, because unconscionability can be established without the presence of surprise. Accordingly, the sliding scale does the job of tying the elements together to

[404] Sanchez v Valencia Holding Co, LLC, 61 Cal 4th 899 (2015) at [820] (citation omitted); Armendariz v Foundation Health Psychcare Servs Inc 99 Cal Rptr 2d 745 (2000) at [767]. In *Patterson* the same idea has also been advanced with reference to unconscionability cases. This is established if a contract is "[t]o be unenforceable there must be both substantive and procedural unconscionability" Patterson v ITT Consumer Financial Corp, 14 Cal App 4th 1659 (1993) at [1664]. Here it should however be acknowledged that there may be an inverse relationship between the two elements. Harper states that: "Yet while both must be present [procedural and substantive unconscionability], they need not be present in equal amounts. There is a sliding scale where the greater the evidence of procedural unconscionability, the less evidence is needed of substantive unconscionability." Harper v Ultimo, 7 Cal Rptr 3d 418 (2003) at [422] (citation omitted). Similarly, in *Sanchez* the California Supreme Court clarified that "The prevailing view is that [procedural and substantive unconscionability] must both be present… But they need not be present in the same degree." Sanchez v Valenca Holding Co, LLC, 61 Cal 4th 899 (2015) at [820] (citation omitted). This has been followed and affirmed in several cases - see for example: Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007).

[405] A & M Produce Co v FMC Corp [1982] 135 Cal App 3d 473 at [487] (emphasis added). Similarly, *Westlye* illustrates that substantive unconscionability "is tied to procedural unconscionability and requires a balancing test, such that 'the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated.'" Westlye v Look Sports, Inc, 17 Cal App 4th 1715 (1993) at [1736] (Citation omitted).

[406] Refer to (text to n 322).

such an extent that the existence of one element is contingent upon the presence of its counterpart.

The sliding scale posits a linear relationship between procedural and substantive unconscionability.[407] This affirms that there will be no application of unconscionability in the absence of any of its elements. The following diagram further clarifies this relationship.

Diagram (8)
Sliding Scale Relationship between Procedural and Substantive Unconscionability

The sliding scale therefore provides further insight into the degrees of the elements of unconscionability, along with the dynamic through which they interact. The sliding scale implies that the greater the level of procedural unconscionability, the less is required of substantive unconscionability and vice-versa. The degrees of procedural and substantive unconscionability enable and sustain the sliding scale.

Case law demonstrates that there are three separate scenarios through which the elements on the sliding scale can become balanced. In the first scenario,

[407] It is a linear relationship because the sliding scale *ties* procedural and substantive unconscionability. Merriam Webster (an online dictionary) clarifies that 'tie' is a verb - "to gather into tight mass by means of *a line* or cord; or to produce something equal to (as in quality or value)."

procedural and substantive unconscionability are equivalent. In *A & M*,[408] the court stated that: "we suspect the substantive unconscionability of the disclaimer and exclusion provisions contributed equally to the trial court's ultimate conclusion."[409] In this case surprise and oppression were found under procedural unconscionability.

Oppression was derived from an inequality of bargaining power that could itself be traced back to the fact that one of the businesses was larger than the other, while surprise was found in the consequential damage exclusion, which was written on the back of the contract and which was "not particularly apparent, being only slightly larger than most of the other contract text."[410] Substantive unconscionability was found upon the basis that the disclaimer of warranties was commercially unreasonable.[411] The sliding scale in this scenario is set out in Diagram (9).

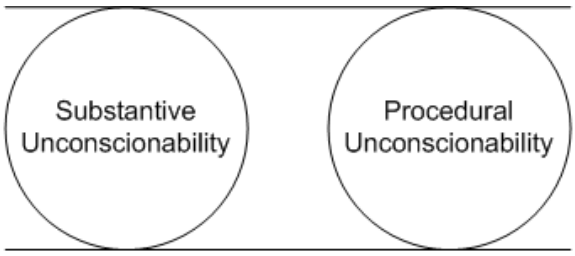

Diagram (9)
Procedural and Substantive Unconscionability of the Same Degree

[408] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982). For further insight into the facts of the case, refer to (text to n 108). In *Sonic-Calabasas A, Inc* both procedural and substantive unconscionability were found to be significantly high. Sonic-Calabasas A, Inc v Moreno, 57 Cal 4th 1109 (2013).
[409] A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [491].
[410] Ibid at [490].
[411] Ibid at [491].

The second scenario relates to cases in which the substantive element is disproportionately greater than its procedural counterpart. This situation derives from a prior proposition that a "[c]ompelling showing of substantive unconscionability may overcome [a] weaker showing of procedural unconscionability."[412] In *Gatton*,[413] subscribers brought a class action against a cellular phone provider, relating to alleged unfair business practices in early termination fees and the sale of locked handsets that cannot be used when switching carriers. In response, the provider sought to force arbitration of the actions. The court found a minimal degree of procedural unconscionability, deriving this from the adhesiveness of the contract, regardless of the availability of market alternatives.[414]

The court demonstrated that this minimal degree of procedural unconscionability requires a high degree of substantive unconscionability if a contract is to be rendered unenforceable. The court concluded that the class-wide arbitration was sufficiently substantively unconscionable to tip the scale and deny the motion to compel the arbitration clause. This application of the sliding scale is depicted in Diagram (10).

[412] Carboni v Arrospide, 2 Cal App 4th 76 (1991) [86]. *Nagrampa* expressed this scenario. It states that: "After all, the difference between no procedural unconscionability (as I see it) and 'minimal' or 'slight' procedural unconscionability (as the majority sees it) should make no difference unless there is evidence of overwhelming substantive unconscionability to offset the 'minimal' showing on the procedural side of the scale." Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006) at [1312].
[413] Gatton v T-Mobile USA, Inc, 152 Cal App 4th 571 (2007).
[414] Ibid at [585-586]. For other examples see: Carboni v Arrospide, 2 Cal App 4th 76 (1991); West v Henderson 227 Cal App 3d 1578 (1991); Ellis v McKinnon Broadcasting Co, 18 Cal App 4th 1796 (1993).

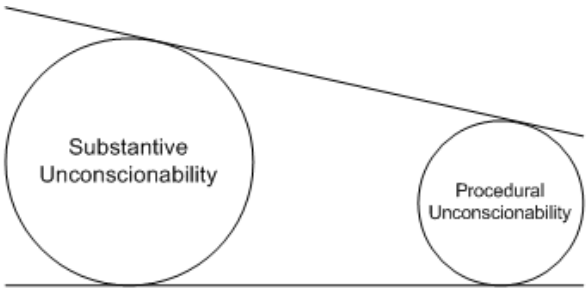

Diagram (10)
Substantive Unconscionability Greater than Procedural Unconscionability

In the final scenario the procedural element exceeds the substantive element within the sliding scale. In *Mercuro*,[415] a former employer moved to compel arbitration pursuant to an arbitration agreement after a former employee and his wife brought an employment-related tort claim. Both elements of unconscionability were found. After clarifying that procedural unconscionability "focuses on the oppressiveness of the stronger party's conduct",[416] the court explained that "Countrywide [the employer] used oppressive tactics to secure Mercuro's [the employee] signature on the arbitration agreement."[417] The court noted that the management of the company had informed Mercuro that he would have to sign the agreement if he wanted to "make a living in Countrywide."[418] In the event that he failed to do so, "he would be 'cut off' and made to pay big time"[419]

Mercuro was also warned that he would have difficulty in finding other employment[420] and that Countrywide "would strip him of his account, refuse to approve his travel requests and take whatever action was necessary to drive

[415] Mercuro v Superior Court, 96 Cal App 4th 167 (2002).
[416] Ibid at [174].
[417] Ibid.
[418] Ibid at [175].
[419] Ibid.
[420] Ibid.

him out."[421] Each of these threats, according to the court, were to exert economic pressure upon Mercuro. Given that the final agreement was only enabled through this highly oppressive conduct, the court ultimately concluded that: "he need only make a minimal showing of the agreement's substantive unconscionability."[422] Substantive unconscionability was found in the unjustified unilateral character of the arbitration agreement, which was underlined by the fact that Countrywide required its employees to arbitrate most of their common claims, while litigating in the courts in pursuit of its own claims.[423] Thus, the court concluded that the contract was procedurally and substantive unconscionable. The sliding scale that applied in this case is depicted in Diagram (11).

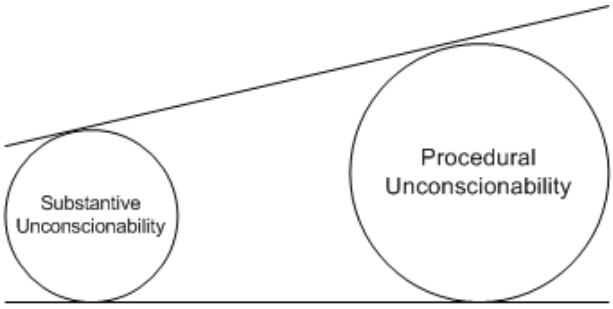

Diagram (11)
Procedural Unconscionability Greater than Substantive Unconscionability

The aforementioned clarification of an effective sliding scale that leads to the application of unconscionability has a clear exception, which is illuminated by *Graham*.[424] In this case substantive unconscionability was found, because

[421] Ibid.
[422] Ibid.
[423] Ibid at [176].
[424] Graham v Scissor-Tail, Inc 28 Cal 3d 807 (1981).

'minimum integrity' which provides the minimum degree of substantive unconscionability had not been met. Here, unconscionability was applied despite the fact that the procedural element was not embodied to its greatest degree, but to its minimum form.

The court demonstrated that the contract's adhesive character and oppression was found. Surprise, however, was not proven, because Graham (the complainant) himself testified that he was not unaware of the disputed terms of the contract, that he had, after all, contracted several times with the same terms, which had previously been drafted by the labour union. In addition, Graham had also been a party in previous disputes brought before the same labor union. The court therefore concluded that Graham was aware of the arbitration clauses and maintained that they were consistent with his reasonable expectations.

The case failed to adopt the rules of the sliding scale, because a maximum level of procedural unconscionability requires the presence of oppression and surprise, the lack of other choice and in some instances, the presence of sophistication. Whereas in *Graham,* there was a lack of alternatives and oppression, but there was no surprise. Accordingly, just a minimal degree of procedural unconscionability was present. This degree requires a great degree of substantive unconscionability. Quite clearly, this was not demonstrated in the current case.[425] This observation can be interpreted in one of two ways.

The first interpretation can be traced back to two foundations: firstly, doubting this thesis' understanding of 'minimal integrity' as the weakest degree of

[425] The rule is "A compelling case of substantive unreasonableness will overcome a relatively weak showing of procedural unconscionability". Ellis v McKinnon Broadcasting Co, 18 Cal App 4th 1796 (1993) at [1805].

substantive; secondly, by taking into account the fact that *Graham* is the first case of unconscionability that followed the codification of unconscionability in the California Civil Code §1670.5. While this case was decided after the codification, it was adjudicated in accordance with precedents that had previously (e.g. prior to the codification) been applied to unconscionability. Therefore, this case can be viewed as an application of the previous law of unconscionability, a feature further reinforced by the fact that no known case had followed *Graham's* inaccurate application of applying the sliding scale.

The second interpretation considers *Graham* as an emphasis on the observed rationale of unconscionability in California law that is remedying unfairness in contracts. In nullifying the contract in *Graham* upon the basis of unconscionability, the court stressed its concern with achieving fairness therefore, it did not follow the rule required for an effective sliding scale.

Further support for this view is provided by cases in which courts proceeded to assess the substantive element, notwithstanding the fact that there was no prior finding of procedural unconscionability.[426] When these cases progressed to assess the substantive element this may well give rise to the assumption that courts would, in cases of excessive unfairness, presume in favour of procedural unconscionability. However, case law makes it clear that there is no basis for such an assumption and the rule is that:

> [To argue that] a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely, that the party subject to a seemingly one-sided term is presumed to have obtained

[426] See for example: Robison v City of Manteca, 78 Cal App 4th 452 (2000); Walnut Producers of California v Diamond Foods, Inc, 187 Cal App 4th 634 (2010).

> some advantage from conceding the term or that, if one party negotiated poorly, it is not the court's place to rectify these kinds of errors or asymmetries.[427]

It is therefore the case that both of the unconscionability elements must be present.[428]

The preceding interpretations reflect weaknesses of uncertainty in California law, which is thrown into starker perspective when the English law approach provides an immediate point of comparison. This uncertainty is brought out in its fullest perspective by *Nagrampa*,[429] in which an action against a franchisor was removed to the federal court. The franchisee alleged common law misrepresentation, along with fraud and state law violation. When the franchisor sought to compel arbitration, the franchisee responded by claiming its unconscionability.

The District Court denied unconscionability and granted the franchisor's motion. The Court of Appeal later affirmed this decision. The majority of the Federal Court maintained that the arbitration provision was unconscionable under California law. This conclusion derived from a finding of minimal procedural unconscionability that could itself be traced back to an inequality of bargaining power between the contractual parties and the adhesiveness of the franchise contract.

In applying the sliding scale, the court then affirmed the need to prove strong evidence of substantive unconscionability. The court proceeded to conclude a finding of unconscionability. This was justified by the fact that there was a lack of mutuality in the arbitration provision and the adhesion contract was not

[427] Sanchez v Western Pizza Enterprises 172 Cal App 4th 154 (2009) at [172].
[428] Ibid at [820].
[429] Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006).

entered into freely (the franchisee did not receive adequate notice as the language was misleading; in addition, the form forum selection clause and the fee splitting clause also potentially impeded the franchisee's statutory rights).[430]

Kozinski, the sitting Circuit Judge, disagreed with the finding of minimal procedural unconscionability.[431] According to him, even if he agrees with the expressed view of the majority, it was still necessary to find overwhelming substantive unconscionability to offset the minimal showing of procedural unconscionability.[432] According to Judge Kozinski, the majority had failed to prove this finding. Commenting on this claim he stated that:

> As it is, *the majority pays only lip service to the sliding scale test.* It briefly discusses the test in the procedural unconscionability part of its opinion, but then forgets all about it when it gets to the other end of the sliding scale. The majority does say that the evidence of substantive unconscionability is 'strong enough' to offset the 'slight' evidence of procedural unconscionability… *But this merely states the conclusion the majority wants to reach; it does not explain why the substantive unconscionability it finds is of such a 'high degree'* as to offset the 'slight' or 'minimal' degree of procedural unconscionability.[433]

A closer review of the majority test of substantive unconscionability provides that although the clause was substantively unconscionable, it similarly supports the proposition that Judge Kozinski was correct in questioning the demonstrated degree of substantive unconscionability. This becomes even

[430] Ibid at [1293].
[431] Judge Kozinski sought to justify his rejection of the existence of unconscionability by observing that the franchisee was a sophisticated person. She was not under distress or need of money. The arbitration clause was also indicated in bold capital letters and the contract was left with the franchisee for two months – this meant that she had sufficient time to read the document and seek legal advice. In addition, there were also clear market alternatives – it was accordingly possible for her to reject the arbitration clause and seek another franchise. See Ibid at [1309-1312].
[432] Ibid at [1312].
[433] Ibid at [1312] (citation omitted- emphasis added).

clearer when the substantive unconscionability test in *Nagrampa* is compared with its *Nyulassy* counterpart[434] (the latter was cited by Koziniski as an authority, which provided reliable insight into how degrees of procedural substantive should be examined on the sliding scale).

In *Nyulassy*, which involved a motion to compel arbitration by an employer against the employee's action for retaliatory demotion, there was a separate heading (titled *'Interplay between procedural and substantive unconscionability'*).[435] In considering this heading, the Court of Appeal investigated the proportions in which each of the unconscionability elements were evidenced.

A comparison of the assessment that was provided by the sliding scale in *Ngrampa* and *Nyulassy* cases brings to light no discernible difference.[436] The main difference is the separate heading which precedes the examination of the sliding scale in *Nyulassy.* It is nonetheless apparent that the lack of certainty remains an on-going threat. It should be noted that the identification of substantive unconscionability itself, let alone its degree, is often a difficult and complicated undertaking.

This shows how the establishment of different degrees of procedural and substantive unconscionability in California law may cause vagueness and uncertainty when it is hard if not impossible to determine the degree present of each element, something which English law successfully avoids it by the adoption of the circular relationship.

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[434] Nyulassy v Lockheed Martin Corp, 120 Cal App 4th 1267 (2004).
[435] Ibid at [1286-1287].
[436] The identification of a high level of substantive unconscionability in *Nyulassy* could mainly be attributed to the lack of mutuality in the arbitration clause. Ibid [1287]. This is identical to the identification that was offered in *Nagrampa*. See Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006) at [1293].

In summary, the analysis of the interaction between the essential elements of unconscionability in English law clarifies a circular relationship that embodies three ways of proving unconscionability, while in California law the interaction is based on a vertical perspective that ties procedural and substantive to a sliding scale.

3.7 Conclusion

This chapter demonstrates the main and the complementary elements of unconscionability in English and California law. It also clarifies how these elements function to provide a case of unconscionability and the results of such findings.

The analysis proves that unconscionability is determined to a great extent in both jurisdictions. However, the comparison conducted observes that English law is more advanced in this regard than its counterpart California law, because the former does not recognise different degrees for procedural and substantive unconscionability, which is a problematic aspect of unconscionability in California law, because of the difficulty of determining the degree of procedural and substantive unconscionability. However, the fact that California law determines specific steps through which substantive unconscionability can be investigated, makes this law a step ahead to its counterpart, English law.

The analysis further evidenced that the disparity between both jurisdictions in the substance of procedural and substantive unconscionability mainly results from the different perspectives through which those elements are assessed in each law. It has been proved that English law adopts a party-oriented approach, in contrast to California law, which adopts a contract-oriented approach.

Moreover, it has been evidenced that the English law of unconscionability is tainted by subjectivity that is not recognised in California law of unconscionability.

The effect of the recognised similarities and differences on the application of unconscionability on e-wraps will be discussed in the following chapter, which is concerned with unconscionable e-wraps.

Chapter Four

Unconscionability in E-Wraps

4.1 Introduction

The chapter investigates the application of unconscionability to e-wraps. This investigation depends heavily on the analysis in the previous chapter which was concerned with the demonstration of unconscionability in traditional contracts.

The findings of the previous chapter help determine differences and similarities in the approaches adopted in English and California law, which in turn will help in demonstrating how e-wraps might fit into each approach and consequently which one is more accurate in this regard.

Moreover, these findings become particularly significant in the analysis of English law, because so far there have been no examples of unconscionable e-wraps cases in English law. This lack of cases means that this discussion must be grounded upon hypothetical models. The knowledge that pertains to the application of unconscionability in traditional contracts will be combined with an analysis of what is known and settled with regard to e-wraps' specific attributes. This will help to construct a theory of unconscionability in e-wraps in English law.

As to California law, although there are only eight cases, they are sufficient to show that California courts have opted to preserve the traditional test of unconscionability. This indicates that unconscionability offers a sufficiently robust solution to unfairness issues in e-wraps. However, there are aspects of the test, which may remove the doctrine or weaken its sufficiency in resolving

unfair e-wraps. The respective advantages and disadvantages will be discussed.

Accordingly, the discussion is divided into two parts. The first part is concerned with English law and attempts to provide a theory for a case of unconscionable e-wrap before an English court and, had an English court been confronted with such a case, how it might have been treated. Contrary to the previous chapter, the discussion will be tailored to the doctrinal application in this jurisdiction. That is, each of the three essential elements of the doctrine will be explored instead of dividing unconscionability into procedural and substantive unconscionability.

The second part of the discussion provides an analysis of the available California e-wrap cases. The findings of this analysis will be combined with the observation of two main theories that propose an adjustment of unconscionability in e-wraps. The integration of theories with case law will assist in analysing and proposing any potential reform of the doctrine's application in e-wraps.

However, before conducting this discussion there is a need to address some of the e-wraps attributes that have been addressed by some research which has a direct impact on understanding some issues that are related to the unconscionability test such as awareness or knowledge and the standard behaviour of online users.

These different issues will be investigated in the following paragraphs.

4.2 Deficiencies of Unconscionability in E-Wraps

With regard to the doctrine's application in e-wraps, the first thing that needs to be noted, with specific attention to California case law, is that the overall

number of cases is only eight. American commentators also refer to the very small number of general cases in the United States.[1] This might be attributable to some of the problems that have been encountered in applying unconscionability in e-wraps.

However, a further reason can be suggested for the absence of unconscionable e-wraps cases in English law, that is, the existence of the Consumer Rights Act 2015 which, with its fairness test, limits the jurisdiction of unconscionability in English law. This fairness test resembles unconscionability greatly. Furthermore, courts are obliged to apply the Act even in cases where the complainant does not request its protection.[2] Thus, when a party to an e-wrap pleas to be relieved on grounds of unconscionability, and the contract can be governed by the Consumer Rights Act, the court should ignore the plea of unconscionability and apply the rules of the Act.[3] However, some types of contracts and terms can still be governed by unconscionability.[4]

Observing what is considered a disadvantage or deficiency of unconscionability that limit its application to e-wraps as documented in some literature, these are

[1] Nancy Kim, *Warp Contracts: Foundations and Ramifications,* (Oxford Scholarship Online 2014) 88; Robert L Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated' (2005) 42 Hous L Rev 1041 <intl.westlaw.com> accessed 8 November 2016, 1064; James R Maxeiner, 'Standard-Terms Contracting in the Global Electronic Age: European Alternatives, (2003) 28 Yale J Int'l L 109, 123.

[2] The Consumer Rights Act 2015. Section 71(2) provides that: "[t]he court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it."

[3] Section 71(3) of the Consumer Rights Act 2015 provides that: "But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term."

[4] Section 64(1) specifies terms that are excluded from the assessment of fairness test. These, inasmuch as the terms are transparent and prominent, define the subject matter of the contract and delineate the price payable under the contract. Section 64(2) states that: "[s]ubsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent. While section 64(1) of the Consumer Rights Act 2015 establishes that: "(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—(a) it specifies the main subject matter of the contract, or (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it." Moreover, non-consumer contracts and contracts of employment or apprenticeship can be governed by unconscionability.

some issues that are applicable to both English and California law.

First, courts have been reluctant to review the substantive part of unconscionability if sufficient notice had been provided and if there had been sufficient time for the user to read through the contractual terms.[5] It has therefore been argued that a clever supplier needs only to ensure that the user is aware of the existence of contractual terms, because the existence of this knowledge clearly demonstrates that he/she knew that they were contracting, and as a result, the complaint of unconscionability is precluded from the outset.[6]

This argument misses the point that it is conceivable, even in cases where terms are incorporated, to challenge terms for their fairness. Moreover, based on the analysis of unconscionability in traditional contracts in California, it can be argued that the fact that minimal procedural was granted in some cases for the mere presence of adhesion contracts grants that California courts may proceed to investigate substantive unconscionability, in an attempt to find out whether the sliding scale is effective in the disputed case or not.

Second, the assessment of substantive unconscionability draws strongly upon commercial standards that have been determined by business sensibilities and practices.[7] Obviously, this argument assumes that businesses would establish practice that is in their favour. Still, the fact that the investigation of

[5] Kim (n 1) 88. This recognition was not found to exist in California. This may be due to the fact that when unconscionability is claimed before courts, minimal procedural unconscionability is almost always granted to adhesion contract cases (this also applies when courts proceed to examine the substantive part of unconscionability).
[6] Maxeiner (n 1) 119.
[7] Nancy S Kim, 'Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes' (2005) 84 Neb L Rev 506, 551. Radin similarly, remarks that "unconscionability may depend on whether other sellers in the same geographical area are doing the same thing, in which case it becomes difficult for a court to find an industry-wide boilerplate scheme unconscionable. Yet this is exactly the kind of case where onerous boilerplate would be inescapable and most oppressive to recipients." Margaret Jane Radin, *Boilerplate The Fine Print, Vanishing Rights, and the Rule of Law* (Princton University Press 2013) 127.

unconscionability relies on the context of cases offsets this argument.

Third, the main purpose of the doctrine is confined to defence rather than damages or affirmative relief,[8] which also describes the doctrine as applied to traditional contracts. Moreover, as clarified in the previous chapter, observing unconscionability as a defence is limited to California law.

Fourth, the contract must be unconscionable at contracting time, therefore, subsequent unfairness that emerges after this time cannot be governed by unconscionability. Again this is a rule that applies to traditional contracts too,[9]and provides certainty in contracts.

Fifth, there is an inconsistency in case law in the determination of substantive unconscionability. This feature, which causes unpredictability,[10] is in large part attributable to the doctrine's failure to list unconscionable terms and its 'fact-sensitive' determination.[11] This, in some instances, has encouraged online suppliers to 'overreach' by taking advantage of the doctrine's unpredictability;[12] in others it has caused patently unfair contract terms to become isolated from the substantive unconscionability test.[13]

It was made clear, in the previous chapter that California law has made some steps towards further determination of substantive unconscionability, which indicates that this criticism of the doctrine might be overcome or reduced in future as cases accumulate.

[8] Kim (n 7) 552. Maxeiner describes the unconscionability doctrine as a method of enforcement and "a no-risk proposition." See Maxeiner (n 1) 121.
[9] Kim (n 7) 553.
[10] Kim '*Warp Contracts'* (n 1) 87.
[11] Maxeiner (n 1) 118.
[12] Oakley (n 1) 1061.
[13] Dov Waisman, 'Preserving Substantive Unconscionability' (2014) 44 Sw L Rev 297 <intl.westlaw.com> accessed 8 November 2016, 299.

Finally, the substantive part of unconscionability is vague and creates a very high standard that is restricted to egregious cases. This ultimately functions to make the doctrine useless.[14]

This review of the main problems in the application of unconscionability to e-wraps, summarises the key themes and issues that may hinder its application to e-wraps. However, unconscionable e-wraps cases in California show that the doctrine was effectively applied, even without adjustment of its traditional rules. Moreover, unconscionability as adopted in English law can also be applied effectively, viewing the recognition of presumed unconscionability in this jurisdiction and the assistance that some research provides to determine the online users' average behaviour. These points will be further elaborated.

4.3 Unconscionable E-wraps in English Law

Chapter One of this thesis shows that different jurisdictions have adopted divergent approaches to e-wraps. While some jurisdictions have recognised e-wraps as contracts that are similar to traditional contracts; other jurisdictions have instead engaged with e-wraps as a special type of contract that requires a modification of some of the traditional rules of contract law.

The English law position on this issue remains unclear, in large part because there have been no cases that involved the application of unconscionability to e-wraps. However, it seems that English courts, in the future, will most likely retain the traditional rules of contract law without making any adjustments in e-wrap cases. This assumption is based on the recognition of two points. The first pertains to *Bassano*, which involved a click-wrap contract that was dealt with in

[14] Oakley (n 1) 1062 -1063. Maxeiner also maintains that this is a reflection of the rule which establishes that the doctrine is not concerned with bad bargains. Maxeiner (n 1) 119.

the same way as any other traditional contract (that is, without any special consideration by the court of its nature). [15]

The second point pertains to the previous chapter's analysis of unconscionability in traditional contracts, which demonstrated that English law adopted a strict approach to unconscionability. This is drawn out when the subjective approach is applied to some of the doctrine's elements and the approach that English law adopts to constructive knowledge which can also be viewed as an attempt to restrict the doctrine's application to a minimum. However, as explained previously, constructive knowledge remains an unresolved matter.[16]

Nonetheless, the flexibility of unconscionability as proved so far, suggests that it is capable of treating unconscionable e-wraps without any adjustments.

Applying the previous understanding of unconscionability suggests that there are two ways to resolve unconscionable e-wraps. The first is through the usage of presumed unconscionability, which is more relaxed than the second which relies on the conception of classic cases of unconscionability where the whole essential must be proved rather than presumed as in the first approach. Therefore, the adoption of either of these two approaches depends on the decision-maker's preference in easing nullification of unconscionable e-wraps or restricting it to a limited extent.

4.4 Presumption in E-Wraps

This approach is based on presumed unconscionability as applied and clarified in early cases of catching bargains with expectant heirs, to be expanded to

[15] *Bassano v Toft* [2014] EWHC 377 (QB).
[16] Refer to Chapter Three (text to n 193-218).

cases of reversioners and annuities for reasons explained by Selborne.[17] The suggestion here is that cases of e-wraps are similar to those early cases because they enjoy the same attributes.

In this respect, *Shelly* demonstrates how the jurisdiction of presumed unconscionability had developed. It remarks that although earlier cases required proving that actual undue advantage had been taken, more modern cases show that reversioners were also "exposed to imposition and hard terms," [18] moreover; they are "in the power of those with whom they contracted."[19] Consequently, it was a fit rule of policy to shift the onus of proving that the transaction was fair on the parties who dealt with expectant and reversioners.[20]

Accordingly, the category of cases that could be governed by presumed unconscionability was extended to include "Post-obit securities and sales of reversions, or of annuities, or gross sums charged upon reversions".[21] The reason for this expansion as *Shelly* explained, is the power of the parties with whom this category contracts.

By contrast, viewing the power the real online suppliers have against online users who are in a weaker position, it can be plausibly argued that further expansion of presumed unconscionability to e-wraps is possible.

The power of online suppliers, as contractual parties, appears in several aspects: they are the one who draft the terms of their e-wraps; the terms cannot be negotiated; the standard behaviour of online users is not reading their e-wraps let alone comparing them to other e-wraps to ensure that they had the

[17] *Earl of Aylesford v Morris* (1873) 8 LR Ch App 484.
[18] *Shelly v Nash* [1818] 56 Eng Rep 494 1815-1865 at [236].
[19] Ibid.
[20] Ibid.
[21] *Earl of Aylesford v Morris* (1873) 8 LR Ch App 484 at [490].

best terms in the market; and finally some online services are monopolised therefore, online users have no alternative choices in contracting.

For these reasons it can be argued that online suppliers, when compared with contractors with expectant heirs and reversioners hold the same position.

However, *Shelly* proceeded to further clarify that the principle and the policy of shifting the *onus probandi* may be questionable, because "[s]ellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms; and persons who sell their expectations and reversions from the pressure of distress, are thrown by the rule into the hands of those who are likely to take advantage of their situation; for no person can securely deal with them."[22] This elucidates the rationale behind making the presumption in such contracts rebuttable.

In further explanation of why the idea of presumption is adopted in catching bargains with expectant heirs and consequently unconscionable bargains, Lord Selborne addresses one peculiar feature that has been universally present in all catching bargains that is

> [t]he victim comes to snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as class), excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him.[23]

By analogy, it can be argued that e-wraps as a system of dealing does set

[22] Ibid.
[23] Ibid at [491-492].

snares to online users as a specific class of contractors who are not necessarily prodigals but most likely ignorant, might be under necessity, and without any other choice due both to their own necessity or for the lack of different contractual terms. They also lack accessible professional advice, therefore, they also come in the dark.

Online users as a class of contractors are in the power of those with whom they contracted just as much as reversioners and expectant heirs. Much research conducted by interested groups have demonstrated the attributes and standard behaviour of online users and their weaknesses. Consequently, they demonstrate circumstances through which courts can identify the relational inequality that is necessary to raise a presumption of unconscionability in addition to unconscionable inexplicable terms.

Indications of Relational Inequality

Studies of the behaviour of online users may ease the application of unconscionability to e-wraps, if they were adopted, as they assert relational inequality in e-wraps as a prerequisite for presuming unconscionability.

The first line of study proves the weakness of online users depicted in their ignorance, because users' lack of reading and understanding affects their ability to comprehend the terms and conditions of e-wraps.

It also has a direct impact on the decision of whether the suppliers' knowledge of the serious disadvantages of online users should be presumed in all e-wraps.

An empirical analysis conducted by the Nielsen Norman Group demonstrates that online users usually read only twenty per cent of texts on webpages.[24] Upon this basis, it is not conceivable that users would read all of the terms and conditions of their wraps.

Similarly, Korobkin, in drawing upon social science research, concludes that non-drafting parties are rational decision makers "who will normally price only a limited number of product attributes as part of their purchase decision."[25] It is therefore the case that most of the terms of their standard form contract are not read.

Similar findings were also obtained by studies conducted in other sectors.[26] The failure of online users to read their e-wraps is, after all, not different to the usual behaviour of contractors in traditional standard form contracts. Indeed, in many respects, the behaviour of online users can be considered an extension of usual behaviour in traditional standard form contracts.[27]

The recognition of this general behaviour of online users is important because it provides a clear basis for the claim that the lack of reading and understanding has become common knowledge to all suppliers. This claim is further supported

[24] Jakob Nielsen, How Little Do Users Read? Nielsen Norman Group (May 6, 2008) available at http://www.nngroup.com/articles/howlittle-do-users-read accessed 18 April 2015.
[25] Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 (4) The University of Chicago Review, 1203, 1203.
[26] Y Bakos, F Marotta-Wurgler, and D Trossen, 'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts' CELS 4th Annual Confrence on Empirical Legal Studies Paper, 2009; Kim (n 1).
[27] *Suisse Atlantique Société d'Armement Maritime S.A. Appellants* explains that "In the ordinary way the customer has no time to read them [exemption clauses in standard form contracts], and if he did read them he would probably not understand them. and if he did understand and object to any of them, he would generally be told he could take it or leave it. and if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining." *Suisse Atlantique Société d'Armement Maritime SA Appellants v NV Rotterdamsche Kolen Centrale Respondents* [1966] 2 WLR 944 at [406].

by the fact that these results are frequently mentioned not only in legal journals but also in other public journals.[28]

Accordingly, such results imply the serious disadvantages of online users on the one hand, and the suppliers' knowledge of this disadvantage on the other. This in turn means that a lack of knowledge cannot be alleged as a defence that would break the circular relationship between the essential elements of unconscionability and consequently, negate the application of unconscionability.

It should be noticed here that the English law position towards constructive knowledge is not clear. Therefore, it can be argued that suppliers' knowledge of the online users' serious disadvantages could be classified under actual knowledge, namely under wilful blindness,[29] because the supplier abstains from inquiring whether the user read and comprehended his/her terms and conditions. Choosing not to enquire further would most likely result in tainting a contract with fraud.[30]

Alternatively, it can be argued that English law recognises constructive knowledge as *Ayres*[31] suggests, therefore, suppliers' knowledge can be addressed under this type of knowledge and claim that a supplier should have known the serious disadvantage of the user.

However, whether the results of this research count, as suppliers' knowledge of users' serious disadvantage remains unsettled – ultimately a court decision will

[28] See for example: Rebecca Smithers, 'Terms and Conditions: Not Reading the Small Print Can Mean Big Problems' The Guardian (London, 11 May 2011). Available on: http://www.theguardian.com/money/2011/may/11/terms-conditions-small-print-big-problems accessed 16 June 2015; A Tugend, 'Those Wordy Contracts We All Do Quickly Accept' *The New York Times,* 12 July 2013 http://www.nytimes.com/2013/07/13/your-money/novel-length-contracts-online-and-what-they-say.html accessed 14 June 2017.
[29] Refer to Chapter Three (text to n 200-205, n 215).
[30] See *Gutch v Homan* [1835] 10 Eng Rep 752 1694-1865 at [1035].
[31] *Ayres v Hazelgrow* [1982] unreported 1982/NJ/1003 (QB) (Russell J). Source pages are not numbered.

be required on the matter. Whereas it seems hard to negate the effect of the findings related to online users' lack of reading and comprehension and consequently their ignorance, because it is very common and is so frequently acknowledged that it can be claimed to be common knowledge.

Hence, in theory, an e-wrap case in which a presumption of unconscionability arises, requires proof of the unconscionable terms without a need to prove relational inequality as in traditional cases, because e-wraps generally imply the online users' ignorance. The raising of the presumption transfers the burden of proof that the e-wrap is justiciable, fair and reasonable to the supplier side - if he/she cannot do this, the e-wrap will be nullified on the basis of unconscionability.

Moreover, since it is difficult to allege the suppliers' lack of knowledge of this serious disadvantage, lack of knowledge cannot break the circle established by the presumption. Similarly it is difficult to envisage a central role for legal advice in e-wraps cases, because one of the main advantages of e-wraps is the ease and pace with which they can be concluded. It is observed in this respect that with reference to contracts that are prepared in advance, "the advice may be regarded as deficient both in respect of independence and knowledge of material aspects and negotiation of the transaction"[32] Had such a consideration been taken by an English court, it would break the circular interaction of the unconscionability elements and therefore uphold the e-wrap.

As the adoption of the preceding theory depends ultimately on the decision-maker's choice of relaxing the application of unconscionability on e-wraps, the discussion, next, focuses on the opposite approach in which the whole essential

[32] Mindy Chen-Wishart, *Unconscionable Bargains* (Butterworths, Wellington 1989) 59.

elements of unconscionability needs to be proved. This constitutes a classic case of unconscionability. Needless to say, such a case presents a strict approach to unconscionability when compared with presumed unconscionability.

4.5 Classic Unconscionable E-Wraps

As explained in the previous chapter, a classic case of unconscionability envisages the presence of the three essential elements of unconscionability the serious disadvantage of one party, the unconscionable conduct of the other and unconscionable terms.

Serious Disadvantage

The nature of e-wraps reduces the online users' awareness of the danger of some terms in their e-wraps. This, in addition to the lack of reading and understanding that is present in most cases, establish the serious disadvantage element just as in traditional cases of unconscionability.

The definition of ignorance in e-wraps can be conceptualised in the following terms:

> If a complainant suffered from a weakness that could not properly be described as poverty or ignorance, English law would not reject the plea of unconscionability on this basis. Any appreciable impairment of complainant's ability to look after his own interests is relevant.[33]

Accordingly, the online user is ignorant because of the lack of ability to judge whether the contract terms are in his/her best interests. This lack may derive from a number of sources, which includes a lack of reading without

[33] Gareth Spark, *Vitiation of Contracts International Contractual Principles and English Law,* (Cambridge University Press 2013) 284 (citation omitted).

understanding or distractions (created by adverts or animations on the webpage). The user's lack of the required knowledge to engage efficiently with the fine print is also another factor under this category that should be addressed.

It can consequently be argued that the manner in which e-wraps are normally formed, in addition to their nature, increases the probability that the complainant's consent will be impaired. As a result, he/she would be exposed to danger of exploitation. As these circumstances are naturally present in all e-wrap cases, it can be claimed that such cases always feature ignorance on the user's side.

Accordingly, online users may be considered to be ignorant *in relation to the nature of their e-wraps.* Connecting the test of the serious disadvantage to the nature of the disputed contract is not novel, because this arrangement has also been recognised in traditional contracts. In *Cresswell*[34] Mergarry J explained that: "[t]he document abounds in terms which, though speaking to the conveyancer in language of precision, can hardly be expected to speak to a van driver and telephonist lucidly or, indeed, at all."[35]

When this contribution is applied to an e-wrap case it suggests that even when the 'terms and conditions' are precise and accurate in the language used, it is difficult to expect online users to read and understand them. This applies even if they are knowledgeable in other senses.

Lack of sophistication and expertise is also a plausible plea in e-wrap cases, where anecdotal evidence shows that even experienced users tend not to read

[34] *Cresswell v Potter* [1978] 1 WLR 255.
[35] Ibid at [260].

their wraps.[36] This means that sophisticated and unsophisticated users will follow the same standard of behaviour.

This contrasts with the approach adopted in traditional cases. In *Clark v Malpas*,[37] for example, an undervalued sale was nullified upon the basis that the vendor was illiterate. It was declared that if the vendor "had been bred to the law, if he had the advantage of education, the case might have stood differently."[38] Thus, the presence of sophistication may have a marginal effect in e-wraps.

However, it is also conceivable that with the growing use of e-wraps in the future, users will henceforth be considered as worldy people that are possessed of the ability to deal with this type of contracting. The likelihood of either one of these possibilities is ultimately contingent upon the view that key decision makers take of the level of protection that should be granted to online users.

A further type of disadvantage, distress, might be present in some cases. It is plausible to have an e-wrap case that is based on the user being under pressure of necessity especially if the product purchased is the subject of monopoly which allows hard-pressed users to make a contract.[39] It is also conceivable that a user who has spent time, effort and other expenses in evaluating a product would also be under pressure of situational necessity if

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[36] "Chief Justice John G. Roberts Jr. admitted at a college appearance on Tuesday that he doesn't usually read the fine print that computer users must agree to before accessing some websites." Available at < http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print> accessed in 24 February 2017. Likewise, Judge Richard Posner of the Chicago-based 7th U.S. Circuit Court of Appeals provided a personal insight when he recalled his encounter with hundreds of pages of documentation that pertained to his home equity loan. Posner admitted that he didn't read it and instead just signed. Available at: http://www.abajournal.com/news/article/judge_posner_admits_he_didnt_read_boilerplate_for_home_equity_loan/ accessed 24 February 2017.

[37] *Clark v Malpas* [1862] 4 De GF & J 401, 45 ER 1238 at [405].

[38] Ibid.

[39] Korobkin (n 25) 1260.

he/she was surprised afterward that he/she needs to sign an e-wrap to gain the product. This situation is addressed as a situation of 'specific-monopoly' that is likely to indicate a presence of unfair terms.[40] In such cases the position of necessity "put him [the user] practically at the mercy"[41] of the supplier.

This is comparable with the situation in *Evan v Llewellyn*.[42] While this case did not actually involve a monopoly, it was a situation that had the same effect. In this case it was decided that it was unconscionable that the complainant was surprised, having been presented with a hard choice, at short notice and without sufficient time to consider his decision.[43]

The recognition of a situation of necessity in e-wraps that involves software and other technology is more conceivable than in other types of transaction. In theory, to take one example, a customer who has already purchased an Apple product can be considered to be in a situation of necessity when the company updates its product operating system (IOS). In this situation the user of these products is in a clear state of necessity and has no choice other than to accept the updated terms and conditions.

Lord Nottingham LC demonstrated this position in *Vernon*.[44] His Lordship stated that: "[n]ecessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose on them."[45] This suggests that the key factor in any assessment is the effect of the situation of necessity of the complainant and whether he/she was compelled to agree to the given terms.

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[40] Ibid 1264.
[41] *James v Kerr* [1888] 40 Ch D 449 at [460].
[42] [1787] 1 Cox Eq Cas 333 at [339-340].
[43] Ibid.
[44] *Vernon v Bethel* [1762] 28 Eng Rep 838 1557-1865.
[45] Ibid at [113].

In relation to situations of necessity, the existence of alternative e-wrap terms should not be considered a mitigating factor because the general predisposition of users is not to read their online terms and conditions. Therefore, plausibly, users would not compare the terms of e-wraps for the same goods or services.

Considering the fact that the serious disadvantage is open-ended, the previously suggested types of serious disadvantage are not limited.

Just as in traditional contracts, the essence of the serious disadvantage element compels the adoption of a subjective test, because what matters under the serious disadvantage element is not the recognition of the special disability; the essential concern is to prove that there was an *operating* serious disadvantage. This stems from a prior recognition that there must be some form of causation; namely, that the serious disadvantage culminated in an incapacity to take a reasonable decision.

While e-wraps will normally encompass one form of serious disadvantage or another, there is a clear requirement to demonstrate that this disadvanatge resulted in the impairment of the online users' consent. The process through which this is demonstrated will depend, subjectively, on the circumstances of each case. Judges will view the characteristics of each e-wrap disputed separately, and will turn their attention to a range of issues. These include the characteristics of the online user; the circumstances under which they engaged with online materials; the location of the disputed term on the webpage; the form of notice that was given to the user to alert him/her of the term; and the various distractions that were on the webpage: each of these reference points will be engaged in depth during the course of an assessment.

The proposition that the process of proving the operation of serious disadvantage would be conducted subjectively entails as restricted an approach to e-wraps as the one adopted for traditional contracts. Due to the standard behaviour of online users, as illustrated and proved by the studies mentioned above, proving the operation of serious disadvantage is, arguably, easier in e-wraps than it is in traditional contracts. Users' lack of awareness of some information, because they were hidden or because there were difficulties in viewing them will eventually result in a situation in which the value assessed and the benefits and burdens expected to emerge from the contract, will not be calculated rationally.[46] This reiterates that ignorance will most likely be effective in evidencing the existence of the serious disadvantage element.

Unconscionable Terms

With regard to unconscionable terms, the second main element of unconscionability, the rules applied to traditional contracts are also applicable to e-wraps. Thus, a fair e-wrap will be upheld regardless of the weakness of the user as a complainant.

However, it is conceivable that there may be more variations of the types of terms that might be considered unconscionable in e-wrap cases. It has already been noted that most unconscionability cases are concerned with the undervaluation of the disputed contracts. It has also been explained that the lack of disputes under the heading of unconscionability is attributable to the existence of the fairness test in the Consumer Rights Act 2015.

Due to the lack of e-wraps cases there is no reason to prevent courts from using examples of what may be considered unfair terms as provided by

[46] Kim (n 1) 29-30.

Schedule 2 of the Consumer Rights Act 2015. In addition, case law which has dealt with e-wraps in other jurisdictions might provide English courts with sufficient insight into what might be an unfair term in an e-wrap. It will be noticed in the second part of this chapter that the examples of unconscionable terms in e-wraps in California are not markedly different from the ones recognised in Schedule 2 of the Consumer Rights Act.

Unconscionable Conduct

The last main element in unconscionability is unconscionable conduct. While this element may take a form that is similar to its equivalent in traditional contracts, its appearance in e-wraps might be affected by the findings of some research if courts consider it.

As has been argued above, the failure of online users to read and understand contracts can be taken as common knowledge. If so, suppliers should take it into account when drafting their e-wraps if they want to grant their enforcement. The unconscionable conduct in this situation will be based on the complainant (the user) being ignorant of the unconscionable terms along with the enforcer's knowledge of the user's ignorance.

This presents a passive acceptance of benefits in unconscionable circumstances. It also suggests that cases of passive acceptance would be highly applicable in the application of unconscionability to e-wraps. It is therefore the case that the test of the unconscionable conduct element in e-wraps cases would most likely focus on the positive reasonable steps suppliers had taken to ensure the enforceability of their contracts (via ensuring the users' awareness of all terms of their e-wraps). The absence of such steps, in combination with the precise circumstances of e-wraps, may be regarded as

unconscionable conduct. This suggests that before online suppliers draft their e-wraps they should be aware of critical issues that may limit the chances of alleging unfairness of their e-wraps.

Accordingly, a close knowledge of statistics and studies related to users' behaviour is highly recommended to ensuring saving their e-wraps. For instance, the place in which the unconscionable term is placed in the e-wrap is of importance.

In this respect, research by the Nielsen Norman Group that is concerned with the pattern of reading of web content states that there are specific areas on webpages that usually attract users' eyes more than others.[47]

In theory, presuming suppliers' awarenece of these results, their reluctance to offer unusual terms in the areas that were proven to attract users' attention might be considered deceptive and therefore unconscionable conduct under English law.

On the other hand, a supplier can negate an allegation of unconscionable conduct by demonstrating that the placement of the disputed terms took the findings of related research into account. In providing a clear notice on their websites, they will substantially increase the likelihood that the courts will uphold the e-wrap. While notice is required in traditional contracts to ensure the incorporation of terms in unsigned contracts,[48] the notice in e-wraps, when conceived within the wider context of the unconscionability test, is not

[47] Jakob Nielsen, F– Shaped Pattern for Reading Web Content, Nielsen Norman Group available at http://www.nngroup.com/articles/f-shaped-pattern-reading-web-content accessed 18 April 2015. This research provides photos of webpages that are highlighted with different colors, which specify the users' level of attention in each area of webpages.

[48] The rule clearly establishes that reasonable sufficient notice of the clause must have been given in advance – this enables consideration of the terms that have been incorporated into the contract. See: *Parker v South Eastern Rly Co* [1877] 2 CPD 416.

concerned with ensuring the incorporation of the disputed clause; rather, it serves an evidential role by clarifying the supplier's good conscience.

It is conceivable that in e-wraps further types of positive actions by suppliers might be considered as signs of their good conscience and consequently uphold the e-wrap. For example, sending the e-wrap terms and conditions to the private emails of users also indicates the supplier's good conscience. It is also the case that any other positive step that may alert users to contractual terms might be considered a positive sign. Furthermore, the request that users should click on each unusual term might be considered another possible step that would negate the supplier's unconscionable conduct.

The unconscionable conduct element in e-wraps is not limited to passive conduct as active victimisation is conceivable too. Arguably the type of unconscionable conduct that is feasible in e-wraps is deliberate misrepresentation.[49] Manipulation and deceit are also conceivable in e-wraps. This danger is particularly pronounced in cases where the e-wrap allows the unilateral amendment of the terms by the drafting party, even without notice or proper reason. Further insight into such cases is discussed with reference to California law.

Undue haste is also one of the unconscionable conduct types that is applicable to e-wraps, namely in browse-wraps when suppliers do not give users enough time to consider the terms and conditions, in case they notice them. Undue haste, as a sufficient type of possible unconscionable conduct in e-wraps cases, might be doubted on the grounds that the nature of e-wraps necessitates

[49] Misrepresentation or misapprehension may be created through active (words or conduct during the course of negotiations) or passive (the presentation of documents which are known to be insufficiently appreciated by the other party and which contain unexpected onerous terms) actions. See Chen-Wishart (n 32) 75-76. In e-wraps, misrepresentation presumably will always be considered to be passive in character.

haste to some extent. The use of e-wraps indicates parties' preference for a quick contracting process that skips the negotiation stage and the time that is consumed by paper contracting.

However, in general, cases of actual fraud in this context would, as clarified earlier in this chapter, be no different from cases of traditional contracts.

4.6 Unconscionable E-wraps in California law

A brief assessment of unconscionability within e-wrap cases brought before California courts signposts that courts have extended comparable treatment to unconscionability within traditional contracts. [50] This is supported by the frequent references in e-wrap cases to traditional cases of unconscionability.[51]

The limited number of unconscionable e-wrap cases[52] namely eight cases,[53] acts to limit the significance of any findings that can be extracted from them. It is, however, possible to make some general observations.

Procedural Unconscionability

Just as in traditional contracts cases, e-wraps cases also vary in their recognition of adhesiveness as minimum procedural unconscionability. For

[50] Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016) at [3].
[51] See for example: Comb v PayPal, Inc, 218 F Supp 2d 1165 (2002) at [1172]; Cortez v Ross Dress for Less, Inc, Not Reported in F Supp 2d (2014) at [4]; Rodriguez v Experian Services Corp, Not Reported in F Supp 3d (2015) at [2]; Tagliabue v J C Penney Corporation, Inc, Not Reported in F Supp 3d (2015) at [4-5]; Graf v Match.com, LLC, Not Reported in F Supp 3d (2015) at [5]; Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016) at [6]; Mikhak v University of Phoenix, Slip Copy (2016) at [8-9].
[52] It should be recognised that e-wrap cases frequently relate to issues other than unconscionability.
[53] Comb v PayPal, Inc, 218 F Supp 2d 1165 (2002); Bragg v Linden Research, Inc, 487 F Supp 2d 593 (2007); Cortez v Ross Dress for Less, Inc, Not Reported in F Supp 2d (2014); Tagliabue v J C Penney Corporation, Inc, Not Reported in F Supp 3d (2015); Rodriguez v Experian Services Corp, Not Reported in F Supp 3d (2015); Graf v Match.com, LLC, Not Reported in F Supp 3d (2015); Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016); Mikhak v University of Phoenix, Slip Copy (2016).

example *Comb*[54] and *Bragg*[55] considered the mere fact that the e-wrap is an adhesion contract to suggest the presence of procedural unconscionability, while the presence of adhesion e-wrap was not sufficient in *Cortez*[56] to find procedural unconscionability.

Cases also show that surprise, as the second component of procedural unconscionability, holds a position similar to its position in traditional contracts. Therefore the fact that the contract is electronically formed has not obliged suppliers to include further note in their e-wraps. Moreover, in some cases surprise was absent from the assessment from the beginning.

The first line of cases, in which adhesiveness was sufficient to find minimum procedural unconscionability, embodies most e-wraps cases.

In *Comb*[57] plaintiffs sought injunctive relief and related remedies against PayPal (a service supplier),[58] which they sued upon the basis that it had removed funds from their bank account. The allegations related to the violation of federal and state laws in PayPal's insufficient service and the adoption of procedure through which PayPal gained profits while investigating its users' complaints of fraud.[59] In response, PayPal moved to compel individual arbitration pursuant to its standard User Agreement. The arbitration clause was ultimately found unconscionable.

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[54] Comb v PayPal, Inc, 218 F Supp 2d 1165 (2002).
[55] Bragg v Linden Research, Inc, 487 F Supp 2d 593 (2007).
[56] Cortez v Ross Dress for Less, Inc, Not Reported in F Supp 2d (2014).
[57] Comb v PayPal, Inc, 218 F Supp 2d 1165 (2002).
[58] "PayPal is an online payment service that allows a business or private individual to send and receive payments via the Internet. A PayPal account holder sends money by informing Paypal of the intended recipient's e-mail address and the amount to be sent and by designating a funding source such as a credit card, bank account or separate PayPal account. PayPal accesses the funds and immediately makes them available to the intended recipient. If an intended recipient does not have a PayPal account, the recipient must open an account to access the payment by following a link that is included in the payment notification e-mail. PayPal generates revenues from transaction fees and the interest it derives from holding funds until they are sent." Ibid at [1166].
[59] Ibid at [1166-1167].

In finding procedural unconscionability, the court first acknowledged that the assessed contract is an adhesion one; therefore, it is procedurally unconscionable. The court then proceeded to assess PayPal's claim that the adhesion contract was not procedurally unconscionable because the contract subject was not a necessity (e.g. food or clothes) and the fact that there were market alternatives for the same service.

The court rejected the claim that there were alternatives upon the basis that even non-account holders needed to assent to PayPal agreement if they wished to access funds sent to them from a PayPal account holder.[60] The court also stressed that the existence of market alternatives does not constitute an absolute effect that negates procedural unconscionability. The court's assertion that the 'vast majority' of customers are unsophisticated clearly implies that not all online users are necessarily unsophisticated.

Similarly, *Bragg*[61] concerned a Second Life online game in which players can buy lands with real money, build objects and interact with other players. Bragg is a player who purchased virtual lands named Taesot in his Second Life. Linden, the creator of Second Life, sent Bragg an email informing him that Taesot was improperly purchased, therefore, Linden took Taesto away, froze Bragg's account and removed all his virtual property and currency in his Second Life account. As Bragg sued Linden, the latter moved to compel the arbitration that is contained in the Terms of Service (TOS) which Bragg had accepted via clicking on the accept button. Bragg alleged the unconscionability of the arbitration. He concedes that he clicked the "accept" button before accessing Second Life.

[60] Ibid.
[61] Bragg v Linden Research, Inc, 487 F Supp 2d 593 (2007).

Procedural unconscionability was found on the basis that the contract is an adhesion one. Reasonable alternative markets could not defeat adhesiveness as Second Life was the only virtual world that grants its players rights in virtual land.[62] Moreover, Linden holds superior bargaining powers over Bragg. This was not alleviated by the fact that Bragg is an experienced attorney, because he did not have the opportunity to negotiate the terms and use his experience.[63]

As to surprise, there was no clear heading under which a claim of surprise could be refuted. On the contrary Linden buried the arbitration provision in a long paragraph under the heading of 'GENERAL PROVISIONS', Linden also did not provide the costs and rules of arbitration either by setting them forth in the TOS or via a hyper-link, therefore surprise was satisfied.

Graf[64] involved a motion that sought to compel arbitration after a monthly subscriber to Match.com brought an action. This subscription required users to agree to Terms of Use, which included an arbitration agreement. One of the plaintiffs objected to the arbitration upon the basis of unconscionability. The court determined that the registration contract was a browse-wrap before proceeding to conclude that a minimal level of procedural unconscionability derives from an adhesion contract and the absence of surprise.[65] However, the court emphasised that "we have held on numerous occasions that adhesion contracts are not per se unconscionable or void."[66] Hence, procedural unconscionability would not be automatically presumed even in e-wrap cases.

Accordingly, although *Graf* considered adhesiveness minimum procedural unconscionability, it acknowledged at the same time that adhesiveness is not

[62] Ibid at [10].
[63] Ibid.
[64] Graf v Match.com, LLC, Not Reported in F Supp 3d (2015).
[65] Ibid at [5].
[66] Ibid.

necessarily a sufficient reason for procedural unconscionability, which indicates that there is not an automatic presumption of a minimum level of procedural unconscionability.

Likewise, in *Mikhak*[67] which concerned a complaint of unlawful discrimination by Mikhak, who was a former faculty candidate that had been denied a full-time faculty position. The University of Phoenix moved to compel arbitration in accordance with an electronic agreement in the University Faculty Handbook that Mikhak had signed, which consented to the arbitration of all employment-related disputes. The enforcement of the arbitration was challenged on unconscionability grounds.

The fact that the contract is an adhesion one, based the finding of procedural unconscionability, however, there was an assessment of whether the claimant had a choice to accept the click-wrap terms or not. There was no mention of finding adhesiveness as a minimum procedural unconscionability.

With regard to the surprise factor, the University's email to Mikhak placed particular emphasis on paying attention to the new information in specific subsections which included information on arbitration. This resulted in a failure to find unfair surprise in the contract.[68]

In *Tagliabue*,[69] a motion to compel arbitration was included in two employment contracts. The employee maintained that the absence of a signed contract rendered the employment unconscionable. In the assessment of the click-wrap, the court found that there was sufficient notice of the contract, because there were clear instructions to follow a link to the arbitration agreement. In addition,

[67] Mikhak v University of Phoenix, Slip Copy (2016).
[68] Ibid.
[69] Tagliabue v J C Penney Corporation, Inc, Not Reported in F Supp 3d (2015) at [2].

the reader is also required to look over certain material before signing.[70]

The court found limited procedural unconscionability in the fact that arbitration had been imposed upon the employee as a condition of employment.[71] Surprise was not found because the screen clearly states that that document is a 'Binding Mandatory Arbitration' that compels parties to arbitrate any disputes. Consequently, the respective parties "voluntarily waive the right to resolve these disputes in courts"[72] because the employee was fully informed of the fact that "he was agreeing to arbitrate any employment claims."[73]

In *Moule*, which involved a dispute over an arbitration provision included in the click-wrap, the court in the assessment of oppression adopted the view that adhesiveness is "quintessential procedural unconscionability",[74] and concluded that the 'oppression element' has been satisfied.[75] In attending to surprise the court maintained that the plaintiff had failed to sufficiently demonstrate its presence. It noted that the terms were stated clearly, with sufficient notice. The court therefore concluded that procedural unconscionability had been lessened.

On the contrary, in the second line of cases, specifically in *Cortez*[76] and *Rodriguez,* [77] procedural unconscionability was not satisfied by the adhesiveness of the e-wrap, which illustrates that California does not presume procedural unconscionability in e-wraps and further underlines the point that there is no presumed procedural unconscionability in adhesion arbitration disputes.

[70] Ibid at [4].
[71] Ibid at [5].
[72] Ibid.
[73] Ibid.
[74] Ibid at [6] (citation omitted).
[75] Ibid.
[76] Cortez v Ross Dress for Less, Inc, Not Reported in F Supp 2d (2014).
[77] Rodriguez v Experian Services Corp, Not Reported in F Supp 3d (2015).

In *Cortez*,[78] previous employees brought a putative collective and class action against their former employer (Ross), upon the basis that he, in failing to pay for work hours, had violated the Fair Labor Standards Act. Ross filed a motion to compel individual arbitration in accordance with the Ross Arbitration Policy (RAP). This was included within their employment provisions. Ross provided evidence that the plaintiffs had electronically signed the revised version of RAP that is entitled 'Dispute Resolution Agreement' (DRA) and is the substantive equivalent to RAP. While Ross maintained that DRA superseded RAP, he added that, if in any instance DRA was found to be unenforceable, arbitration should be granted upon the basis of RAP.

After acknowledging the existence of a valid contract, the court proceeded to observe that the software through which employees were asked to sign their employment was explicitly clear. It was therefore transparent that in clicking 'I agree' they would be legally bound by the contract; by logical extension, any dispute would be resolved through arbitration.[79] In addition, the presented evidence conclusively proved that the plaintiffs had electronically signed the contract. The court granted the motion and concluded that the contract could not be set aside upon the basis of a lack of substantive unconscionability.[80]

Thus, the mere presence of an e-wrap was not sufficient to find minimum procedural unconscionability.

Equally, *Rodriguez*[81] involved a motion that sought to compel an arbitration provision. This was drafted in the Terms and Conditions of a website that was contained in a browse-wrap. In this case procedural unconscionability was not

[78] Cortez v Ross Dress for Less, Inc, Not Reported in F Supp 2d (2014).
[79] Ibid at [2].
[80] Ibid at [4].
[81] Rodriguez v Experian Services Corp, Not Reported in F Supp 3d (2015).

found because the plaintiff had market access to other debt relief providers. As a consequence, there was no inequality of bargaining power between the parties. Surprise also was not found because the Terms of Use were presented in normal size, and headings appeared in bold.[82]

Accordingly, in e-wraps both oppression and surprise therefore remain subject to assessment and considering adhesiveness minimum procedural unconscionability remains subject to inconsistency.

Substantive Unconscionability

As pointed out earlier, the eight e-wrap cases are concerned with pleas of the unconscionability of arbitration provisions. Therefore all cases were concerned under substantive unconscionability with the mutuality of the arbitration provisions.

While the determination of substantive unconscionability in eight of the e-wrap cases is straightforward, because they adopt a test that is similar to the one adopted in traditional contracts, one case, namely *Moule*,[83] varies in its observation of substantive unconscionability which resulted in uncertainty and ambiguity.

In *Moule*,[84] a motion to compel arbitration by United Parcel Service Company (UPS) was granted. This decision followed an action by a business owner who shipped a Synthesized Generator Model (SG) to Hawaii. The shipment was wrapped carefully with stickers that warned the handler to proceed with care. The box also included a '75G Shock Watch' which contained a device which

[82] Ibid at [2].
[83] Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016).
[84] Ibid.

"lights red when rough handling of the box occurs."[85] The plaintiff alleged that when the SG arrived in Hawaii it was a "total loss".[86] He maintained that the box was damaged, crushed and taped together and that the 75G Shock Watch was glowing red. The plaintiff alleged that UPS was liable for the value of the SG 27.000 (USD). UPS, in outlining its response, maintained that the dispute was subject to the arbitration provision that is included in its own Terms and Conditions.

Based on a finding of minimum procedural unconscionability, the court proceeded to assess substantive unconscionability. While the claimant's plea of substantive unconscionability of arbitration was "due to the requirement of forcing Plaintiff to pay costs, its confidentiality requirement, and limitations on discovery",[87] the court added to the claimant's claims another three aspects that would be examined in relation to the arbitration.

In doing so, the court in *Moule* drew strongly upon *Ingle*,[88] in which an arbitration agreement had been found unconscionable after examination of the following provisions within the agreement: "[1] claims subject to arbitration, [2] its statute of limitations, [3] class actions, [4] fee and cost-splitting arrangements, [5] remedies available, and [6] termination/ modification of the agreement."[89]

The basis on which the court in *Moule* decided to adopt the aspects investigated in *Ingle* are not clear. The previous chapter clarified that the procedure that is usually adopted in determining unconscionability, depends on the representations of contractual parties and the evidence that is provided to

[85] Ibid at [1].
[86] Ibid.
[87] ibid at [7].
[88] Ibid citing Ingle v Circuit City Stores, Inc 328 F 3d 1165 (9th Cir 2003).
[89] Ibid.

support their claims. *Moule,* in this regard, demonstrates that *Ingle* was one of the cases that had been referenced by the claimant.[90]

Furthermore, a review of *Ingle* shows that the six different aspects were *not* presented in a way that would support an interpretation that the court in *Ingle*[91] sought to introduce specific criteria, which should be followed during the assessment of any future arbitration case.

It is not therefore clear how the court's reference to the six aspects mentioned in the *Ingle* case should be approached. The main significance of the allusion to these aspects is that they provide criteria that closely resemble the five criteria that are used to assess the lawful arbitration of rights in employment contracts as were first presented in *Armendariz*.[92] Therefore they could be interpreted as an attempt to provide specific criteria for the examination of arbitration provisions, which in turn shows California law willing to determine substantive unconscionability to a greater extent than English law.

In referring back to the investigation of substantive unconscionability the court concluded that terms "taken as a whole, do not appear substantively unconscionable."[93] The court further added that the provisions "regarding claims

[90] After outlining the plaintiff's claims that are related to substantive unconscionability in *Moule*, the court provided a reference (Doc. 20 at 6, 6-10). Unfortunately, in attempting to establish that the plaintiff did not cite *Ingle,* this thesis was unable to locate this reference.
[91] *Ingle* addressed an employment contract – this meant that the five criteria set out in *Armendariz* were duly applied.
[92] Armendariz v Foundation Health Psychcare Servs Inc 99 Cal Rptr 2d 745 (2000).
[93] Ibid at [11]. This finding was justified on the following basis: 1) the claims subject to the arbitration aspect were not unconscionable because the Terms do not exclude defendant's claims from arbitration; 2) the fees and costs arrangement were not found substantively unconscionable because the Terms do not require the Plaintiff to incur any type of expense other than those that may similarly be paid in court; 3) the discovery provision was not found to be unconscionable because this provision did not require the parties to demonstrate substantial needs before the arbitrator may approve requests for discovery; 4) the provision of remedies were not found to be unconscionable because the remedies available in the Terms were not improperly limited; 5) the provision that allows UPS to unilaterally amend or terminate the contract was found to be, upon the basis of *Ingle*, to be substantively unconscionable; 6) the provision that requires confidentiality even though it is bilateral was found to be unconscionable upon the grounds that there was a lack of business justification for this

subject to arbitration, discovery, fees, costs, and remedies are not permeated by unconscionability"[94] therefore they can be severed. The court proceeded to observe that "the unconscionable provisions are not relevant to Plaintiff's claims, and may be severed from the agreement."[95] It is not clear whether there is any basis for distinguishing the provisions claimed by the plaintiff from the provision assessed by the sole discretion of the court.

The rest of the e-wraps cases do not raise any specific issues with regard to substantive unconscionability. For example, in *Tagliabue*,[96] which involved a motion to compel arbitration included in an employment contract,[97] the court relied on the five minimum requirements for a lawful arbitration of rights in employment context[98] as applied to traditional contracts.

The employee claimed that the arbitration was substantively unconscionable upon a number of grounds. These include the fact that it: prevents multi-party litigations; entails a false assertion that the employee received an attorney; presents arbitration rules within a separate document; prohibits injunctive relief in arbitration; and makes the arbitrator the sole authority in the restriction or retention of any order of preliminary injunction.[99]

In referencing the five minimum requirements for a lawful arbitration of rights in employment context,[100] the court maintained that each of the requirements had been met.

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provision. It should however be noted that the fact that this provision can be severed form the arbitration agreement ultimately functioned to limit the significance of this finding. Ibid at [8-10].
[94] Ibid at [11].
[95] Ibid.
[96] Tagliabue v J C Penney Corporation, Inc, Not Reported in F Supp 3d (2015) at [2].
[97] For the facts of the case refer to (text to n 69-70).
[98] Refer to Chapter Three (text to n 178-179).
[99] Tagliabue v J C Penney Corporation, Inc, Not Reported in F Supp 3d (2015) at [6].
[100] Refer to Chapter Three (text to n 178-179).

In seeking to explain this conclusion, the court clarified that no bias could be found in the process through which the arbitrator would be selected. Moreover, the employee did not sufficiently demonstrate that "he will be subjected to a biased arbitrator or to any arbitration fees or expenses under the arbitration agreement."[101] In addition, the arbitration rules permit the arbitrator to grant the appropriate remedy, just as with any other judge. Accordingly, it was established that "[t]hrough the agreement, [the] Plaintiff is able to receive more than minimal discovery".[102] Furthermore, the party is permitted to provide any information that is likely to lead to admissible evidence and the arbitrator is required to mail a final award to the parties,[103] following the conclusion of the arbitration.

This case, as in *Moule,* exemplifies the possibility of severing an unconscionable clause from the disputed arbitration. In such instances, the arbitration will be partly upheld.

In *Graf*,[104] after a finding of a limited degree of procedural unconscionability, the court observed that a substantial level of substantive unconscionability would be necessary for a finding of unconscionability. The plaintiff contended that the arbitration was unconscionable for two reasons: firstly, upon the basis that he had been bound to arbitration for any type of wrong committed by the defendant (this applied even if it was not related to the account); secondly, for the reason that the arbitration obliges users to arbitrate in Dallas county.

In responding, the court found that, contrary to the plaintiff's allegation, the arbitration provision was mutual, because both parties have to resolve their

[101] Tagliabue v J C Penney Corporation, Inc, Not Reported in F Supp 3d (2015) at [6].
[102] Ibid.
[103] Ibid.
[104] Graf v Match.com, LLC, Not Reported in F Supp 3d (2015).

disputes via arbitration. As to the arbitration location, the court observed that the relevant provision was not oppressive as the respective parties had options with regard to the location and also had the option to bring small claims before the courts. Accordingly, the provisions were substantively unconscionable.[105]

In *Cortez*, substantive unconscionability was not satisfied, because "[t]he agreement does not include any of the sorts of unfairly one-sided terms that have been the basis for findings that an arbitration agreement is substantively unconscionable."[106]

Comb and *Bragg* provide examples of e-wrap cases in which mutuality and business reality justification were assessed to investigate substantive unconscionability. Both cases are identical in the examination of substantive unconscionability therefore just one of them is elaborated.

In *Comb*, for example, the court established that its preponderant concern is with the lack of mutuality and the impact of the arbitration clause upon consolidation allegations, venue and costs of arbitration.[107] The court acknowledged that some degree of mutuality is present in the arbitration clause which allows either users or PayPal to seek relief from a court in Santa Clara County or California.[108]

However, the plaintiffs evidenced that PayPal in freezing its customers' account and retaining the funds, clarified that it alone had the right of determination to undertake this course of action without providing further notification to customers. The claim of mutuality was subject to further doubts because the

[105] Ibid.
[106] Cortez v Ross Dress for Less, Inc, Not Reported in F Supp 2d (2014) at [4].
[107] Comb v PayPal, Inc, 218 F Supp 2d 1165 (2002) at [1173].
[108] Ibid.

Agreement contained other terms that gave PayPal the sole discretion to restrict or close accounts, withhold funds, take steps to investigate customers' financial records, and change User Agreement terms without prior notice (unless the law requires such notice).[109]

According to the court, if a customer can theoretically seek provisional relief, and unfreeze his/her account in courts, the cost would be exorbitant, in comparison with the amounts that typically characterise disputes of this nature. This was an important consideration given that during the dispute PayPal kept hold of the funds and raised profits.[110]

The court also remarked that PayPal did not demonstrate that 'business realities' justified the one-sidedness of the terms that allowed PayPal to amend its Agreement Unilaterally. It consequently concluded that there was a lack of mutuality.

With regard to the arbitration clause that precludes the consolidation of customers' disputes over small amounts, the court found it substantively unconscionable, [111] because of "[t]he potential for millions of customers to be overcharged small amounts without an effective method of redress...." [112]

In referring to the arbitration cost, the related provision provides that the cost will be calculated in accordance with the rules of *commercial* arbitration set out by the American Arbitration Association (AAA). This undermines the PayPal claim that it will be calculated in accordance with *consumer* arbitration rules. The fact that each of the plaintiff's claims does not exceed $310.00, in addition

[109] Ibid at [1173-1174].
[110] Ibid at [1174].
[111] Ibid at [1175-1176].
[112] Ibid at [1175] citing Szetela v Discover Bank, 97 Cal App 4th 1094, 1100, 118 Cal Rptr 2d 862 (2002) 1172 (N D Cal 2002).

to the fact that the costs of each claim are likely to be in commercial arbitration, make it likely that the arbitration fees will prove to be prohibitive for junior claims. This in turn indicates that PayPal attempted to "insulate itself contractually from any meaningful challenge to its alleged practices."[113] The court consequently concluded that the cost provision was substantively unconscionable.

PayPal maintained that because forum selection clauses are generally valid, the provision that establishes California as the selected arbitration venue is not unconscionable. In responding, the court remarked that while forum selection clauses are prima facie valid, this does not apply when they are unreasonable. The fact that PayPal limited the venue to its immediate sphere of operations supports the proposition that PayPal used arbitration to provide it with a shield from liability; this prerogative predominated over the provision of a neutral forum in which disputes could be arbitrated. Accordingly, the court (which considered the sliding scale in the process) denied the motion to compel arbitration.

The previous analysis shows that the traditional test of unconscionability is also applied in e-wraps. The following observations can be further distilled from e-wrap cases.

First, contrary to expectations surprise was treated similarly to its treatment in traditional contracts, which emphasises an attempt to keep traditional rules without adjustments. Therefore courts did not rely on the findings of some research that is related to the 'reasonable, prudent online user' as a measurement for determining users' expected behaviour.

[113] Ibid.

Second, the type of the disputed e-wrap (e.g. whether it is click-wrap[114] or browse-wrap[115] or even a modified click-wrap[116]) did not have any discernible impact on the unconscionability assessment.

This is evidenced in *Moule* where the claimant maintained that the contract was a browse-wrap, while the defendant instead asserted that it was click-wrap. After assessing the presentation of the terms and the click function of both the UPS program and website, the court asserted that the relevant contract was a modified click-wrap "because the screens asked the user to confirm acceptance of the UPS Terms, though the terms were not identified on the same page."[117] This did not appear to have important implications for the investigation of unconscionability, something that was underlined by the fact that the court did not reference it during the course of its investigation. After assessing the user's acceptance and the procedure that had been followed, the court concluded that a binding contract had been formed and preceded to test the unconscionability of the arbitration provisions.

Third, cases which investigated the existence of market alternatives, have not distinguished alternatives that are available online from the ones available via traditional contracts, which equates e-wraps with traditional contracts.

Fourth, all the identified e-wrap cases are related to claims of the unconscionability of arbitration clauses although there is no clear reason for this exclusiveness. The selection of unconscionability cases investigated in this thesis shows that disputes over arbitration clauses in traditional contracts are

[114] Comb v PayPal, Inc, 218 F Supp 2d 1165 (2002); Cortez v Ross Dress for Less, Inc, Not Reported in F Supp 2d (2014); Tagliabue v J C Penney Corporation, Inc, Not Reported in F Supp 3d (2015).
[115] Graf v Match.com, LLC, Not Reported in F Supp 3d (2015); Rodriguez v Experian Services Corp, Not Reported in F Supp 3d (2015).
[116] Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016).
[117] Ibid at [5].

more frequent than disputes over other types of terms. Viewing the limited number of e-wrap cases, this exclusiveness is understandable.

Finally, in all cases courts tend to examine first the validity of the disputed e-wrap via investigating its formation and the presence of sufficient notice before proceeding to investigate its unconscionability, which explains the limited number of unconscionable e-wrap cases.

Although the previous analysis of e-wrap cases shows adherence to the traditional tests of unconscionability, there are two contributions in legal writing which suggest the need for reconstructing unconscionability in correspondence to the specific qualities of e-wraps.

4.7 Reconstructing Unconscionability?

The following analysis focuses on two main proposals for reforming unconscionability in e-wrap contracts. Nancy Kim provided the first proposal, while Dov Waisman has presented the second. Both proposals link into a more general call to restructure the doctrine in e-wraps.

This thesis draws strongly upon Kim's argument that the doctrine's potential contribution to the governance of e-wraps has been overlooked.[118] However, Kim's proposed solution diverges from the one that this thesis outlines. This thesis does not argue in favour of an adjustment to the law on unconscionability; it seeks a solution that will enhance the flexibility and functionality of case law, ultimately resulting in a more consistent approach to the doctrine.

[118] Kim (n 1).

Kim's proposal envisages a restructured unconscionability.[119] She explicitly advocates a 'holistic' approach to unconscionability[120] that is grounded within the presumption that all e-wraps are unconscionable. According to Kim, once it is proved that the e-wrap is coercive unconscionability can be presumed. She therefore defines coerciveness as "an online wrap contract which she [the user] was required to accept in order to proceed with the transaction."[121] Once this is proved, the disputed term can be presumed to be unconscionable. This presumption is rebuttable, and it accordingly shifts the burden to the enforcer (the supplier in this situation) to prove that the term is fair and reasonable.

Kim maintains that presumed unconscionability can be discharged in two situations: firstly, if the disputed term was "expressly permitted by legislative action or by regulatory agency"; [122] secondly, if alternative terms were present.[123]

Kim argues that the first situation could be achieved if suppliers lobbied their legislators to pass bills that permitted these terms. From her perspective, this would help to shift "the current system of unilaterally drafted legislation to the realm of public legislation."[124] Kim notes that companies would achieve this, because they are in better position than individuals. Companies are the player with better experience, resources, common interests and better connections.[125]

Even if Kim's argument that companies are more capable of taking steps that

[119] She calls this process 'reinvigorate'. Ibid 203.
[120] Ibid 208.
[121] Ibid.
[122] Ibid.
[123] Ibid. In discussing Kim's assertion, Waisman reflects upon the fact that it imposes two burdens (to produce evidence and persuade the court that the contract is fair and reasonable). This applies because if the burden was limited to providing evidence of an alternative or policy permission, Kim's proposal would be incomplete. The application of unconscionability would also be complicated if it had been drawn into question by the evidence of one of the two rebutted options. See Waisman (n 13) fn: 20.
[124] Kim (n 1) 209.
[125] Ibid.

would ensure legislatively unified terms is accepted, it nonetheless raises the concern that the resultant unified terms would be in favour of these large companies. In addition, Kim's argument produces a problem that is comparable to the one that Kim addressed in an earlier publication,[126] in which she complained that the assessment of unconscionability is largely dependent on commercial standards that are derived from business practice.[127] One may legitimately question why the use of commercial standards threatens the doctrine's adequacy, while the adoption of legislation influenced by big companies would not result in a similar threat.

In addition to these limitations, Wiasman remarks that the adoption of unified legislation terms as a tool to rebut the presumption of unconscionability would ultimately deprive courts of the discretion that they had been granted by substantive unconscionability,[128] because Kim's proposal relies on the procedural aspect of unconscionability. He rightly doubts that legislation that is sponsored by online suppliers would be fair for online users. He observes a tension with Kim's argument. On the one hand, she suggests that companies should sponsor unified legislation for e-wrap terms, as they have resources and experience. On the other she assumes that firm-sponsered legislation would adequately represent consumer's interests. In his view, this tension raises clear doubts about the impact of such a proposal viewing its possible effect upon the balance of the contractual parties' interests.[129]

The second situation which under Kim's proposal may rebut presumed unconscionability, involves one of two options: either providing evidence by the

[126] Kim (n 7) 551.
[127] Ibid.
[128] Waisman (n 13) 306. Waisman has referred to online suppliers 'hijacking' the legislative process.
[129] Ibid.

supplier that other competitors/similar businesses offered different terms or demonstrating that the same supplier provided the user an alternative option before proceeding through the transaction.[130]

Waisman, in evaluating this second option, acknowledges that Kim's proposal may provide users with a meaningful choice to a limited extent,[131] because it provides a solution to users' expenses. It is more likely that suppliers would choose this second option by providing alternative terms that maximise their profits, because the cost of securing legislation that would render their e-wraps enforceable is higher than the cost of providing alternative terms in their e-wraps.[132]

In addition to Waisman's criticism, it can also be argued, that the efficiency and accuracy of providing evidence of the existence of alternative terms by another supplier or business can be legitimately questioned, because it overlooks one of the central facts of e-wraps:users do not usually read their own e-wrap terms, let alone other e-wraps.[133] Consequently, the existence of a market alternative does not necessarily entail that the user's decision-making was informed and meaningful.

Kim exemplifies the second option, in which the supplier offers alternative terms, by referring to an e-wrap in which users of an email account are required to consent to the provision of personal information. This e-wrap would not be

[130] Kim (n 1) 208.
[131] Waisman argues that meaningful choice is limited by the fact that it is unimaginable that users, in seeking to avoid mandatory arbitration, will voluntarily pay an extra annual fee. The issue is therefore largely dependent upon the type of term that is being examined. Waisman (n 13) fn: 43.
[132] Ibid 307.
[133] Waisman suggests that it may be possible to resolve this problem by including a note in the e-wrap that alerts readers to the existence of market alternatives. Ibid 307. However, the standard behaviour of online users (e.g. not reading their wraps) clearly diminishes the benefits that would be derived from this suggestion.

unconscionable if it provided users with an option to proceed without consenting to the term. This option would be conditional upon an annual payment. Kim maintains that this payment would help to make the term salient for the user and offer him/her a meaningful choice. In addition, it would also raise users' awareness of the importance of surrendered information.[134]

This proposal accurately resolves issues that were previously raised by the investigation of the market alternatives factor. It further, in the view of this thesis, reiterates the good conscience of the supplier, although this is not usually a matter of concern in the application of unconscionability in California. However, the value of the second option might be questioned upon the grounds that the market alternative factor is ultimately subject to the discretion of the courts.[135] In California e-wrap cases, for example, two cases out of eight recognised the market alternatives factor.[136] This may indicate the insignificance of the market alternative factor in e-wraps.

The substantive element of unconscionability, in Kim's view, will be presumed to be present in all e-wraps if the supplier fails to rebut the procedural unconscionability element through the application of one of the two proposed options.

Waisman questions the wisdom of this approach. He accurately notes that most of the problems that anticipate Kim's proposal ultimately direct attention toward substantive, rather than procedural, unconscionability.[137] More fundamentally, Waisman argues that in cases where the disputed term is overly one-sided (in

[134] Kim (n 1) 208-209.
[135] *Nagrampa* which provides an extensive discussion of the approach that California courts have adopted to the market alternative factor. Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006) at [1311].
[136] Rodriguez v Experian Services Corp, Not Reported in F Supp 3d (2015); Bragg v Linden Research, Inc, 487 F Supp 2d 593 (2007).
[137] Waisman (n 13) 302.

which the supplier could provide legislative permission or the presence of alternative terms), the court would have no option other than to enforce the overly one-sided term. This raises the question of whether the court should consider whether the rebuttal of procedural unconscionability signalled the user's consent to the patently one-sided term. [138] Waisman answers in the negative.[139] In his view, this is a consequence that is naturally derived from the uniqueness of e-wraps and users' standard behaviour toward them.

Waisman therefore advocates the retention of the substantive test of unconscionability. He also observes that the sliding scale provides that "a grossly one-sided or unfair term would weigh strongly in favor of a finding of unconscionability [this applies] provided a minimal basis existed for questioning the procedural soundness of the bargaining process, *as it almost always would in the case of a wrap contract*."[140] He correctly notes that Kim's proposal precludes this function of the sliding scale before adding that the goal of her proposal is to reduce one-sided terms in e-wraps.[141]

In extrapolating from these points, Waisman maintains that rebuttable presumed substantive unconscionability should replace rebuttable procedural unconscionability. As in Kim's proposal, the burden of proving the fairness of the contract substance would ultimately fall upon the supplier arguing in favour of the contract enforcement.[142]

While this thesis acknowledges the soundness of the criticisms that Waisman directs towards Kim's argument, it also recognises the limitations of Waisman's proposal. His conclusion, in which he proposes presumed substantive

[138] Ibid 303.
[139] Ibid.
[140] Ibid 305 (author's emphasis).
[141] Ibid.
[142] Ibid 308.

unconscionability, derives from a prior assumption that e-wraps are always proceduraly unconscionable. Waisman expresses his proposal in the following terms:

> [W]hat if wrap contracts were *conclusively* presumed to be procedurally unconscionable and *rebuttably* presumed to be substantively unconscionable? The burden would be on the drafting party to prove the term at issue substantively 'conscionable'.[143]

By virtue of the fact that the procedural aspect is *conclusively presumed* it cannot be rebutted. This means that every e-wrap contract, even in the absence of evidence, is presumed to be unconscionable. The only instance in which this is not the case is when the opposite is proven. In addition to proposing a presumption of unconscionability in all e-wraps, Waisman adds that the drafting party cannot rebut substantive unconscionability by referencing existing industry norms and practices.[144] He also stresses that the drafting party has to convince the court that that the disputed terms are not unreasonably of his/her favour.[145]

In advancing this proposal, Waisman makes a strong case in favour of the complainant (online users) in e-wrap contracts. The proposed presumption of unconscionability, in addition to shifting the burden of proof (namely proving the fairness of the e-wrap) is logical and consistent with the online suppliers' superior power, who presumably have resources, power and connections to defend their wraps if they want to grant their enforcement.

However, the main drawback of this proposal is that it is unclear what the

[143] Ibid (emphasis added).
[144] This assertion can be traced back to Kim's previous observation that the determination of substantive unconscionability is deeply dependent upon commercial standards and business mores/practices. She makes the important point that this severely limits the doctrine's ability to deal with issues that relate to contractual unfairness. See Kim (n 7) 551.
[145] Waisman (n 13) 308.

procedure is in unconscionability cases. Waisman does not explain whether this proposal implies that the doctrine would consequently be adjusted to be a cause of action. If this was the case, then it would be more than a mere defence. Furthermore, Waisman does not illustrate what degree of procedural unconscionability he presumes to be present in e-wraps. The importance of this question is further underlined by the fact that California law adopts the sliding scale as the main means through which to measure the degree required for each of the unconscionability elements. If this aspect of the unconscionability test is ignored, then it is also easy to overlook Waisman's critique of Kim's proposal (specifically his criticism that her ignorance of the sliding scale undermines her proposed restructuring of unconscionability).

Moreover, it is also important to question the effect that the adoption of this proposal would have on e-commerce generally. Here it should be recognised that this proposal would presumably facilitate the process of unconscionability allegations. In the case of an online user, it would be sufficient to plead unconscionability as a means to save him/her from contractual obligations without a need to provide any evidence in support of such a claim. This would apply as unconscionability would automatically be presumed to exist in any e-wrap.

Thus, claims of unconscionability would be encouraged under this proposal. This would in turn inevitably impact negatively upon e-commerce. It can be justifiably argued that if the traditional recognition of the unconscionability application made it too difficult for online users to prove the unconscionability of their e-wrap, Waisman's proposal instead makes it too easy for online users to escape their contractual commitments.

However, it is undoubtedly the case that preserving further protection for complainants in e-wraps is considerably more demanding than engaging with the difficulties imposed upon suppliers in the course of proving the fairness of their e-wraps. It should also be noted that Waisman's proposal offers a tool of deterrence. The drafting parties would be aware of the fact that Waisman's proposal would open up space for online users to plead unconscionability. For this reason, there would be a clear incentive for drafting parties to avoid unusual terms in their e-wraps, lest they will be set aside on grounds of unconscionability.

Waisman's proposal would gain renewed strength and impetus if it had already been decided to adjust unconscionability and its application to e-wraps. However, California's decision not to do so, attests to a clear policy preference not to reform the doctrine. Thus, it is logical to argue in favour of maintaining the doctrine. From this perspective, it appears preferable to try to develop aspects of the doctrine, to resolve e-wrap issues. The 'reasonable, prudent users' measurement in e-wraps serves as a clear case-in-point.

With respect to procedural unconscionability, it could potentially be fruitful to begin from the assumption that all e-wraps are, by virtue of the fact that they are adhesion contracts, oppressive. While this position clearly contradicts prior attempts to distinguish adhesiveness from oppressiveness,[146] it is nonetheless consistent with the approach adopted by some California courts, most notably the California Supreme Court, which has previously considered adhesion

[146] For further insight on this point, refer to Graham v Scissor-Tail, Inc 28 Cal 3d 807 (1981). Waisman outlines a very similar line of argument when he suggests that presumed procedural unconscionability be applied to all e-wraps. This (reformist) approach to unconscionability directly contrasts with the position of the current thesis. Waisman (n 13) 308.

contract as a minimal procedural unconscionability.[147] This also brings to mind some e-wrap cases in California such as *Mikhak* [148] and *Moule*,[149] in which adhesiveness was considered sufficient to satisfy minimal procedural unconscionability.

With regard to surprise, California courts adopt a strict approach in e-wrap cases, and therefore ignore the fact that these contracts are not usually read by users. The ascription of a marginal role to surprise, by keeping its traditional test, serves to underline the contract-oriented approach that is adopted in California law. If unfair surprise were considered with reference to the failure to read e-wraps terms, the observer would inevitably presume its presence in all e-wraps, thus offsetting the need for further investigation.

This presents two possible approaches to surprise. The first one is conservative and therefore counsels in favour of maintaining the existing arrangements: consequently, surprise would not be presumed in e-wraps, and would be investigated by examining the appearance of each e-wrap. This, it should be noted, is essentially what California courts currently do. However, this test could be advanced by requiring further notice attached to each unusual term in e-wraps. In other words, providing bold headings in capital letters would not be sufficient to defeat surprise in e-wraps. Further notice should be provided such as requiring a click or similar action next to each unusual term.[150]

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[147] Refer to Chapter Three (text to n 363-371).
[148] Mikhak v University of Phoenix, Slip Copy (2016).
[149] Moule v United Parcel Service Co, Not Reported in F Supp 3d (2016).
[150] The determination of proper procedure through which surprise might be defeated may rely on research conducted by some institutions or companies that make use of the services of psychologists and anthropologists to offer analyses of online users' behaviour. See, for example, Intel Research Centers Driving critical research in computer science through academic collaboration. Available on: https://www.intel.com/content/www/us/en/education/highered/research-centers.html accessed 16 December 2016 cited in Robert A. Hillman and Jeffrey J. Rachlinski, 'Standard-From

The second approach instead counsels in favour of incorporating the 'reasonable, prudent user' measure into the investigation of surprise. This measurement is used by California courts in the course of examining the sufficiency of notice that has been given to online users in e-wraps.[151] Therefore, in addition to not being alien to California courts, it is also applied in the context of e-wraps.

The adoption of this test will ultimately result in the recognition of surprise in e-wraps becoming more flexible. Ultimately, this will result in a situation where online users' behaviour, in not reading their e-wraps, becomes accepted as 'reasonable behaviour'.[152] The adoption of this test actually makes this fact more salient.

Although it might be argued that the use of the 'reasonable, prudent user' concept implies a divergence away from the usual contract-oriented approach in favour of more party-oriented approach, this is justifiable, mainly upon the grounds that the presence of the party-oriented approach is limited, because the test would be an objective test and not a subjective one and the contract-oriented approach is preserved in the fact that the use of 'reasonable, prudent user' test emphasises the electronic characteristic of e-wraps.

Furthermore, the recognition of 'reasonable, prudent user' test asserts the fact that the effect of providing terms in bold and capital letters, which is the basic characteristic of the surprise test, is not as strong as it is in paper contracts. Therefore further efforts would be required in e-wraps to negate surprise.

Contracting in the Electronic Age' (2002) 77 NYULRev 429 <intl.westlaw.com> accessed 22 October 2015.

[151] Nguyen v Barnes & Noble Inc, 763 F 3d 1171 (2014).

[152] The findings of various researchers reiterate this point. Refer to Chapter One (n 81); Chpater Four (n 36).

This argument establishes that minimum procedural unconscionability will always be present in e-wraps. The question of whether its higher degree will be initiated by surprise is ultimately dependent on either proving the existence of surprise after examination (the first approach) or presuming surprise through the adoption of 'reasonable, prudent user' perception (the second approach). This matter is ultimately contingent upon the choice of the policy maker.

A further point needs to be clarified with regard to procedural unconscionability. The complementary elements of market alteratives, sophistication and necessity, remain effective in e-wraps. This is evidenced in the e-wrap case of *Comb,*[153] which was reviewed in extensive detail above.

PayPal in this case did not argue against the finding of minimal procedural unconscionability that was depicted in the relevant adhesion contract. The company instead argued that this aspect of unconscionability was defeated by the fact that the service which PayPal provides cannot be said to be a matter of necessity.[154] In this instance, the court took the opportunity to emphasize that the matter is ultimately subject to its discretion. In referencing *Dean*,[155] the court maintained that while there was a market alternative the complainant was a sophisticated person. This served to clearly distinguish *Comb* from *Dean*, because, on average, PayPal users cannot be said to be sophisticated. This illustrates that the court considered the complementary elements.

In engaging with substantive unconscionability, this thesis maintains that the approach that California courts have adopted in the course of arbitration has a considerable contribution to make to the resolution of unfair e-wraps. It has

[153] Comb v PayPal, Inc, 218 F Supp 2d 1165 (2002).
[154] Ibid at [1172].
[155] Ibid at [1172-1173] citing Dean Witter Reynolds, Inc v Superior Court, 211 Cal App 3d 758, 769, 259 Cal Rptr 789 (1989).

already been clarified that in arbitration unconscionability disputes courts tend to presume substantive unconscionability via the test of mutuality in arbitration clauses. This suggests that arbitration clauses that cast unilateral burdens on the complainant are presumably unconscionable.

Thus the enforcer is burdened with proving the fairness and reasonability of the said terms. Regardless of the criticisms that have been made of the way that California courts treat arbitration clauses,[156] this approach demonstrates that the policy maker is willing to approach unconscionability differently, in accordance with the type of terms and contracts that are in dispute. The same approach can easily be adopted in e-wrap unconscionability cases. Accordingly, the identification of a lack of mutuality in any unusual e-wrap term will raise a presumption of substantive unconscionability.

Moreover, cases support the argument that California is a step ahead in trying to provide specific criteria for the determination of substantive unconscionability. The substantive aspect of unconscionability is usually the problematic part of the unconscionability test; it has been subject to extensive criticism by academics.[157]

This thesis argues that an identification of similar criteria in other types of contract as e-wraps is possible. In this respect it seems that California courts are willing and capable of doing so. This is illustrated in *Moran*, [158] which involved an investigation of the unconscionability of a price term. Here, the

[156] See Stephen A Broome, 'An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act' (2006) 3 Hastings Bus LJ 39 <intl.westlaw.com> accessed 12 May 2016; Michael G McGuiness and Adam J. Karr, 'California's Unique Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption under the Federal Arbitration Act' (2005) 1 J Disp Resol 61.
[157] Refer to this Chapter (n 11, 14). .
[158] Moran v Prime Healthcare Management, Inc, 3 Cal App 5th 1131 (2016).

court provided some criteria[159] that may develop in the future towards more specific determination (just as in the employment arbitration context).

The court in *Moran* initially addressed the scene of the investigation of price by observing that "[a]llegations that the price exceeds cost or fair value, standing alone, do not state a cause of action."[160] It then proceeded to explain that "courts look to the basis and justification for the price."[161] In extrapolating, the court referenced: a) "the price actually being paid by ... other similarly situated consumers in a similar transaction"[162]; b) and the cost of the goods and services to the seller in addition to the market price.[163] Closer examination reveals that this brings two criteria (market price and the cost to the seller) together; c) "the inconvenience imposed on the seller"[164]; d) "the true value of the product or service."[165] It can be argued that these criteria provide a sufficiently strong basis for determining – at least to some extent - the substantive part of unconscionability in terms other than arbitration.

However, the preceding review of case law has exposed some clear limitations, which may restrict the possibility of effectively determining substantive unconscionability in California. It was noted that a number of inconsistencies were identified within cases when courts addressed the substantive part of unconscionability. It has already been demonstrated that in some cases courts do not adopt a restricted approach to determined criteria that should be investigated.[166] However, this inconsistency does not limit the argument here, because it shows a defect within the courts' application of the law, as opposed

[159] Ibid at [1148].
[160] Ibid (citation omitted).
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Refer to (text to n 93-95).

to a defect within the approach that seeks to determine substantive unconscionability.

The adoption of this reading of the determination of substantive unconscionability will help to put the sliding scale of unconscionability into effect. If the existence of minimum procedural unconscionability in e-wraps is initially granted, this entails that a great degree of substantive unconscionability will be required to tip the scale towards the application of unconscionability. The establishment of specific criteria that prove substantive unconscionability will lend further impetus and momentum to this approach.

In concluding this evaluation, it appears appropriate to begin by questioning the claim that unconscionability provides a very high standard for the complete protection of online users.[167] Unconscionability, as this thesis has clarified and proposed, is capable of efficiently resolving unfairness in e-wrap contracts. The problems documented in this chapter adhere at a practical, as opposed to doctrinal, level of analysis.

4.8 Conclusion

This chapter investigated the application of unconscionability in e-wraps in both English and California law.

In English law the lack of concrete e-wrap cases has given rise to a degree of uncertainty about how unconscionability law in e-wraps could be applied in the future. Based on *Bassano* [168] it has been illustrated that English law most likely will treat e-wraps without adjusting the traditional rules of contract law.

[167] Erin Canino, 'The Electronic 'Sign-in-wrap' Contract: Issues of Notice and Assent, the Avrage Internet User Standard, and Unconscionability' (2016) 50 UC Davis L Rev 535 <intl.westlaw.com> accessed 12 May 2017, 561.
[168] *Kathryn Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd* [2014] EWHC 377 (QB).

Therefore, considering the analysis of unconscionability in traditional rules as explained in the previous chapter, this chapter has demonstrated two possible approaches to unconscionable e-wraps. First there is a relaxed one that takes into consideration the particularities of e-wraps as clarified by some research which consequently ease the application of unconscionability and a strict approach that does not rely on the findings of the aforementioned research and applies unconscionability in a way that is identical to its application in traditional contracts. This has been illustrated through a theoretical construction of cases of presumed unconscionability and cases of classic unconscionability.

In contrast, in California law the analysis relied on examples of unconscionable e-wraps provided in case law. This analysis shows an adherence to the traditional test of unconscionability as demonstrated in the previous chapter. It also discussed two proposals in legal writing that defend reconstructing unconscionability in e-wraps. The discussion revealed some drawbacks to the suggested proposals, therefore concluded in proposing that a reconstruction is not required and argued instead that the unconscionability test as applied in California has aspects that advance the protection that may be provided to online users by easing the test of unconscionability.

The analysis and proposals related to the application of unconscionability in both jurisdictions relied heavily on presumed unconscionability which shows that this aspect of unconscionability is the most significant part in both jurisdictions.

The next chapter merges the findings of the three previous chapters. It focuses on lessons that could be derived from the application of unconscionability to

English and California law with a view to improving unconscionability in Libyan law to overcome the weaknesses addressed in this law.

Chapter Five

The Way Forward

5.1 Introduction

This chapter will assemble the findings of the previous three chapters, in an attempt to answer the research questions of this thesis, which are mainly concerned with: the various approaches to unconscionability; the position of e-wraps in these approaches; derived lessons from the analysis of the various approaches to be considered in proposing a reform of Libyan law; and finally the theoretical bases of unconscionability. Each of these themes will be discussed, starting with the theoretical bases of unconscionability, which are partly addressed in this chapter and will be further discussed in the next.

The process through which these themes are presented, focuses on reiterating the significant findings of the analysis of unconscionability in each jurisdiction investigated, which consequently clarifies the different approaches. This focus will shed light on similarities and differences between the analysed jurisdictions.

The discussion then proceeds to demonstrate the impact of the findings. This part draws attention to an interpretation of two important aspects of unconscionability. Firstly, the change in value given to the legal advice element in English law, because in some early cases it was one of the essential elements, while in other cases it is more complementary element. Reasons for this variation will be elaborated. Secondly, the findings of the unconscionability analysis will eventually answer the question; under which general principle should unconscionability be placed in contract law? While the answer to this question in Libyan law depends on the type of reform adopted in the future, the

answer in English and California law is relatively clear in light of the addressed findings.

This chapter partially addresses the theoretical bases of unconscionability and when combined with the next chapter will provide a fuller picture of this theme.

The final part of this chapter evaluates the different approaches to unconscionability as explored in English and California law. Additionally, the discussion draws upon what is already settled in Libyan law and tries to find a way to reform of unconscionability that, while being close to its current version in Libyan law, will be a more sufficient one that could bring the doctrine into functioning properly in both traditional contracts and e-wraps. This can be achieved via adopting the good qualities of unconscionability tests in both English and California law.

5.2 Unconscionability: Various Approaches

The analysis of this thesis so far illustrates the position of Libyan, English and California law towards unconscionability and the various approaches of each of these jurisdictions to the doctrine.

Libyan Law

Unconscionability under Libyan law is restricted, suffers from ambiguity and a lack of clarity. This affected the doctrine's capability to serve complainants as this is the rationale according to which Libyan legislators decided to add unconscionability to the Civil Code contrary to its first origin in the French Civil Code.

Restrictions

The restrictions applied to unconscionability in Libyan law can be recognised in three aspects. Firstly, the limited types of disadvantage that may trigger the test of unconscionability to provide a protection to the complainant. Libyan law allows the application of unconscionability if the weaker party suffers levity of character or unbridled passion. The language of the Civil Code does not suggest that those types of disadvantage should be relaxed to include situations that might be understood in terms of levity of character or unbridled passion (as poor and ignorant conceptions in English law). Al-Sanhori, the main drafter of the Civil Code, asserts that adding unbridled to passion was to restrict situations that might be treated by unconscionability. Moreover, the lack of case law does not help to extend the meaning of these disadvantages.

Secondly, applying a statutory limitation of one year from the time of contracting for unconscionability cases shows Libyan legislators' preference to limit the application of unconscionability to the minimum. This is further emphasised by the fact that other types of vitiating factors in Libyan law have a statutory limitation of fifteen years from the time of the making of the contract.

Thirdly, the decision not to adopt presumed unconscionability with regard to the psychological element shows, contrary to the early draft of the Civil Code a reiteration of the tendency to restrict unconscionability.

Lack of Clarity

Ambiguity and lack of clarity are both it is observed in different aspects of the doctrine. Firstly, it is submitted that the psychological element of unconscionability requires that the complainant should prove that the other

party's exploitation of him/her was the reason for contracting. On the contrary, Al-Sanhori in his explanation of situations in which judges may decide to amend an unconscionable contract instead of nullifying it, claims that this is applied if the judge finds that the complainant would have entered into a contract even without the exploitation of the other party.

Secondly, how unconscionability cases should be investigated is not clear. The Libyan Civil Code does not demonstrate the procedure through which Libyan judges can make a decision in unconscionability cases. Therefore several issues in this regard are not clear: for example the order through which the elements of unconscionability should be investigated in case law; what behaviour consist of levity and unbridled passion; is there a specific type of relationship that links the two elements of unconscionability in Libyan law such as a sliding scale or circular relationship as in California and English law respectively, or any other type of relationship. In this regard there is a sign that within the psychological element which consists of unconscionable conduct and serious disadvantage, there is some form of circularity, in demanding a proof that the exploitation is the reason of contracting.

Thirdly, it is also unclear whether Libyan law identifies knowledge as an element that should be considered in the assessment of the enforcer's advantage taking or not and if it is required or identified in cases, what is its effect. Al-Sanhori hinted that unconscionable conduct signifies the enforcer's bad conscience in addition to the complainant's impaired consent, which indicates that knowledge should play a role in the unconscionability test. Yet due to the lack of cases the issue has remained unsettled.

Referencing Islamic law as the second source of Libyan law to which judges should resort in cases which lack rules in the Civil Code, shows no better solution. Islamic law under the Malikya School of thought (which is the Islamic School that is followed in Libya) recognises unconscionability in the rules of *Ghubun* and *Ghara*. An analysis of both rules shows that they are restricted to a very narrow sense; therefore they do not provide sufficient solutions for unconscionable contracts.

These observations asserted the need for a reform of the doctrine in Libyan law, because it seems that the observed limitations have rendered the doctrine ineffective in the current law. This is supported by the fact that since the enactment of the Civil Code in 1954 not even one case that applied unconscionability can be found in Libyan law.

Any proposal for reform needs to consider other approaches to unconscionability to identify the best way to achieve some level of certainty to the law of unconscionability and consequently enhance the chances of applying the doctrine.

English and California Law

The amount of case law in English and California law allow recognition of a fuller picture of unconscionability in these jurisdictions. This in turn signifies the variation in their approaches from different perspectives, namely: in the choice of party-oriented and contract-oriented approaches; in the recognition of presumed unconscionability; and in the type of relationship between the elements of unconscionability through which these elements interact to present a positive case of unconscionability.

5.3 Party-Oriented v Contract-Oriented Approaches

The analysis shows that English law prefers an approach that focuses on the contractual parties rather than on the contract itself. This is clearly shown in the way through which the elements of unconscionability are investigated in this law.

First of all, the door to the serious disadvantage element has been left open and may include various forms of disadvantage under unconscionability, as long as they result in the impairment of the complainant's consent. Case law also clarifies that what matters to apply unconscionability is that the serious disadvantage must be an operated one, in other words, it must show the impairment of the weaker party's consent. This is investigated via considering relational inequality between the contractual parties. While the investigation of serious disadvantage can be objectively held, English courts reveal a tendency towards adopting a subjective test too. This might be interpreted in terms of the subjective nature of the serious disadvantage itself or as a reflection of the adopted party-oriented approach.

Overall this approach can be easily signified through the factors considered in the serious disadvantage test.

Unconscionable conduct as the second element of unconscionability in English law also supports the argument that it has adopted a party-oriented approach to unconscionability.

Frist, the element itself is concerned with the quality of the enforcer's actions rather than with the result of such actions as appeared in contractual terms.

Second, when the unconscionable conduct is passively held, that is, when it is embodied in accepting contractual benefits without taking further positive action by the enforcer depends upon the knowledge element recognition. Knowledge in the test of unconscionability is subjectively investigated, and the doubts placed on English law's adoption of constructive knowledge can be understood as a reflection of the subjective approach.

Third, this element is connected to the moral aspect of unconscionability; therefore, it is described as a conduct that is excercised in a morally reprehensible manner. The emphasis added to the moral aspect of this element does not have any impact on the investigation of this element. However it might be understood as a reflection of the subjective aspect of the unconscionability test or as an emphasis on the requirement that for the conduct to be unconscionable, it must shock the conscience of both the court and the enforcer.

These points attest to the party-oriented approach of different aspects of the unconscionable conduct test whether in its focus, type and connection to the moral aspect of unconscionability.

The third element of unconscionability is the unconscionable terms. As the main focus of this element is contractual terms, presumably it should present a contract-oriented approach. However, the English law preference for a party-oriented approach can be identified in this element too, namely, in the appearance of subjectivity in its test.

Ideally, a term is unconscionable if it is objectively unfair, in this regard *Qureshi* shows that "[u]nequal bargaining power or *objectively unreasonable terms* provide no basis for equitable interference in the absence of

unconscientious or extortionate abuse of power…"[1] However, terms that are grossly unfair for the claimant might be considered unconscionable even if they are unobjectionable in terms of market value. This is indicated in *Burch*[2] and can be derived from the language of some case law.

For example, in *Filmer*[3] after an objective assessment of contractual terms and finding them to be unconscionable, the court viewed the circumstances' of the complainants as well as the enforcer, and described the transaction as "a bargain that is so preposterous in itself, and *so greatly to their prejudice*."[4] Such language indicates that if contractual terms are objectively fair but they are outrageous for one party, the contract might be found unconscionable when the other elements of unconscionability are satisfied.

The party-oriented approach of English law is further evidenced in the requirement of impropriety. Determining impropriety connects the doctrine not only to the court's conscience but also to the enforcer's conscience.[5]

By contrast, California law adopts a contract-oriented approach that focuses on the contractual terms rather than the contractual parties. This is clearly supported in placing unconscionability in California Civil Code in §1670.5 under unlawful contract rather than under vitiating factors. Consequently, the investigation of procedural and substantive unconscionability is objectively tested.

Procedural unconscionability is in parallel with the serious disadvantage and unconscionable conduct elements identified in English law. However, while

[1] *Norwich Union Life Insurance Society v Qureshi* [1996] 3 All ER 61 at [1617] (emphasis added).
[2] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144.
[3] *Filmer v Gott* [1774] 2 Eng Rep156 1694-1865.
[4] Ibid.
[5] *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221 at [236].

exploitation in English law is embodied in one stage, namely in the unconscionable conduct element, exploitation in California law is embodied in two stages through oppression and surprise.

Although oppression seeks to examine whether the complainant was compelled to make the contract in order to find unconscionability, its emphasis is on the contract itself instead of the weaker party. This is clearly shown in connecting oppression to adhesion contracts to the extent that some courts found minimum procedural unconscionability merely for the presence of adhesion contracts.

The test of oppression, like the test of the English element of serious disadvantage, has a close connection to inequality of bargaining power. This is tested via consideration of factors that are assessed objectively, such as the existence of reasonable market alternatives and necessity as object of the contract and the sophistication of the weaker party. While sophistication is subjective in nature, it is objectively assessed just as market alternatives and necessities, which assert the contract-oriented approach of this test. Moreover, oppression does not consider the weaker party's special disadvantage rather, it is concerned with the presentation of contractual terms, something that is in common with surprise.

Surprise as the second component of procedural unconscionability refers to hidden contract terms, consequently it also focuses on the presentation of contract terms. While surprise, like oppression, implies a consideration of the enforcer's conduct, courts examine this elements via focusing on the appearance of contractual terms without the action of presenting them. Therefore, case law does not refer to sharp practices of the enforcer but to language, font, capitalised letters and colors of the terms. These aspects,

consequently, are assessed objectively as clarified in Chapter Three of this thesis.

As to substantive unconscionability, it has been evidenced via case law that this part of unconscionability, while similar to its counterpart in English law, does not recognise any form of subjectivity in language or in investigation. This is further supported in the tendency of California to specify steps according to which courts examine the existence of unconscionable terms. It is also seen in the tendency to determine criteria through which courts investigate unconscionable terms. This is particularly exemplified in disputes related to employment arbitration contracts. This tendency asserts the objectivity of the unconscionable terms test.

The contract-oriented approach is also depicted in presumed unconscionability in California law, as the presumption in this law is connected to the type of the terms disputed. Accordingly, if the disputed terms are related to arbitration, a presumption of substantive unconscionability arises.

5.4 Fixed Presumed Unconscionability v Inconsistency

Presumed unconscionability in English law presents one of the main strengths of the doctrine in this jurisdiction. In California law, however, it is, to some extent, a point of weakness.

It is proved that presumed unconscionability in English law is clear, settled and exemplified in many cases. It is also proved that presumed unconscionability is in fact a doctrine that resembles presumed undue influence to a great extent, something that was unhindered even by the fact that the rationale of each

doctrine is different i.e. where undue influence is concerned with competent consent while unconscionability with exploitation.

By contrast, presumed unconscionability is partly settled in California law, namely in relation to presumed substantive unconscionability that arises in arbitration disputes. Nonetheless, presumed procedural unconscionability triggers uncertainty in the law's position towards this part of presumption. In some unconscionability cases the mere presence of an adhesion contract was sufficient to raise a presumption of oppression, which is a minimum procedural unconscionability.

The argument that this minimum level of procedural unconscionability appears in arbitration disputes has also been explored and proved to be inadequate. On the contrary, it has been proved that cases of minimum procedural unconscionability evidence inconsistency in case law that is related to issues in the practice and application of the doctrine rather than issues in the doctrine itself.

5.5 Circularity v Sliding Scale

The final aspect through which the variation in the approaches of English and California law to unconscionability can be identified is in the type of relationship that connects the components of unconscionability in each jurisdiction.

Circularity is also one of the doctrine strengths in English law, because it shows the doctrine's flexibility and capability of being proved in different ways. Circularity explains several issues related to the doctrine some of which are: why case law varies in their methods of investigating the doctrine's essential elements; it also clarifies how each element is connected to the next in a

mutually dependent manner that enhances the doctrine's flexibility; circularity draws attention and emphasises that there is a classic case of unconscionability and a case of presumed unconscionability; circularity explains the function of legal advice and knowledge and their power to break the circle and consequently negate unconscionability.

The sliding scale is a type of interaction that ties together the elements of unconscionability in California law. It envisages that the greater the degree of procedural unconscionability, the less is required of substantive unconscionability to tip the scale and apply the doctrine and vice versa.

The function of this scale depends heavily on the recognition of different degrees of procedural and substantive unconscionability. The specification of procedural unconscionability is to some extent straightforward because it has two components, oppression and surprise. Hence, proving one of them suggests a limited degree of procedural unconscionability, while proving both suggests a high degree of procedural unconscionability. In that case, a limited degree of substantive unconscionability would be sufficient to apply the doctrine.

However, the determination of the degree of procedural unconscionability might be difficult sometimes.[6] This is understandable viewing the fact that the complementary elements of market alternatives, necessity and sophistication have a role in the determination of the degree of procedural unconscionability. In addition, their effect depends ultimately on the courts' sole discretion which undermines any attempt to specify criteria according to which the specific degree of procedural contract can be determined.

[6] See for example Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006) at [1309-1312] (Judge Kozinski dissenting).

However, the determination of the degree of substantive unconscionability is more complicated, for the lack of recognition of specific components under this element. This strain has been discussed in depth in *Nagrampa*,[7] in which judge Kozinski questioned the decision of the majority of the court, which identified a high degree of substantive unconscionability. His honour's opinion on the facts of the case was that the court reached this conclusion to effectuate the sliding scale without a clarification of the basis on which this decision was made.[8]

This view reflects the problem that this thesis recognised, especially in light of the certainty provided by circularity in English law, which avoids the complication of recognising different degrees of the elements of unconscionability. The recognition of varied approaches enhances the understanding of unconscionability.

5.6 Various Approaches: Significance and Impact

The initial impact of the addressed various approaches to unconscionability was on the traditional understanding of some related issues that were either left in legal writing without explanation or sometimes, explained inaccurately. These are: the interpretation of the variation in the value given to legal advice in English law; and the general principle under which unconscionability should be placed.

While these topics are the outcome of the analysis of the different approaches to unconscionability, they also partly contribute to answering one of the main research questions of this thesis, which is related to the theoretical basis of unconscionability.

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[7] Nagrampa v Mailcoups, Inc, 469 F 3d 1257 (2006).
[8] Ibid at [1312] (citation omitted- emphasis added).

5.7 Legal Advice: Alec Lobb and Fry v Lane

As explained in Chapter Three, English law recognises three essential elements for unconscionability: serious disadvantage, unconscionable conduct and unconscionable terms.[9] *Alec Lobb* is the reference point in this regard. This law also recognises elements that this thesis calls complementary elements. These are: knowledge and legal advice. The classification of these elements is sometimes called modern unconscionability.[10] With the aim of recognising what so-called modern unconscionability is in order to distinguish it from early cases, in which legal advice was considered one of the essential elements instead of the unconscionable conduct element, examination of the leading case in this regard, *Fry v Lane*, is needed.

The literature generally avoids going farther than addressing this distinction and falls short of providing a justification for the variation in the value given to legal advice in case law. However, one attempt in this respect is the work of David Capper.

Capper draws upon the concept of reincarnation to justify the divergence between the elements of *Fry v Lane* and *Alec Lobb*. Capper therefore suggests that *Cresswell* reincarnated unconscionability. He adds that the doctrine of unconscionability was not an active component of English law until *Cresswell* in 1968.[11] Capper maintains that *Multiservice Bookbinding* represents the point at which the doctrine's elements began to change, [12] because it adopts the *Fry v Lane* elements, in addition to the unconscionable conduct element. Accordingly

[9] *Alec Lobb (Garages) Ltd. and Others v Total Oil Great Britain Ltd.* [1983] 1 WLR 87 at [94-95].
[9] Robert W Clark, *Inequality of Bargaining Power,* (The Carswell Company Ltd 1987).
[10] Ibid 25; David Capper, 'The Unconscionable Bargain in the Common Law World', (2010) 126 LQR 403 <login.westlaw.co.uk> accessed 8 May 2014, 404.
[11] Capper (n 10) 404.
[12] *Multiservice Bookbinding Ltd and others v Marden* [1978] 2 All ER 489.

the elements were reproduced in a different form, and more closely resembled the *Alec Lobb.*

However, Capper questions whether *Multiservice Bookbinding* can be legitimately perceived as a case of unconscionability, because its focus on collateral stipulations in a lending agreement suggests a basis within a different grounding of relief.[13] The narrative of this conclusion, in Capper's reading, begins by noting that *Multiservice Bookbinding* did not cite *Fry v Lane* or any of the cases in its lineage.

Capper notes, however, that the value of *Multiservice Bookbinding* derives from Wilkinson's statement in which the unconscionable conduct element is described as a form of action that imposes unconscionable terms in a *morally reprehensible manner*. Capper observes that the frequent recurrence of this description in subsequent cases established this dictum both as a recognised component of the English law of unconscionability, and as an established feature of unconscionability. As Capper notes, when recent applications of unconscionability are contrasted with *Fry v Lane*, stark differences become immediately apparent.[14]

Some limitations, however, can be observed with Capper's theory. Firstly, his contribution fails to explain why the elements of unconscionability observed in *Fry v Lane* are different from earlier 'catching bargain' cases in which the *Alec Lobb* elements were adopted. To put it differently, Capper's theory overlooks catching bargain cases in which the elements of unconscionability take on the *Alec Lobb* elements. Given that Capper's study sought to observe these cases

[13] Capper (n 10) 404.
[14] Ibid 405 (Emphasis added).

through the prism of unconscionability,[15] this highlights a clear contradiction. For example, in cases such as *Earl of Chesterfield* in 1750,[16] the unconscionable conduct element was recognised as an essential element.

Secondly, Capper's interpretation overlooks much of the historical research of unconscionability cases. Capper's observation that the doctrine went into hibernation between *Fry v Lane* (1889) and *Cresswell v Potter* (1968)[17] overlooks the essential point, namely, that *Cresswell* adopts the *Fry v Lane* elements. This means that, in the aftermath of *Cresswell*, the doctrine appeared in its old version (the *Fry v Lane* version) and since 'reincarnation' suggests rebirth in a different form,[18] it is inaccurate to contend that *Cresswell* reincarnated the doctrine.

Third, the existence of even one case of unconscionability in the hibernation period undermines Capper's theory. The cases of *James v Kerr*[19] and *Rees v De Bernardy*[20] are both relevant in this regard as they were both subsequent to *Fry v Lane* (1888 and 1896 respectively).

Clark proposes alternative explanations for the lack of cases in the so-called hibernation period addressed by Capper:[21] First, he notes that the (in his words) 'quaint and restrictive' summary of unconscionability that *Fry v Lane* delivers

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[15] Ibid 403.
[16] *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865.
[17] Capper (n 10) 403.
[18] Merriam Webster online dictionary.
[19] *James v Kerr* [1888] 40 Ch D 449, In this case a transaction was nullified because an undue advantage was obtained from the defendant, who was young, very poor and in a clear situation of distress.
[20] *Rees v De Bernardy* [1896] 2 Ch 437. In this case D induced B and C who were of old age, very humble rank of life and illiterate, to sign an agreement by which they agreed to give him one-half of the net amount of the property, in consideration of D's revealing to them the existence of the property and their title to it. He however did not reveal the existence of the property or their entitlement to it. In addition, D persuaded them to use his solicitor (at the time the property was being held by a New Zealand trustee). The court held that contract should be nullified because the bargain was improvident - D had clearly taken unfair advantage of his position.
[21] Clark (n 9) 25.

may have given rise to the impression that this jurisdiction is not of general application; second, the enactment of the Money Lenders Act of 1900 reduced the number of possible litigations of unconscionability that could have been brought before equity courts.[22] This justification relates to the fact that the Money Lenders Act allows courts to nullify unconscionable moneylending agreements upon grounds that closely resemble those required for the application of unconscionability.[23] Third, the initial movement within English law towards certainty and predictability has now been superseded by a 'secondary' shift in the direction of flexibility and pragmatism.[24]

While Clark's second justification sounds plausible, the first justification may be questioned because it disregards precedents that existed before *Fry v Lane*, which assert the general application of unconscionability. The third explanation can similarly be challenged with reference to the explanation of the relationship between unconscionability and certainty that will be addressed in the next chapter,[25] which demonstrates that unconscionability does not necessarily produce uncertainty.

As the theory that unconscionability has been 'reincarnated' proved to be inadequate, this thesis argues alternatively that circularity and presumed unconscionability explain the variation in the value given to legal advice in the *Fry v Lane* line of cases versus the *Alec Lobb* line of cases.

The line of cases that cited *Fry v Lane*, which identified legal advice as an essential element, in fact are cases of presumed unconscionability. Chapter Three explained that legal advice has a central role in rebutting presumed

[22] Ibid.
[23] *Samuel v Newbold* [1906] AC 461 at [469] (Lord Macnaghten).
[24] Clark (n 9) 25.
[25] Refer to Chapter Six (text to n 104-199).

unconscionability and consequently breaking the circle of the unconscionability elements interaction. Hence, legal advice was addressed in such cases as an essential element.

Exploring subsequent cases to *Fry v Lane*[26]shows that most of these cases[27] are of presumed unconscionability. *Cresswell,* for example, which concerned a dispute on the transference of the wife's share in the matrimonial house after divorce, relied on *Fry V Lane.* The court in *Cresswell*, asserted the need for the three requirements: whether the claimant is poor and ignorant, whether the sale considerably undervalues and, finally, the lack of legal advice.[28] Having identified the essential elements that need to be investigated the court pointed out that this is not to suggest "that these are the only circumstances which will suffice; thus there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity."[29] This is an indication of presumed fraud.

Hence, this statement can be understood as a reference to cases of presumed unconscionability. The fact that *Fry v Lane* is such a case supports this conclusion. Moreover, *Cresswell* cited *Earl of Aylesford*,[30] which is also a case of presumed unconscionability. Furthermore, *Cresswell* itself is a case of presumed unconscionability, in which the burden of proving that the transaction was fair and just was shifted to the defendant.[31]

The second case that cited *Fry v Lane* is *Burch*, which has already been discussed in Chapter Three. Although this is a case of presumed undue influence the court clarified that it could be pleaded on unconscionability

[26] The author used the JustCite search engine to identify subsequent cases to *Fry v Lane.*
[27] Note here that cases in other jurisdictions other than English law were excluded.
[28] *Cresswell v Potter* [1978] 1 WLR 255 at [257].
[29] Ibid.
[30] Ibid.
[31] Ibid at [259].

grounds. In this case the court illustrated the bases for the presumption of unconscionable conduct and it is striking that legal advice played a prominent role in this case, therefore, its conditions and value were elaborated in depth. This shows why *Burch* referenced *Fry v Lane*.

AIdrich[32] and *Quareshi*[33] also cited *Fry v Lane*. Although neither case is a case of presumed unconscionability, they do not undermine the current argument that legal advice is an essential element in *Fry v Lane,* because *Fry v Lane* was a case of presumed unconscionability. On the contrary, the fact that *Aldrich* and *Quareshi* cited *Fry v Lane* alongside cases such as *Alec Lobb*, shows that unconscionability as applied in *Fry v Lane* is identical to modern unconscionability (in Capper's words) that is illustrated by *Alec Lobb*.

The final case in which *Fry v Lane* was cited is *Evan v Lloyd* which was pleaded on undue influence grounds with unconscionability as an alternative ground. The undue influence claim was discussed under presumed undue influence and the court concluded the failure of this claim and therefore did not proceed to investigate the unconscionability of the contract.[34] Had the court proceeded to this investigation, it would have been investigated under presumed unconscionability, therefore, *Fry v Lane* was cited, which again supports the argument of this thesis.

The second impact of the explored approaches to unconscionability is in demonstrating the rationale of unconscionability and consequently its position in contract law.

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[32] *Aldrich v Norwich Union Life Insurance Co Ltd* [1998] CLC 1621 at [1628].
[33] *Norwich Union Life Insurance Society v Qureshi* [1996] 3 All ER 61 at [1617].
[34] The court clarified that "if the Claimants succeeded on the ground of undue influence, they would not need to rely on this alternative head of claim, whereas if they fail (as they do) on the ground of undue influence they cannot conceivably succeed on this alternative ground." *Evans v Lloyd* [2013] EWHC 1725 (Ch) [2013] 2 P & CR at [76].

5.8 Unconscionability: Rationales

In general, three rationales are usually connected to unconscionability in literature and in case law. These are: protection of the weaker party, anti-exploitation and remedying unfairness rationales. At first glance, the nature of these rationales suggests that they are attributable to the constitutive elements of unconscionability doctrine: procedural and substantive unconscionability.

Therefore, it can be argued that these rationales mirror courts' and academics' special emphasis on one of the elements of unconscionability more than others. However, this thesis argues that while the focus on which unconscionability elements are important, it is not the mere aspect in determining the unconscionability rationale, the law preference of party-oriented or contract-oriented approaches is a relevant consideration too.

Accordingly, since a lack of clarity made it impossible to identify a specific approach to unconscionability in Libyan law, the unconscionability rationale in this law could not be determined. However, some academics suggest that the unconscionability rationale in this law is protecting the weaker party.[35] Although there is no case law that may support (or undermine) this position, the fact that unconscionability in the Libyan Civil Code is recognised as a vitiating factor supports the protection rationale, and the anti-exploitation rationales equally.

Nevertheless, a determination of this aspect of unconscionability in Libyan law is not crucial for proposing law reforms, as such reforms presumably would determine the rationale preferred.

[35] Mohammad Al-Azhari, *The General Theory of the Law of Obligation* (Libya, The National Books Press 2013) 126 (author's translation).

Clark claims that English law recognised the three rationales.[36] On the contrary, this thesis argues that protection and anti-exploitation rationales are the salient ones in case law and can be observed across two separate eras.[37] Clark observes the remedying unfairness rationale in the middle of the nineteenth century, where the rationale placed an emphasis on justice.[38] He claims that in *Earl of Aldborough*[39] prominent importance was given to explaining when terms can be considered unconscionable and the court's rejection of unconscionable bargains.[40]

However, a review of the mentioned case shows that in its conclusion Lord Brougham asserted that courts certainly discouraged dealings with expectant heirs for the purpose of protecting them.[41] Therefore, the claim that this case represents an era in which the rationale of unconscionability was remedying unfairness in English law is doubtful.

According to this thesis, the first era in which the rationale was protecting weaker parties is observed in early cases of catching bargains. In this era the predominant preoccupation was protecting expectant heirs, reversioners and remainder men.[42] The protection that is given to this class of contractors is "against the consequences of their not being on equal terms with the buyer, or in a position fully to understand the value of their interest, and justly to estimate the proposals made to them."[43]

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[36] Clark (n 9) 16-26.
[37] These shifts and adjustments were not also evidenced in California law.
[38] Clark (n 9) 16 citing *Earl of Aldborough v Trye* [1840] 7 Eng Rep 1136 1694-1865.
[39] *Earl of Aldborough v Trye* [1840] 7 Eng Rep 1136 1694-1865.
[40] Clark (n 9) 16.
[41] *Earl of Aldborough v Trye* [1840] 7 Eng Rep 1136 1694-1865 at [465].
[42] Rick Bigwood, *Exploitative Contracts* (Oxford University Press 2003) 233
[43] *O'Rorke v Bolingbroke* [1877] 2 App Cas 814 at [829]. See also *Earl of Aylesford* which describes the weaker party in catching bargains: "He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him." *Earl of Aylesford v Morris* [1872-73] LR 8 Ch App 484 at [491-92].

In the second era the preponderant concern was the prevention of fraud.[44] The focus shifted in this era to the unconscionable conduct element whereby the behaviour of the enforcer is described in terms that fall short of basic moral standards.[45] Therefore, in English law "a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience."[46]

As to California law, no shifts from one rational to another were observed. Courts usually emphasise the substantive aspect of unconscionability therefore the rationale has always been remedying unfairness in contracts.

The chosen rationale in each jurisdiction is better understood in the light of the party-oriented and contract-oriented approaches. In English law, as the party-oriented approach appears in the focus on contractual parties rather than contractual terms, it is embodied in the procedural part of unconscionability, namely in the serious disadvantage and the unconscionable conduct elements. Consequently, the unconscionability rationales in this law are of protection the weaker party and anti-exploitation rationales.

By contrast, in California law the contract-oriented approach focuses on contractual terms therefore it is embodied in substantive unconscionability. Consequently, the unconscionability rationale in this law is remedying unfairness in contracts.

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[44] Clark (n 9) 16-26. Clark initially claims that *Earl of Aylesford v Morris* was one of the first cases in which these shifts were evidenced. However, he later retracts this claim. In retrospect, however, it is clear that this shift did occur. This is evidenced by the contemporaneous focus upon the prevention of exploitation. See, for example, *Boustany v Pigott* [1995] 69 P & CR 298.
[45] Stephen A Smith, *Contract Theory* (Oxford Scholarship Online 2012) 342; H G Beale (ed), *Chitty on Contracts,* Vol1 (32nd edn, Sweet & Maxwell 2015) 452.
[46] *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at [110] (Browne-Wilkinson J). See also: *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at [182-183].

A review of the content of these rationales would be beneficial for further clarity before proceeding to explain their effect on the unconscionability position in contract law.

5.8.1 Protection Rationale

This rationale calls for the adoption of unconscionability to protect the complainants. This protection ostensibly recalls measures that seek to 'correct' weaknesses within the ability to make a rational decision. However, this weakness does not qualify as a case of incapacity[47] and cannot therefore be protected by traditional rules of incapacity.

For Waddams unconscionable terms are *ipso facto* non-consensual terms.[48] Smith, similarly, advocates a protection rationale and argues that unconscionable bargains should not be enforced because they are non-consensual contracts that lead to unjust enrichment.[49] Smith therefore places unconscionability under the law of offer and acceptance.[50]

This argument derives its soundness from several foundations. Firstly, as has already been noted, unconscionability is based on conscience, which is "the moral requirement of consent"[51] and unconscionability is a doctrine that is

[47] *Longmate* in seeking to explain the weakness of the complainant, noted that he was "not absolutely incompetent or incapable" but was instead in need of protection. *Longmate v Leger* [1860] 66 Eng Rep 67 1815-1865 at [164].
[48] S M Waddams, 'Unconscionability in Contracts' (1976) 39 (4) The Modern Law Journal 369, 382-381.
[49] Stephen A Smith, 'In Defence of Substantive Fairness' (1996) 112 Law Quarterly Review, 138 16; Charlotte Thomas, 'What Role Should Substantive Fairness Have in the English Law of Contract? An Overview of the Law' (2010) 6 Cambridge Student L Rev 177, 183-184; Murray suggests that unconscionability can be understood with reference to the absence of consent. John E Murray, 'Unconscionability: Unconscionability' (1969) 31 (1) University of Pittsburgh 1. Bamforth, meanwhile, observes that unconscionability functions to prevent unjust enrichment. See Nicholas Bamforth, 'Unconscionability as a Vitiating Factor'(1995) Lloyds Maritime and Commercial Law Quarterly 538, 555-557.
[50] Smith, *Contract Theory* (n 45) 315.
[51] Randy E Barnett, 'A Consent Theory of Contract' (1986) 86 (2) Columbia Law Review 269, 298.

based on conscience. Hence, the link between unconscionability and consent can be recognised in some parts of the unconscionability test, for example the assessment of legal advice and whether the enforcer disclosed all the information to the other party, illustrates the court's concern to ensure that the contracting decision was an informative one.

Secondly, there is the datum, complainants in unconscionable bargains suffer serious disadvantages or 'special disability'.[52] Conceivably, disadvantages may include a number of different types, two of which are mental disorder and drunkenness. These two types of disadvantage are recognised under the law of incapacity,[53] because they impair the ability to make a reasonable decision.[54] The law of incapacity also requires that a contract be set aside if it has been agreed by persons of unsound mind, and if this lack of capacity has been known to the other party.[55] These requirements take incapacity a step closer towards the law of unconscionability, which has similar conditions in English law.

However, unconscionable bargains extend beyond cases of incapacity. This is evidenced in situations where knowledge is not present, a contract cannot be

[52] Chen-Wishart uses this expression in Unconscionable Bargains. Mindy Chen-Wishart, *Contract Law* (5th edn,Oxford University Press 2015).
[53] The nearest equivalent is the California Civil Code §1556. This states that "[a]ll persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights." Whereas under English law the issue is regulated by the Mental Capacity Act 2005 section 1 (2) declares that: "[a] person must be assumed to have capacity unless it is established that he lacks capacity."
[54] Section 2 (3) of the Mental Incapacity Act 2005 establishes that "[f]or the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain." California law also establishes in §15 Restatement (Second) of Contract that: "(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable s relation to the transaction and the other party has reason to know of his condition."
[55] *Imperial Loan Co* establishes that the enforcer should have known of the incapacity 'constructive knowledge' *Imperial Loan Co v Stone* [1892] 1QB 599. See also *Dunhill v Burgin* [2014] 1 WLR 933; §15 Restatement Second of Contract 1981.

set aside for incapacity, and still such a situation might be treated by unconscionability[56] when the other elements of unconscionability are satisfied.[57]

Moreover, in unconscionable bargains the defect of consent is, most likely, a consequence of more than one form of disadvantage, Disadvantage in unconscionability is not confined to an unsound mind or drunkenness as in incapacity, and it might be a combination of more than one form of disability.

In addition to the fact that unconscionability law extends beyond incapacity, there are also other serious limitations to basing unconscionability on lack of consent only.

Firstly, it overlooks the point that the complainant in unconscionable bargains is usually willing to contract.[58] Relevant English case Law demonstrates that this willingness to contract is usually considered in the facts; for example, it was often remarked, during the early cases, that the complainant was the first to offer to contract.[59] In other cases, the fact that the complainant hawked about the market for someone to contract with was identified as a relevant consideration;[60] in some instances judges refused to apply unconscionability upon the basis that the complainant entered into the contract with his/her 'eyes open'.[61]

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[56] Ewan McKendrick, *Contract law* (11th edn, Palgrave Macmillan 2015) 290.
[57] *Hart v O'Connor* provides the clearest distinction between incapacity and unconscionability. *Hart v O'Connor* [1985] 2 All ER 880.
[58] In *Earl of Aylesford* relief was granted to the complainant although the contract was described as a "*very willful* and culpable folly and extravagance." *Earl of Aylesford v Morris* [1873] 8 LR Ch App 484 at [499].
For a distinction between notions of free choice, consent and voluntariness see W N R Lucy, 'Contract as a Mechanism of Distributive Justice', (1989) 9 (1) Oxford Journal of Legal Studies, 132, 137.
[59] *Peacock v Evans* [1809] 33 Eng. Rep. 1079 1557-1865 at [515].
[60] See for example: *Earl of Aylesford v Morris* [1873] 8 LR Ch App 484 at [497].
[61] *Multiservice Bookbinding Ltd and others v Marden* [1978] 2 All ER 489. In *Day* relief was not granted because the complainant made a contract with 'eyes open' the court explained that "there are no grounds on which I can set the contract aside; for neither side have a right to

Secondly, it has also been explicitly declared in some cases that unconscionability is not a matter of lack of consent;[62] *Alec Lobb* states that "[i]n such a case the court is concerned, not with the reality of the weaker party's consent…"[63]

Thirdly, there is also the clear danger that connecting unconscionability to issues of consent will expose the doctrine to the danger of being equated with undue influence, a quite separate vitiating factor.[64]

However, Waddams clarifies that, while it is possible to distinguish between cases of unconscionability and 'defences of no assent', it is also possible to identify instances in which both defences are applicable.[65] This was the case in *Barrett*, [66] in which the examination of the unconscionable contract began with a reference to assent.[67]

This section is not arguing that unconscionability has no relation to consent; on the contrary, unconscionability presents a situation in which the capacity of the complainant has been limited or impaired. It is therefore more accurate to argue that, in unconscionability cases, the central issue is the quality or extent of consent, as opposed to its absence.

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complain of a bargain made so *deliberately* as this was. The party has no right to ask the Court to prevent the consequences of his own solemn act." *Day v Newman* [1788] 30 Eng Rep 36 1557-1865 at [83]. In the same case at [82] the court explained that this is a "case of two men sui juris, bargaining with their eyes open: no pressure of circumstances whatever."

[62] *Alec Lobb (Garages) Ltd. and others v Total Oil Great Britain Ltd* [1983] 1 WLR 87.

[63] Ibid at [94]. Likewise in *Bundy* Lord Denning, in proposing inequality of bargaining power, clearly establishes that it was his intention to focus upon wrongdoing by the strong party – the will of the other party was not therefore of concern to him. *Bundy Lloyds Bank Ltd v Bundy* [1975] QB 326 at [339].

[64] *Evans v Lloyd* [2013] EWHC 1725 (Ch) at [D59] (H H Judge Keyser). See also: Chen-Wishart (n 32) 91.

[65] Waddams (n 48) 382; Chen-Wishart also highlights a possible overlap between unconscionability and undue influence. See Chen-Wishart (n 32) 41, fn:115.

[66] *Barrett v Hartley* [1866] LR 2 Eq 789 at [794-795] (Sir J. Stuart V.C).

[67] Ibid.

This explains why the category of people that suffer 'bargaining disabilities' was left open.[68] This category cannot usually be protected by the traditional rules of incapacity.

It can be argued that approaches that take consent as a justification in unconscionability bargains in fact reflect the classical view of contract law,[69] in which freedom of contract is a main ideology. Moreover relating unconscionability to consent corresponds to the suggestion that unconscionability should be used as a tool to regulate standard form contracts, [70] because consent "implies that choice occurs against some background of alternatives".[71] While standard form contracts are based on take it or leave it conception. From this perspective it can be seen how consent is a relative consideration even in California where adhesiveness is a reason for finding procedural unconscionability.

5.8.2 Anti-Exploitation Rationale

This rationale mirrors the weight that has been attached to the unconscionable conduct element.

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[68] People who deserve protection has been clearly set out during legal cases that pertain to expectant heirs. *Earl of Chesterfield* and *Fry v Lane* extended protection to the poor and ignorant. *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865; *Fry v Lane* [1888] 40 Ch D 312. *Cresswell* extended it to people who were on low incomes and who were less educated. *Cresswell v Potter* [1978] 1 WLR 255. *Backhouse* meanwhile, clarified that emotional circumstances could impair capacities of accurate judgment. *Backhouse v Backhouse* [1978] 1 WLR 243. See also Chen-Wishart (n 52) 365; Thomas (n 48) 184.

[69] Jay M Feinman, 'Critical Approaches to Contract Law' (1982-1983) 30 UCLA L Rev 829, 833; Lucy (n 58) 137.

[70] The Uniform Commercial Code (§2-302) was drafted originally to the governing of standard form contracts. See Sinai Deutch, *Unfair Contracts The Doctrine of Unconscionability* (Lexington Books 1977) 45; William C Withford, 'Contract Law and Control of Standardised Terms in Consumer Contracts: An American Report' (1995) 3 European Review of Private Law, 193, 200; Jeffrey C Fort, 'Understanding Unconscionability: Defining the Principle' (1978) 9 (765) Loy U Chi LJ 765, 766-767.

[71] C Mac, *Fundamental Rights in European Contract Law A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (The Netherlands, Kluwer Law International BV 2008) 19, citing Cf Scanlon, Nozik on Rights, Liberty, and Property, 6PHIL & Pub Afairs 3 17 (1976).

In advancing this rationale, Bigwood argues in favour of 'transactional neglect'. This establishes that an unconscionable bargain should be set aside because the enforcer did not take reasonable measures to prevent a predictable harm being inflicted upon the complainant; this applies when the enforcer is fully aware of the fact that the relationship is structured in a way that is conducive to exploitation.[72] Bigwood observes that courts in unconscionability cases tend to focus upon the abuse of power that has resulted from the vulnerability of the complainant, as opposed to the vulnerability itself.[73]

This, according to Bigwood, corresponds to the proposition that common law performs to govern "the use of the unfair precontractual circumstances or conditions."[74] This abuse establishes the impairment of the complainant's ability to make a rational decision which is one among a number of different elements that can be engaged with a view to assessing the propriety of the enforcer's conduct.[75] Consequently, the unconscionable conduct is the main element in the test.

5.8.3 Remedying Unfairness Rationale

This rationale focuses on substantive unconscionability[76] and establishes that unconscionable bargains should be set aside because of their substantive unfairness.[77]

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[72] Rick Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25 (1) Oxford Journal of Legal Studies, 65.
[73] Bigwood, *Exploitative Contracts* (n 42) 228.
[74] Ibid.
[75] Ibid 236. Bamforth has identified how highly disadvantaged terms and the lack of independent legal advice could conceivably impact upon the assessment of the enforcer's conduct. Bamforth (n 49) 538.
[76] This might be understood form the language of *Earl of Aldborough v Trye* [1840] 7 Eng Rep 1136 at [1694-1865].
[77] Gordly recognises that substantive unfairness is the core question. See James Gordley, 'Equality in Exchange' (1981) 69 (6) California Law Review, 1587; Seana Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' (2000) 29 (3) Philosophy of Law, 205, 209.

Substantive unconscionability, according to Benson, calls for an explanation that is directed towards demonstrating that the party who took on the burden of the unfair risks intended to bear them in the expectation that the contract would be upheld; if this intention is not demonstrated the contract will be nullified upon the basis that it is unconscionable.[78]

Smith takes the issue one stage further by arguing that unfair contracts, which are measured against the market price,[79] should not be encouraged on the basis that these contracts invade individuals' purchasing power, thus negatively impacting their plans and in turn affecting their "well being, [and expectation] of leading an autonomous, self-directed life…"[80] This demonstrates that the substantive element of unconscionability does little more than attest to the existence of a procedural defect in contracts.[81]

The soundness of this rationale is derived from cases in which courts have asserted the significance of substantive fairness,[82] because it indicates the presence of fraud or similar conduct such as undue influence.[83] Therefore, the general rule remains that "[i]f parties are of full age, treating upon equal terms

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Harrington also presents unconscionability as the price that must be paid for the policing of grossly one-sided unfair contracts. Eugene M Harrington, 'Unconscionability Under the Uniform Commercial Code' (1967-1968) 10 S Tex LJ 203.

[78] Benson notes that the law does not assume that there is an intention to donate. On the contrary, this intention must be proven. Peter Benson, *The Unity of Contract Law' in Peter Benson* (ed), *The Theory of Contract Law, New Essays* (Cambridge University Press 2001) 185-86.

[79] In explaining how the assessment of substantive fairness in contracts has developed to the point where it is dependent on the market price, see Clark (n 9) 11-14.

[80] Smith (n 49) 16-17.

[81] Ibid.

[82] *Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd* [1983] 1 WLR 87.

[83] Ibid at [94-95]. Similarly, *Earl of Aldborough* demonstrates that the lack of substantive unfairness "[negates] the imputation of fraud." *Earl of Aldborough v Trye* ([1840] 7 Eng Rep 1136 1694-1865 at [460].

without imposition, and there is an inequality, even if it is a gross one, the Court in general has not set it aside."[84]

However, other observers suggest that the focus upon substantive unfairness as the main element of unconscionability threatens the certainty of law, because courts usually do not provide solid grounds in determining the fairness of contracts.[85]

Nonetheless, it has been acknowledged that California courts showed a tendency towards specifying criteria for the determination of substantive unconscionability in some types of contracts. Therefore, such criticisms may be alleviated with time in California law.

Having determined the substance of each rationale, the question remains what is the significance of determining the rationale that unconscionability serves.

5.9 Rationales: Significance and Impact

This thesis argues that the determination of the unconscionability rationales demonstrates where the doctrine should be placed in contract law. Chen-Wishart initially touches upon this question when she asks how a general doctrine of unfairness would be expressed in the law?[86] In addressing this question, she highlights three key possibilities. These are good faith, inequalities of bargaining power and unconscionability as a general principle (unconscionability in its wider sense).[87] In engaging with each of these possibilities, this thesis shows that each one can be directly linked to the rationales that have been extensively discussed above.

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[84] *Gwynne v Heaton* [1778] 28 Eng Rep 949 1557-1865 at [9] (Lord Chancellor Thurlow).
[85] Thomas (n 48) 193.
[86] Chen-Wishart (n 52) 370.
[87] Ibid 370-371.

Accordingly, the theory is that if the emphasis were placed on serious disadvantage, the rationale would be the protection of the complainant, with the consequence that unconscionability would be placed under the inequality of bargaining power. A heightened emphasis upon substantive unfairness would result in the remedy rationale placing unconscionability under unconscionability as a general principle. Finally, asserting the unconscionable conduct element further reinforces the anti-exploitation rationale, thus situating unconscionability under the general principle of good faith.

The following analysis illustrates how at one stage case law shows that it was possible to place unconscionability in English law under inequality of bargaining power when the unconscionability rationale was protecting weaker parties. However, the rejection of inequality of bargaining power as a general principle in this law in addition to the change in rationale into anti-exploitation rationale has lead to recognising unconscionability as one of the piecemeal solutions to unfairness that are adopted in English law instead of good faith.

While in California law the choice of a contract-oriented approach and consequently the remedying unfairness rationale, has lead to placing unconscionability under unconscionability in its wider conception.

The analysis of good faith is relatively extensive as good faith itself is a problematic concept therefore, the starting point will be inequality of bargaining power, moving on to address unconscionability as a general principle that is recognised in California, to conclude with good faith that is believed to be the basis of unconscionability in English law.

5.10 Inequality of Bargaining Power

In early English cases unconscionability was viewed as a means of protecting parties who did not meet on equal terms.[88] The language used in these cases underlines this inequality. This is evidenced, for example, when it is observed that "the parties were not on equal terms";[89] or when the complainants are described as being "in the power of those with whom they contracted"[90] or when it is observed that the parties were not standing "upon a precisely equal footing."[91] Each expression brings out a disparity in bargaining power.

The connection of the protection rationale to inequality of bargaining power as a general principle was expounded in *Bundy,*[92] where Lord Denning proposed the implementation of a general principle of inequality of bargaining power in English law. However, most authorities had rejected this proposal.[93] Nonetheless, Lord Denning's proposal confirms that inequality of bargaining power is a general principle under which unconscionability might be categorised, ultimately resulting from the concern to protect the vulnerable.

While referring to instances where courts nullified a contract upon the basis of an excessive imbalance between contractual parties, Lord Denning clarified that these cases "have been treated each as a separate category in itself."[94] Upon

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[88] *Wood v Abrey* [1818] 56 Eng Rep 558 at [423] (Sir John Leach).
[89] *Croft v Graham* [1963] 46 Eng Rep 334 1557-1865 [161]; *Bawtree v Watson* [1834] 40 Eng Rep 129 1557-1865 at [341]; *O'Rorke v Bolingbroke* [1877] 2 App Cas 814 at [823].
[90] *Shelly v Nash* [1818] 56 Eng Rep 494 1815-1865 at [236]. This expression was also cited and adopted in *Earl of Aylesford v Morris* [1872-73] LR 8 Ch App 484 at [490].
[91] *Peacock v Evans* [1809] 33 Eng Rep 1079 1557-1865 at [517]; *Barrett v Hartley* [1866] LR 2 Eq 789 at [794].
[92] Obiter per Lord Denning MR in *Lloyd's Bank v Bundy* [1975] QB 326 at [339].
Also refer to the following cases: *Arrale v Costain* Civil Engineering Ltd [1976] 1 Lloyd's Rep 98 at [102]; *Levison* v *Patent Steam Carpet CleaningCo Ltd* [1978] QB 69 at [78-79]; *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237 at [240-241].
[93] *Shiloh Spinners Ltd v Harding* [1973] AC 691 at [726] (Lord Simon of Glaisdale); *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 at [1315] (Lord Diplock); *Horry v Tate & Lyle Refineries Ltd* [1982] 2 Lloyd's Rep 416 at [422]; *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, CA at [717].
[94] *Lloyd's Bank v Bundy* [1975] QB 326 at [337].

this basis he proposed to unify them under a general principle of inequality of bargaining power.[95]

Since the key assumption of this contribution is that the contractual parties did not encounter each other on equal terms, Lord Denning proceeded to maintain that courts should not tolerate a situation in which the strong push the weak to the wall.[96] This sentence supports the argument that inequality of bargaining power is the general principle that surmounts doctrines that seek to protect the vulnerable and unconscionability at the time aimed to do so.

Therefore, when Lord Denning proceeded to illustrate which cases should be included under inequality of bargaining power, he observed unconscionable bargains. He explained that in unconscionable transactions:

> A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue. The typical case is that of the 'expectant heir.' But it applies to all cases where a man comes into property, or is expected to come into it - and then being in urgent need - another gives him ready cash for it, greatly below its true worth, and so gets the property transferred to him.[97]

Asserting the fact that unconscionability provides protection to weaker parties seems to be the justification of placing unconscionability under inequality of bargaining power.

5.11 Unconscionability as a General Principle

In this hierarchy unconscionability as a vitiating factor has been placed under

[95] Ibid.
[96] Ibid at [336-337].
[97] Ibid at [337].

unconscionability as a general principle. [98] This categorisation of unconscionability derives from a strong emphasis upon the substantive part of the doctrine.

Unconscionability, as a general principle, is not a legal work of art. It does not have "a precise legal meaning established by case law which would free the word from the confines of this religious and moral framework". [99] Unconscionability, when perceived in a wider sense, can be said to reflect a policy goal. It provides the justification for preventing a specific conduct or contract that is "inconsistent with equity and good conscience."[100] While English law does not recognise a general principle of unconscionability,[101] this hierarchy prevails in the US jurisdiction.[102]

In *U.S. v Bethlehem Steel Corp*.[103] unconscionability in its general sense broadly resembled Lord Denning's identification of inequality of bargaining power in English law. The Supreme Court, in this case, asked the following questions:

> Is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the

[98] Bamforth (n 49) 538.
[99] JA Manwaring, 'Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law' (1993) 25 Ottawa L Rev 235, 252.
[100] Bamforth (n 49) 540 citing *Commercial Bank of Australia Ltd v Amido* (1982-3), 151 CLR 447.
[101] *Thames Trains Ltd v Michael Adams* [2006] EWHC 3291 (QB), 2006 WL 3835284.
[102] Chen-Wishart (n 52) 368.
[103] See *United States v Bethlehem*. This case focused upon the risks in the disputed contracts. The court stated that: "If we are to go outside the record, the evidence is confusing and unreliable. It must be borne in mind that Bethlehem took no risk of loss, that under the contracts it was protected from the risks of rising costs of labor, materials, transportation, etc…" This confirms that the emphasis is upon the substantive element of the contract.
United States v Bethlehem 315 US 289 (1942) at [332].

> relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? [104]

It will be noted that the decision of whether a contract is enforced in instances where there is a manifest inequality between the parties is closely attached to the overarching concern of achieving justice. The Supreme Court emphasised that "Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts"[105] This resembles *Bundy*,[106] in which Lord Denning also excluded fraud and duress from the context. The Supreme Court elaborated that "[t]he law is not so primitive that it sanctions every injustice except brute force and downright fraud."[107]

In developing this point, the court observed that: "courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other. 'And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.'"[108] This affirms in unconscionable bargains that the central concern is justice.

The Supreme Court therefore asserted that: "[t]he fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases."[109]

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[104] Ibid at [326].
[105] Ibid.
[106] Lord Denning, in engaging with inequality of bargaining power, observed that: "I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles." *Lloyd's Bank v Bundy* [1975] QB 326 at [337].
[107] United States v Bethlehem 315 US 289 (1942) at [326].
[108] Ibid citing Vernon v Bethell 2 Eden 110 113.
[109] United States v Bethlehem 315 US 289 (1942) at [327-328].

In conclusion, the court referenced situations that should be categorised under previous explanations, and included expectant heirs' cases and unconscionable bargains.[110]

The court also included other categories which are the same ones which *Bundy* identified. These are: instances in which lenders had unjustly taken advantage of the borrowers' necessities and undue pressure,[111] duress of goods[112] and salvage agreements.[113]

This resemblance to *Bundy* means that same cases can be rationalised and categorised differently. While in *Bundy*, unconscionable bargains were placed under inequality of bargaining power and justified with reference to protection concerns; in the US jurisdiction unconscionable bargains were placed under 'unconscionability as a general principle' and rationalised with reference to justice concerns. This approach was later affirmed by the enactment of §2-302 of unconscionability in the Code, which adopts a test that focuses dominantly on the contractual terms rather than on contractual parties as clarified in Chapter Three.

Smith is one of the commentators who stresses viewing unconscionability as a general principle rather than as a vitiating factor, and provides the US jurisdiction as an example.[114] However, a shift of focus onto the unconscionable conduct element and contractual parties would change this perception, and

[110] Ibid at [328]; *Lloyds Bank Ltd v Bundy* [1975] QB 326 at [337].
[111] United States v Bethlehem 315 US 289 (1942) at [329]; *Lloyds Bank Ltd v Bundy* [1975] QB 326 at [337].
[112] United States v Bethlehem 315 US 289 (1942) at [329]; *Lloyds Bank Ltd v Bundy* [1975] QB 326 at [337].
[113] United States v Bethlehem 315 US 289 (1942) at [330]; *Lloyds Bank Ltd v Bundy* [1975] QB 326 at [338-339].
[114] Smith *Contract Theory* (n 45) 340-341. See also Mindy Chen-Wishart (n 52) 370.

would establish good faith as another general principle under which unconscionability can be placed, which is the case in English law.

5.12 Good Faith

The rejection of inequality of bargaining power as a general principle in English law coupled with the emphasis shift to the unconscionable conduct element and consequently anti-exploitation becomes the overarching rationale, changing the perspective according to which unconscionability should be expressed in contract law.

The good faith connection to unconscionable conduct is clear in the literature, case law and good faith definition. Finn, for example, in focusing upon unconscionable conduct and the derivation of its character from conscience, has spoken of unconscionable conduct as conduct "which in its factual setting is unfair to, which is a breach of faith to, another where fairness, where good faith, is properly to be expected by that other."[115] It is also submitted that "[p]arty to contract breaches his implied duty under California law to act in good faith, if he is guilty of any fraud in connection with contract."[116]

The linguistic definition of good faith – in English also asserts its connection to unconscionable conduct. The word 'faith' is:[117] "1. The duty of fulfilling one's trust; fealty; the obligation of a promise or engagement. 2. The quality of fulfilling one's trust, fidelity, loyalty."[118] Faith accordingly has two elements: the duty that encompasses the fulfilment of one's trust and the quality of this duty. It has been suggested that good faith is about the second element - that is, the

[115] Paul Finn, 'Unconscionable Conduct' (1994) 8 Journal of Contract Law, 37-38.
[116] In re Amica Inc Bkrtcy N D Ill 1992 135 B R 534.
[117] The Shorter Oxford English Dictionary cited in the case of Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16 at [88-89].
[118] Ibid at [90].

assessment of how the duty is achieved.[119] This shows that, in instances where good faith is being assessed, the emphasis is upon the conduct.

The fact that modern unconscionability in English law focuses on the unconscionable conduct element suggests that the doctrine should be placed under the general principle of good faith.

However, English law does not recognise good faith as an overriding principle;[120] it is recognised within some piecemeal solutions which treats fairness issues in contracts.[121] It has recently been suggested that English law recognises good faith as an implied duty in Leggatt J's declaration in *Yam Seng*, in which he stressed that "there is nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts."[122]

In this case, Leggatt J accepted that although English law does not recognise an implied term by law of good faith in commercial contracts, "there [nevertheless] seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such

[119] Ibid.
[120] *Walford v Miles*, [1992] 2 WLR 174 [1992] 2 AC 128 at [131]. Steyn has claimed that the hostility of English law to good faith derives from the suspicion that surrounds its meaning. Johan Steyn, 'Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 Law Quarterly Review <http://login.westlaw.co.uk/maf/wluk/api/tocectory?sttype=stdtemplate&stnew=true> accessed 13 January 2015, 438; Raphael Powell, 'Good Faith in Contracts' (1956) 9 Current Legal Problems, 25-26; Waddams, 'Good Faith, Unconscionability and Reasonable Expectations.' (1995) 9 Journal of Contract Law accessed 2 June 2015, 55; Rosalee S Dorfman, 'The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment' (2015) The NEWJURIST <http://newjurist.com/fairness-in-english-contract-law.html> accessed 23 December 2015,90, 91.
[121] *Interfoto Library* offers examples of such solutions. *Interfoto Picture Library Limited v Stiletto Visual Programmes Limited* [1987] WL 491981. See also Roy Goode, 'The Concept of Good Faith in English Law', (1992) Centro di studi e ricerche di diritto comparator e straniero, diretoo da MJ Bonell; E. Allan Farnsworth, 'Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code' (1963) 30 (4) The University of Chicago Law Review, 666, 670.
[122] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [146].

a duty into any ordinary commercial contract based on the presumed intention of the parties."[123]

Subsequent cases, however, reiterated the traditional view that English law does not recognise this principle.[124] *Hamsard*, for example, declared that *Yam Seng* is not an authority upon the implied duty of good faith in commercial contracts.[125] Consequently, Leggatt J's interpretation was rejected.

In a more recent case of *Astor Management AG,*[126] Leggatt J initially mentioned his previous declaration in *Yam Seng* regarding the existence of an implied duty of good faith and proceeded to draw the accuracy of this assertion into question. He asserted that:

> A duty to act in good faith, where it exists, is *a modest requirement.* It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would regarded as commercially unacceptable by reasonable and honest people. This is a lesser duty that the positive obligation to use all reasonable endeavours to achieve a specified result which the contract in this case imposed.[127]

There are some good reasons for considering this statement to be a reversion of the *Yam Seng* position.[128] However, Lord Leggatt, in a recent conference on

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[123] Ibid at [132].
[124] See *MSC Mediterranean Shipping Co SA v Cotton ex Anstalt [*2016] EWCA Civ 789; *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services* [2013] EWCA Civ 200, [2013] BLR 265.
[125] *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat); 2013 WL 5826153 at [86].
[126] *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 680 (Comm).
[127] Ibid at [195] (emphasis added).
[128] This was the initial understanding of the author for the following reasons: firstly the expression of a modest requirement was understood to represent an attempt to restrict good faith to its minimum. Good faith is a relational concept that is connected to many norms, and the notion of honesty is always present even in English law. Secondly, this reversion was initially interpreted, as a reaction to the recent British decision to leave the European Union, because Leggatt J, in *Yam Seng*, remarked that English law, in not recognising good faith would appear to be "swimming against the tide". Therefore the recognition of good faith in English law was

'Good Faith in Contract Law',[129] clarified that this statement should not be viewed as an amendment of his previous position in *Yam Seng.* He demonstrated that the description of good faith as a modest requirement in *Astor Management AG* entails a certain element of judicial politics. Conservative people do not prefer a change in the law – the best way to resist this is to inform that what was presented in *Yem Seng* has actually already been practised for hundreds of years. It has however not been possible to recognise this because it has taken a different form, and has not therefore been recognised in its true significance. The recognition of good faith therefore entails a very modest change that need not arouse strong opposition, and any opposition is therefore rooted within a strong misconception.[130]

However, in case this view is rejected, it is settled that English law has provided other solutions that are essentially a reflection of good faith. For example, implied duty, which has a scope that is narrower than good faith as a general principle, because the implied duty might be restricted by the expressed terms[131] or by the nature of the contract.[132] Moreover, good faith in English law can be recognised either as an incident/specific type of contracts (e.g. contracts of employment)[133] or as an expressed duty in contractual terms[134] (which is also

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justified with reference to EU attempts to achieve a harmonization of contract law. He concluded that: "There can be little doubt that the penetration of this principle [good faith] into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase." *Yam Seng Pte Ltd v International Trade Corp Ltd.* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [125].

[129] Held at the University of Exeter, on 29 July 2017.

[130] Ibid (Lord Leggatt).

[131] Severine Saintier, 'The Elusive Notion of Good Faith in the Performance of a Contract, Why Still a *Bete Noire* for the Civil and Common Law' (2017) J.B.L. 441, 450.

[132] Ibid.

[133] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [132].

[134] *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch) at [95]-[97]; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) at [246]. *Philips Electronique Grand Public SA and Another v British Sky Broadcasting Limited* [1995] EMR 472 at [481]. Good faith clearly manifests in the conditions that the law requires for the implementaion of terms. These conditions establish that: 1) The implied term must be

of a narrow scope as its interpretation would be limited to the specific term rather to the whole contract disputed);[135] alternatively it appears as one among a number of piecemeal solutions developed to solve fairness issues.

Bingham LJ in *Interfoto*[136] remarked that English law is not committed to a general principle of good faith, it has instead "developed piecemeal solutions in response to demonstrated problems of unfairness." [137]

Accordingly, English law *covertly* applies good faith, or at the very least is consistent with the rationale of good faith.[138] The preference of an indirect adoption of good faith reflects that English law hostility towards the adoption of general principles. This hostility is based on three foundations:[139] the English law preference to apply specific solution to specific problems instead of adopting general principles;[140] the English law embodiment of the ethos of individualism that entails that parties are free to pursue their interests as long as they do not breach their contract;[141] the fear that a recognition of good faith as a general principle would create uncertainty while English law attaches great weight to certainty.[142]

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reasonable and equitable; 2) The implied term must make an essential contribution by providing the contract with business efficacy; 3) The implied term must be so clear that it does not need to be stated; 4) The implied term must be clearly expressed; 5) The implied term must not contradict other terms that are expressed in the contract.

[135] *Compass Group UK and Irland Ltd v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civil law 200, [2013] BLR 265 at [106].

[136] *Interfoto Picture Library Limited v Stiletto Visual Programmes Limited* [1987] WL 491981.

[137] Ibid at [439].

[138] The Consumer Right Act 2015 exemplifies this.

[139] Leggatt J referring to Professor McKendrick in *Yam Seng Pte Ltd v International Trade Corp Ltd.* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [124]. For similar reasoning see: Benedicte Fauvarque-Cosson and Denis Mazeaud (eds), *European Contract Law Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Sellier european law publishers 2008) 199; Ewan McKendrick, 'Good Faith in the Performance of a Contract in English Law' in Larry DiMatteo and Martin Hogg (eds), *Comparative contract law: British and American perspectives* (Oxford University Press 2015) 199-200.

[140] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [124].

[141] Ibid.

[142] Ibid.

Accordingly, unconscionability can be viewed as an application of the English law preference for developing particular solutions to specific problems.[143] Any assessment of whether it is possible to subsume unconscionability under good faith requires a determination of good faith. This would help to diagnose links between unconscionability and good faith and consequently supports placing unconscionability under good faith.

Good faith seems to have no specific meaning,[144] because no set of specific facts can be claimed to produce good faith.[145] The meaning of good faith[146] depends on the context in which it is applied.[147] Good faith has contextual and relational characters[148] that are indicated by its linkage to several distinct norms and concepts,[149] which include standards of fair dealing, [150] faithfulness, altruism and reasonable expectations. Conversely bad faith, as good faith's

[143] Ibid.
[144] Waddams's study provides three meanings of good faith that focuse on one aspect over the other. Waddams (n 120) 56.
[145] Steven J Burton, 'More on Good Faith Performance of a Contract: A Reply to Professor Summers' (1983-1984) 69 (497) Iowa L Rev 497, 508; Martijn W Hesselink, 'The Concept of Good Faith' in Arthur S Harkamp and others (ed) *Towards a European Civil Code* (4th edn, Kluwer Law International, 2011) 473.
[146] Comment (a) in §205 of the Restatement (Second) of Contracts clarifies that good faith cannot be confined to a single meaning. See also: B J Reiter, 'Good Faith in Contracts' (1983) 17 (705) Val U Rev <http://heinonline.org> accessed 13 February 2015, 706; Jamie Cassels, 'Good Faith in Contract Bargaining: General Principles and Recent Developments' (1993) 15 (56) Advoc. Q. <http://heinonline.org> accessed 13 September 2015, 79; Roger Brownsword, Norma J Hird and Geranint Howells (ed), *Good Faith in Contract Concept and Content,* (Dartmouth Publishing Company, 1999) 4.
[147] The court in *Med Essex* affirms that: "good faith is heavily conditioned by its context". *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services* [2013] EWCA Civ 200; [2013] BLR 265 at [109]. In furthering this observation, this case highlighted instances in which the meaning of good faith varies at [109-110]. Comment (a) on §205 of the Restatement (Second) of Contract; Bruno Zeller, 'Good Faith - Is it a Contractual Obligation?' (2003) 15 (2) Bond Law Review <http://epublications.bond.edu.au/blr.vol15/iss2/13 accessed 23 November 2015, 219.
[148] The contextual dimensions of good faith are summarized in Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16 at [91].
[149] Jane Stapleton, 'Good Faith in Private Law' (1999) 52 (1) Current Legal Problems <http://clp.oxfordjournals.org/content/52/1/1.full.pdf> accessed 5 November 2015, 7.
[150] Powell (n 120) 19.

negative counterpart, also invokes concepts such as exploitation, opportunism and abuse of rights.[151]

Some commentators argue that good faith is a loose concept that seeks to hold contractors to moral standards.[152] Thus, good faith has been described as the moral gateway of the law.[153] Good faith, therefore, is one of the foundations upon which the obligation to perform contracts rests. There is a sense that morality is deeply imbued within keeping promises.

The Uniform Commercial Code provides two meanings of good faith. The first meaning is set out in §1-201 (19) as "honesty in fact in the conduct or transaction concerned."[154] Article 2 of the Code outlines the second meaning and provides a specific definition of good faith that relates to merchants' contracts. Here good faith means, in addition to honesty in fact, "the observance of reasonable commercial standards of fair dealing in the trade."[155] The Code does not provide a definition of commercial reasonableness. However, it is more specific than §(205) of the Restatement (Second) of Contracts, which imposes on contractual parties a duty of good faith and fair dealing that applies both to performance and enforcement.[156]

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[151] Ibid.
[152] Mark Snyderman, 'What's So Good about Good Faith? The Good Faith Performance Obligation in Commercial Lending' (1988) 55 (4) University of Chicago Law Review <http://www.jstor.org/stable/1599790> accessed 10 November 2015, 1337.
[153] M W Hesselink, 'The Concept of Good Faith' in Arthur S. Harkamp and others (ed) *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) 471.
[154] Farnsworth observes that this is the definition which some American academics have applied to so-called 'good faith' purchases. The Code applies the same meaning to the performance of good faith. Allan Farnsworth, 'The Concept of Good Faith in American Law' (1993) 10 Centro di studi e ricerche di dirittocomparato e straniero<http://www.cisg.law.pace.edu/cisg/biblio/farnsworth3.html>accessed 11 December 2015, 1-2.
[155] § 2-301 (1) (b) of the Uniform Commercial Code. Kessler explains how good faith originated and provided further insight into the history of its application in the US. Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study' (1964) 77 (3) Harvard Law Review <http://www.jstore.org/stable/1339028> accessed 16 March 2015, 404, 408.
[156] Restatement (Second) of Contracts §205 (1981).

For a more specific meaning of good faith, *Bropho* submits that: "[t]he exercise of a power in good faith requires an honest and conscientious approach. The latter aspect accords with the requirement of fidelity to the obligation cast upon the decision-maker."[157] Thus, honesty and conscientious approach are the two key components of good faith. [158]

Black's Law Dictionary defines good faith as:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. Also termed bona fides.[159]

The question of whether one of these elements is relatively more important can be resolved by reading *Bropho* and the Black's Law Dictionary definitions in conjunction. This shows that once the honesty pre-requirement is excluded, the other three requirements stated in Black's law definition present under the conscientious aspect of good faith that is recognised in *Bropho's* definition.

Accordingly, good faith constitutes honesty and conscientious which maintain: the three elements of: faithfulness to the obligation; observance of reasonable commercial standards of fair dealing in a given trade; and absence of intent to

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[157] Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16 at [85].

[158] Nagla Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (The Netherlands, MartinusNijhoff Publishers, 1995) 145-146. Other observers have divided good faith into a 'duty of loyalty' and 'duty of cooperation'. The former is negative "*abstention* from all unfair behavior" and the latter is positive *"imposing* a clear obligation to act" (emphasis added). See Cosson and Mazeaud (n 139) 184.

[159] 7th edition, west Group (1999) [701] cited in Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16 [90]. Leggatt J in *Yam Seng* also points out the same elements. See *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [131]. These aspects of good faith are also set out in the Restatement (Second) of Contracts § 205 cmt. (a) (1985). It should be noted here that, as Dugan observes, the orthodox doctrines equate honesty with the state of mind of the party that is subject to a good faith examination; see Robert Dugan, 'Good Faith and the Enforceability of Standardised Terms' (1980) 22 (1) William and Mary Law Review <http//www.heinonline.org> accessed 24 January 2015, 1, 13.

defraud or to seek unconscionable advantage. The use of the word 'conscientious' suggests that there is a clear need for great attention and care if compliance with the three elements is to be achieved.

Thus, the conscientious approach requires the subject to "put forth their best efforts, exercise due diligence in performing contractual undertakings, uphold common contractual goals, avoided abuse of rights acquired under the contract and facilitate the other party's performance."[160] The specified three elements in this approach generally include features that entrench these points.

5.12.1 Faithfulness

Faithfulness is described as "fidelity to the parties' bargain"[161] and "loyalty to the promise."[162] Implied terms and duty to co-operate present this aspect of good faith which signifies the importance that the law ascribes to the achievement of contract goals and reflects a need to give business efficacy to the contract, thus ensuring and upholding a set of benefits that were intended by the parties at the time of contracting.[163] The extent of the co-operation that is required is ultimately determined by an objective standard that is rooted within reasonableness, fairness and decency standards.[164]

Brownsword argues that good faith is the ideal that guides cooperative dealings.[165] It identifies the legitimate interests of each party; and does not therefore prevent parties from pursuing their interests. It does not mean that

[160] Nassar (n 158) 145-146.
[161] Ibid at [140].
[162] A F Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 L.Q.R. <login.westlaw.co.uk> accessed 8 September 1015, 75.
[163] *The Moorcock* (1889) 14 PD 64.
[164] Farnsworth (n 121) 672.
[165] Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 Journal of Contract law, 197, 214.

one actor is obliged to prioritise the interests of his/her counterpart.[166] In other words, it can be argued that good faith sets out the territory in which parties can pursue their own interest; it does not, however, establish new rights or duties that were not agreed to at the time when the respective parties drafted the contract.

5.12.2 Reasonable Commercial Standards of Fair Dealing

Commercial standards provide "factual referents (observance, standards, and dealing) with vague evaluative criteria (reasonable and fair)."[167] Invoking good faith alongside fair dealing emphasises the objective nature of the good faith test.[168]

The observation of these standards covers cases in which the given conduct can be described as being in bad faith, 'improper', 'commercially unacceptable' or 'unconscionable'.[169]

5.12.3 No Intention to Defraud

According to this requirement, "[t]o act in good faith requires that you do not act dishonestly, do not deliberately contradict yourself (these first two requirements might be loosely termed the 'sincerity' dimension of good faith) and do not deliberately exploit a position of dominance over another."[170]

This requirement should not limit good faith to bad intentions. Feinman therefore emphasises that courts should not limit good faith cases to intentional

[166] Ibid. This is also explained extensively in *Automasters Australia Ptv Ltd v Bruness Ptv Ltd* [2002] WASC 286 citing *Overlook v FoxtelAutomasters Australia Ptv Ltd v BrunessPtv Ltd* (2002) Aust Contract R 90-143 at [65-67].
[167] Dugan (n 159) 8-9.
[168] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [151].
[169] Ibid.
[170] Stapleton (n 149) 8. Similarly see: Steven J Burton, 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 (2) Harvard Law Review 369, 373.

violation of standards of behaviour, as this limitation excludes tests, other than dishonesty, which will enable good faith to be measured.[171]

Some observers suggest the investigation of intention or bad faith is inevitably linked to a state of mind, and is based upon the identification of motives that underpin specific actions.[172] However, Lord Leggatt asserts that a particular party's perception of improper conduct is not an important consideration; rather, it is a matter that can be assessed with reference to the circumstances of the case, the relevant background and what is commercially acceptable to reasonable persons.[173] Therefore, the test is an objective one.

As the requirements of the 'conscientious' aspect of good faith just clarified, honesty is the other aspect of good faith that is observed separately from the 'conscientious' requirements.

5.12.4 Honesty

The difference between honesty and the previous good faith requirements is that honesty is an element that should always be present in all contracts[174] while the presence of the other requirements vary in accordance with the specific circumstances of each case.[175]

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[171] Jay M Feinman, 'The Duty of Good Faith: A Perspective on Contemporary Contract Law' (2014-2015) 66 Hastings L J 937, 939.

[172] Saintier (n 131) 13 (citation omitted); Roger Brownsword, 'Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law' in Roger Brownsword, Norma J Hird and Geranint Howells (ed), *Good Faith in Contract Concept and Content,* (Dartmouth Publishing Company, 1999) 17-18.

[173] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [145].

[174] Ibid at [139]- [697-698] citing *HIH Casualty v Manhattan Bank* [2003] 1 CLC 358 at [15] and [68], in which Lord Hoffmann observes that "in the absence of words which expressly refer to dishonesty, it goes without saying that underlying the contractual arrangements of the parties there will be a common assumption that the parties involved will behave honestly." Speidel classifies honesty as the minimum requirement in contracts. Richard E Speidel, 'The "Duty" of Good Faith in Contract Performance and Enforcement' (1996) 46 (4) J Legal Educ, 537, 539.

[175] It should be noticed here that Leggatt J (in *Yam Seng*) determines that commercial standards of fair dealing present a requirement that, in addition to honesty, should be evidenced

Therefore, *Manifest Shipping Co Ltd,*[176] submits that good faith requires no more than acting honestly and not in bad faith.[177] Auld LJ explaines that: "the words 'in good faith' have a core meaning of honesty. Introduce context, and it calls for further elaboration."[178] Honesty can therefore be said to be the bare requisite of good faith.[179]

Honesty is the antithesis of bad faith, and is narrower in focus than fidelity and loyalty.[180] It is, by its very nature, implicit in character. If it were explicitly articulated, it would attest to a lack of trust between the respective parties.[181]

Having clarified the different requirements of good faith, the question remains what are the aspects of good faith that are in common with unconscionability and support the argument that unconscionability in English law should be placed under good faith or recognised as one of the piecemeal solutions to unfairness.

5.13 Unconscionability and Good Faith: Common Elements

To subsume unconscionability under good faith, it is necessary to determine the links between both concepts. In general, the links that can be observed are situated in: the general themes; good faith paradigms; and in some conceptual boundaries.

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in all contracts. However, his Lordship does not elaborate this point in length and does not refer to any cases in support of his assertion. For this reason, his approach has not been developed in this thesis. *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [139].

[176] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd*, [2001] UKHL 1; [2003] 1 AC 469 at [111].

[177] Ibid.

[178] Market Street Associates Ltd Partnership v Frey 941 F 2d 588 (1991) (emphasis added).

[179] Lord Steyn describes honesty as the baseline of the good faith. Steyn (n 120) 438.

[180] Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16 at [91].

[181] *HIH Casualty v Chase Manhattan Bank* [2003] 1 CLC 358 [15]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [136].

5.13.1 General Themes and Requirements

In the US words that invoke a clear moral dimension such as 'honesty' also appear in the Code's general definition of good faith.[182] The Code also invokes 'reasonableness' and 'fairness' in clarifying good faith. The Restatement (Second) of Contracts, meanwhile, invokes 'innocence' and 'lack of suspicion'.[183]

The general theme of unconscionability and good faith is therefore the same. However, this link might be considered a marginal consideration, as many legal rules evidence the same moral dimensions, but are not placed under good faith.

Nevertheless, the observation that "[t]he standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing",[184] makes it reasonable to expect that the good faith requirements can be identified by the unconscionability test.

Honesty is signified in unconscionability cases at two levels, the first of which is in the knowledge element. Knowledge implies an assessment of the enforcer's behaviour to determine his/her good/bad conscience.

Earl of Eylesford shows how knowledge can be applied to clarify whether the conduct was honest or not. In this case a 22 year old nobleman was heavily indebted. His situation was however partially redeemed by the fact that he was entitled to a property if he survived his father. His creditors pressed for payment, and pointed him in the direction of a moneylender who advanced the funding that enabled the young man to pay his debts.

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[182] Refer to (text to n 154-156) of this chapter.
[183] Farnsworth (n 121) 669.
[184] Roos (n 134) 111 citing Kugler v Romain 45 58 NJ [544], 279 A 2d [652].

The lender subsequently advanced further money to the young nobleman. While the first transaction occurred in the presence of a solicitor, the second did not. The lender imposed various security guarantees which, when taken together, exceeded the rate of 60 per cent. No application was made to the young man's father or his legal representatives. When the father died before a second set of bills were due, the lender commenced actions on them.

In the assessment of the enforcer's conduct, the court noted that the lender did not seek any information from the complainant's solicitor or enquire as to the father's health. The enforcer acknowledged that if he had been informed that the father suffered from a fatal disease, "he should not have taken any notice of it."[185] The court concluded that: "Whatever hazard there might be in dealing with the Plaintiff, it is clear that the hazard did not present itself as a very substantial risk to the mind of Mr. Morris [the enforcer], who did not care even to know whether the Plaintiff was in a condition to give anything more than personal security."[186] This demonstrates that the court sought to attain an insight into the state of mind of the enforcer through an assessment of his knowledge.

Equally, in *Ayres*, [187] which relates to an 82-year-old woman (Lady Ayres) who suffered from senile dementia and who sold paintings worth several thousands of pounds, to a door-to-door salesman for £40. In questioning whether the enforcer was aware of Lady Ayres's incapacity, Russell J stated that:

> I am completely satisfied that the defendant did know it and knows it to this day. Lady Ayres was a strange old lady, eccentric in the extreme and one whom, within a very short time, let alone in forty minutes, would have made it manifestly plain by her conduct that she was suffering from a

[185] *Earl of Aylesford v Morris* [1873] 8 LR Ch App 484 at [496].
[186] Ibid (emphasis added).
[187] *Ayres v Hazelgrow* [1982] unreported 1982/NJ/1003 (QB) (Russell J). Source pages are not numbered;

> mental incapacity. Such is the evidence…I remind myself that this young defendant was with her, according to his own evidence, for no less than forty minutes.[188]

Here the defendant's knowledge, in addition to the surrounding circumstances, provided evidence of his dishonesty.

The requirement of faithfulness to one's obligation, along with its corollary of a duty of co-operation, can best be recognised in the unconscionability test in the lack of disclosure of information, which is related to unconscionable bargains that have ultimately proven to be to the detriment of the complainant.[189] The requirement of information disclosure is a reflection of a duty to co-operate to ensure the enforcement of contracts. The legal advice element of unconscionability[190] can also be conceived of as an application of a co-operation duty, especially in cases where courts consider the recommendation of legal advice.

Cresswell gave rise to the following exposition:

> [S]omeone who seeks to uphold what is, to him, an advantageous conveying transaction can do so merely by saying that the other party could have obtained independent advice, unless something has been done to bring to the notice of that other party the true nature of the transaction and the need for advice.[191]

This reiterates that a positive action that could be conceived of as an attempt to co-operate, was required from the enforcer.

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[188] Ibid.
[189] *Cresswell v Potter* [1978] 1 WLR 255 at [295].
[190] *O'Rorke* perfectly exemplifies how the lack of independent legal advice provided the basis for an assessment of the enforcer's behavior. *O'Rorke v Bolingbroke* [1877] 2 App Cas 814.
[191] *Cresswell v Potter* [1978] 1 WLR 255 at [259] (emphasis added).

Commercial standards and fair dealings can also be identified in the unconscionability test, because the "[q]uestion of unconscionability of a contract clause often requires inquiry into the commercial setting, purpose, and effect of the contract or contract provision."[192] This is evidenced in the assessment of the values exchanged within the disputed contracts. Courts tend to use experts to evaluate market value. *Samuel v Newbold*[193] further establishes that an unconscionable bargain is "unreasonable, and not in accordance with the ordinary rules of fair dealing." [194]

Unconscionability cases also engage with the good faith requirement of no bad intent to defraud or seek unconscionable advantage. *Earl of Eylesford* in describing the defendant's attempts to seek the initial information of the complainant's circumstances and his father's health condition, declares that the enforcer "*purposely* obstained from making any of those inquiries which every man would have made who was entering into business transaction fairly and in good faith, without either irrational disregard of his own security, or a *design* to make his market of another man's weakness."[195] This signalled an intention to exploit the other party's weakness. In *O'Rorke* the lack of bad intention on the part of the enforcer significantly influenced the final decision to allow the contract to stand.[196]

5.13.2 Good Faith Paradigms

[192] Solo v American Association of University Women 187 F Supp 3d 1151 (2016) at [12].
[193] [1906] AC 461.
[194] Ibid at [470].
[195] *Earl of Aylesford v Morris* [1873] 8 LR Ch App 484 at [495] (emphasis added). The same text is also cited in *Nevill v Snelling* [1880] 15 Ch D 679 at [700] (Denman J).
[196] Lord Hatherley observed that "the Appellant was well aware of the great poverty of the father and of the family. But I think it right to say that I see no evidence whatever of a deliberate, fraudulent intent on the part of the Appellant to oppress and injure the father or the children, or to do anything more than to-free the estate he had purchased from its remaining incumbrances, on the best terms he could make." *O'Rorke v Bolingbroke* [1877] 2 App Cas 814 at [824].

Unconscionability is linked to the three main paradigms used to explain good faith that are presented by Burton, Farnsworth and Summers. Courts, at least in the US, have viewed these specific paradigms as cumulative and consistent with a diagnosis of a breach of good faith.[197] These paradigms derive from an initial focus upon one or two of the requirements of good faith. Burton's theory, for example, is an application of implied terms.

Summers's paradigm is specifically important in relation to explaining points in common between unconscionability and good faith.

Summers views good faith as a "phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith".[198] Therefore, good faith can be determined by excluding bad faith actions. Thus, good faith is an excluder; judges in the assessment of 'good faith' are mainly concerned with ruling out specific conduct rather than with specifying precisely what they mean by good faith.[199]

This theory has been adopted by §205 (comment a) of the Restatement (Second) of Contracts.[200] This section declares that it is impossible to offer a list of types of bad faith and instead proposes a list of examples of bad faith.[201]

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[197] Allan Farnsworth, during a 1993 conference presentation in Rome's *Centro di studi e ricerche di diritto*, demonstrated how the three paradigms of good faith can be adopted in the same case. The presentation paper is available at: http://www.cisg.law.pace.edu/cisg/biblio/farnsworth3.html#13 See also: *CivicLife.com Inc v Canada* in which Fransworth's and Burton's approaches to good faith are set out in more detail. CivicLife.com Inc v Canada (2006), 215 O A C 43 at [49-50]. See also *Mitsui & Co (Canada) Ltd v Royal Bank of Canada,* [1995] 2 S C R 187 at [34]; Waddams (n 120) 56-57.

[198] Robert S Summers, 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 (2) Virginia Law Review, 195,196.

[199] Ibid 202.

[200] The Restatement (Second) of Contracts cmt. (a) on §205 states that: "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances."

[201] Refer to comment (d) on §205 of the Restatement (Second) of Contracts; Summers (n 198) 232- 233.

Summers's contribution also closely resembles the view advanced by the Consumer Rights Act 2015, in which terms are held to be unfair if they create a significant imbalance between parties' rights and obligations, and ultimately act to the detriment of the consumer, *a situation that is ultimately contrary to the good faith* requirement.[202]

The requirement of good faith under this Act (previously the Unfair Terms in Consumer Contracts Regulations 1999) was previously clarified in *Director General of Fair Trading*.[203] This case illustrates that within the framework of the Regulations, good faith is synonymous with fair and open dealing.[204] Although openness requires terms to be expressed fully and clearly, it must be preceded by the prevention of traps or pitfalls. *Fair dealing also derives from the 'negative' prescription that suppliers should not exploit consumers' disadvantage*.[205] This is basically an application of the exclusion of bad faith that was presented by Summers.

The consistency of Summers's paradigm with the good faith requirement of the absence of a bad intention to defraud, in addition to Summers's emphasis that the abuse of superior bargaining power is one of the forms of bad faith that good faith is obliged to rule out,[206] establishes that this paradigm meets the unconscionability test. Summers further claims that §2-302 of the Uniform Commercial Code, which is concerned with unconscionability, is one of the

[202] The Consumer Rights Act 2015, Chapter 5, Part 2, Article 62.
[203] *The Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52; [2002] ECC 22 at [411].
[204] Ibid.
[205] Ibid.
[206] Summers (n 198) 216-217.

Code provisions that requires good faith, even though it is not explicitly expressed.[207]

Moreover, (Comment d) on §205 of the Restatement (Second) of Contracts provides examples of some types of bad faith as follows:[208] "evasion of the spirit of the bargain, lack of diligence and slacking off, wilful rendering of imperfect performance, abuse of power to specify terms, and interference with the or failure to cooperate in the other party's performance."[209] Some of these types depict the essence of unconscionable conduct under unconscionability.

The second paradigm is proposed by Burton, who rejects Summers' excluder analysis of good faith upon the grounds that it defines good faith in its negative form without clarifying the positive aspect of good faith. According to Burton, this results in good faith being dependent upon the idea that "one must not act contrary to the spirit of the deal".[210]

Burton observes that legal reasoning in good faith cases does not use a list of bad faith actions that can be compared with case facts. He claims that cases of good faith are governed by a general technique of description that attempts to identify similarities in cases of advantage-taking.[211] Burton suggests that good faith cases are usually related to situations in which one party has discretion in performing the contract in accordance with the parties' considerations during contract formation. When this discretion is exercised with a view to recapturing

[207] Ibid 219.
[210] Burton (n 145) 509.
[211] Robert S Summers, 'The General Duty of Good Faith-Its Recognition and Conceptualization' (1982) 67 (810) Cornell L Rev 810, 826.

opportunities that were foregone when the contract was agreed, good faith would have been breached.[212]

Discretion in contract performance occurs when contract terms do not explicitly set out the way that the contract should be fulfilled.[213] Burton concludes that "a breach of contract by failing to perform in good faith can be described as a use of discretion in performance to recapture opportunities forgone on entering the contract."[214] This theory essentially recognises the second requirement of good faith, namely, faithfulness to one's duty or obligation. Consequently, the commonality of unconscionability set out in this requirement can also be engaged within Burton's theory.

The third paradigm is presented by Farnsworth when he observes that good faith performance is able to be, as in common law systems, the source of implied terms. He suggests that the form of good faith that is enacted in the Unifrom Commercial Code can establish the basis for a wide range of implied terms.[215] This understanding of good faith meets the requirement of faithfulness to contracts purposes.

5.13.3 Conceptual Boundaries

Focusing upon the borders that surround both concepts, as Collins demonstrates, can identify a further parallel between unconscionability and good faith. He presents good faith as a doctrine that encompasinsses a spectrum of norms. At the narrowest end, good faith requires honesty in fact and applies to all types of contracts. At the other end good faith is similar to

[212] Burton (n 145) 500.
[213] Ibid 502.
[214] Ibid 505.
[215] Farnsworth (n 154) 2.

fiduciary duties, which require one party to take the other party's interest into account.[216]

The norms presented by the spectrum illustrate the fact that good faith has different requirements, and that their presence vary in accordance with the precise circumstances of each case. Within this spectrum, unconscionability is situated close to the minimum requirement of honesty.[217] Collins claims that unconscionability in this form removes the need to demonstrate the subjective components of dishonesty (namely that the enforcer knowingly misled the other party). Unconscionability can therefore be said to be concerned with opportunistic actions depicted in unconscionable conduct when unfair advantage is taken of another party's disability; it also applies when advantages were not bargained for or considered – this arises in large part because of the omission of protection against risks in certain circumstances.[218]

In other words, when unconscionability is understood as taking advantage of the weakness of one party or as an omission of clarifying the allocation of risks, it falls close to honesty and is situated near to the narrow end of the good faith spectrum. Thus, according to Collins, good faith can, in this instance, be labelled as unconscionability.[219]He proceeds to observe that unconscionability should be contrasted with another norm close to the centre of the spectrum, where good faith is "concerned with establishing efficient and balanced obligations." [220] It is here, he suggests, that the standard of 'reasonable

[216] Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 (1) Current Legal Problems, 297, 314.
[217] Ibid citing P Finn, 'The Fiduciary Principle' in TG Youdan (ed) *Equity, Fiduciaries and Trusts.*
[218] Collins (n 216) 314.
[219] Ibid 315.
[220] Ibid.

expectations of honest men' "can be invoked to shape a contract."[221]

Collins therefore, after clarifying position of unconscionability on the good faith spectrum, attempts to contrast unconscionability with the reasonable expectations standard; asserting that, despite positioning unconscionability beside honesty, it will not be tested subjectively, thus emphasising the objectivity of the unconscionability test.

This emphasis is an indication of the proposition that unconscionability when subsumed under good faith raises the danger of subjectivity. While acknowledging this point, Bamforth refers to instances in which subjectivity tainted the unconscionability test in some English cases,[222] which were elaborated in Chapter Three. In fact this thesis argues that the observed subjectivity in unconscionability can be explained in light of the fact that good faith, specifically disputed in honesty, is assessed subjectively too. Hence, when unconscionability is subsumed under good faith subjectivity appears in its test too.

Farnsworth makes a particularly helpful contribution in this regard when he illustrates the type of test that is required to demonstrate good faith. In this respect, he distinguishes between a 'good faith purchase' and 'good faith performance'. 'Good faith purchase' is closely related to the question of what state of mind prevails at a particular point. In this sense, good faith is bound up with innocent forms of conduct that do not elicit suspicion.

'Good faith performance' relates to instances in which good faith establishes the basis for performance and enforcement in contracts. Its main concern is

[221] Ibid.
[222] Bamforth (n 49) 549.

fairness, reasonableness and decency, as opposed to attributes of a state of mind (innocence, suspicion or notice). In this second sense of good faith the general obligation of good faith is recognised.[223] The application of this type of good faith would encompass an implied term of co-operation to ensure that the other party's reasonable expectations are not deprived.[224]

Farnsworth observes that while 'good faith performance' was widely known and applied in Roman law, and imposed the same general obligation of good faith that is evidenced today, good faith purchase was confined to a later stage within Roman law.[225] Both forms of good faith were also recognised in English merchant law. However, when this merchant law was absorbed into the common law, courts instead tended to focus upon defining 'good faith purchase'.

Lawson v Weston in 1801 presents a subjective test of good faith that is 'the pure heart and the empty head.'[226] In *Gill v Cubitt* in 1824, this subjective test was discarded in favour of the objective test of a reasonable man.[227] However, *Goodman v Harvey* overruled this decision in 1836, and the repercussions of this decision rippled through the American states. Consequently, the emphasis shifted to a subjective test for 'good faith purchase'.[228] As Farnsworth observes, this resulted in the flawed assumption that a good faith test is always subjective in character and that the terminology of good faith only refers to 'good faith purchase'.

[223] Farnsworth (n 121) 668.
[224] Ibid 670. This is the form of good faith that is set out in the Uniform Commercial Code (§1-201). Here it is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing."
[225] Farnsworth (n 121) 670.
[226] Ibid citing *Lawson v Weston* 4 Esp 56, 170 Eng Rep 640 (KB 1801).
[227] Ibid citing *Gill v Cubitt*3 B & C 466, 107 Eng Rep 806 (KB 1824).
[228] Ibid.

In support of this observation, Farnsworth examined the unified acts before the enactment of the Uniform Commercial Code and 'good faith performance', and counted fifty references to good faith purchase (honesty in fact) and none was for 'good faith performance'.[229] However, the Uniform Commercial Code encompasses both forms of good faith, while the English jurisdiction demurred from imposing a general obligation of good faith on contractual parties.[230] As Fransworth observes, the 'good faith performance' requires an objective test, while 'good faith purchase' corresponds to both types of test (subjectivity and objectivity). He clarifies that:

> There is, at least on the face of it, nothing inherently implausible in a subjective standard looking to actual ignorance or lack of suspicion, and nothing inherently implausible in an objective standard looking to the ignorance or lack of suspicion to be expected of a reasonable man under the same circumstances. Authority happens to favor the subjective test in order to promote the circulation of goods and commercial paper.[231]

It does not appear that the same can be said of 'good faith performance'. Farnsworth asserts that this test is an objective test because it implies a clear duty of co-operation. The determination of the precise meaning of 'co-operation' ultimately depends upon the decency, fairness and reasonableness of the community; thus this test is objective because it does not relate to individuals.[232] It is noted that, within the US jurisdiction, both types of test adhere to the good faith realm. In contrast, in English law, the issue is dealt

[229] Ibid 670-71.
[230] Ibid 671
[231] Ibid. Dugan observes that the definition of good faith as honesty focuses attention on a subjective consideration – that is, the expectations of each of the respective parties. In direct contrast, honesty 'in fact' diverts attention towards the objective element, and therefore clearly reiterates that attention should focus upon the circumstances. Dugan (n 159) 12.
[232] Farnsworth (n 121) 672. Dugan explains that the definition of reasonable commercial standards "anticipates [the] subsuming of various fact patterns under general norms (reasonable commercial standards) and leaves little leeway for investigation of the subjective expectations of the parties." Dugan (n 159) 38.

with, or proposed to be dealt with, through the objective test.

In this context we come to register the full significance of Leggatt J's assertion that good faith is an implied duty in all contract types that should be assessed objectively.[233] He clarifies that the dependence of good faith on the context does not imply that its test is subjective. A good faith test is objective because it seeks to establish the appropriateness of the given conduct by comparing it to standards of commercial acceptance that have been established, and which would be recognised, by reasonable and honest people.[234]

Leggatt J draws heavily upon the standard of objectivity that was established in *Royal Brunei Airlines*.[235] This case confirms that honesty is connected to subjectivity clarifying that "it is a description of a type of conduct assessed in light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated."[236] However, it should be emphasised that this subjective dimension of honesty does not entail that cases should be examined according to individual standards of honesty. Instead, the standard of assessing what is honest and what is not is an objective one because "[h]onesty is not an optional scale, with higher or lower values according to the moral standards of each individual."[237]

It may be argued that Leggatt's determination of the good faith test was of little or no value, because *Yam Seng* was not widely considered to be an authoritative judgement but was understood to merely suggest an appropriate legal position. However, it should be noted that this interpretation of the good

[233] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [145].
[234] Ibid.
[235] *Royal Brunei Airlines v Tan* [1995] 3 WLR 64, [1995] 2 AC 378.
[236] Ibid at [389-390].
[237] Ibid.

faith test runs parallel to English law and more specifically, its adoption of the general approach of contract law of objectivity. If good faith had been adopted the test could be an objective one.

However, this was not the case and subjectivity in the test of unconscionability could therefore be viewed as an extension of the form of good faith that was recognised in the 19th century in *Lawson v Weston* in 1801 and *Goodman v Harvey* in 1836 where the subjective test was adopted, in contrast with *Gill v Cubitt* (1824), in which the objective test was instead adopted. The recognition of subjectivity in the assessment of unconscionable bargains can therefore be interpreted as a reflection of the fact that unconscionability is derived from the general principle of good faith. This feature, in addition to the presence of moral components highlights a point at which both concepts overlap.

The subjective aspect of good faith is also addressed by Waddams who compares good faith with unconscionability. After asserting that good faith cannot substitute for unconscionability, he offers an account of unconscionability. In his view, the enforcement of profitable contracts is preferable, and is closely aligned with key values such as freedom of contract. However, other values, such as great enrichment and imbalance in bargaining power, should also enter the equation.[238]

In cases where a great enrichment has resulted from a significant inequality of bargaining power, the contract will be nullified upon the basis of unconscionability. This applies irrespective of whether the promising party acted in good faith or not. The application of good faith in this instance would produce a further weakening of the complainant's protection, because further

[238] Ibid.

assessment of his/her action would be necessary to establish whether the party was aware of the weakness of the other party.

Unconscionability cannot therefore substitute for good faith.[239] This suggests that good faith always requires an assessment of parties' intentions and motives. However, it can be argued that Waddams's position is based on contrasting subjective good faith and objective reasonableness.

However, accepting Lord Leggatt's view in *Yem Sang*, that even the subjective aspects of good faith can be assessed objectively,[240] adopting a subjective or an objective approach to good faith and consequently unconscionability is a matter of laws' preference.

Overall, this analysis of aspects held in common between good faith and unconscionability demonstrates that good faith has a wider reach than unconscionability. This is further demonstrated in Lord Mansfield's statement that "Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary."[241]

This statement clarifies that good faith is a wider concept that enables the application of unconscionability if its specified conditions are met. In *Interfoto*,[242] which was concerned with the integration of onerous conditions in a pre-printed contract, the question inevitably arose of how these conditions should be brought to the attention of the other party.

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[239] Ibid.
[240] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 CLC 662 at [124].
[241] *Carter v Boehm*, 3 Burr 1905,1910 Cited in *Banque Keyser Ullmann SA v (UK) Insurance Co Ltd* [1983 B No 813] [1983 S No 763] [1982 B No 3436] [1990] 1 QB 665 at [703].
[242] *Interfoto Picture Library Limited v Stiletto Visual Programmes Limited* [1987] WL 491981.

In his judgement, Lord Bingham sought to link the idea of sufficiency of notice to good faith. While he acknowledged that English law does not recognise good faith, he nonetheless approved that it has developed piecemeal solutions to resolving unfairness issues. In emphasising this point, he referenced several examples, including the equity intervention to nullify unconscionable bargains. He also mentioned Parliament's regulation of the imposition of exemption clauses in the Unfair Terms Act as the second example of the piecemeal solutions.[243]

Some scholars have argued that this latter example evidences an application of substantive unconscionability labelled as good faith,[244] an interpretation which is justified upon the basis that the Act controls the fairness of contractual terms. It might be claimed that Lord Bingham's use of the words 'unconscionable bargains' was intended to relate unreasonable or unfair contracts in general and was not intended to specifically invoke the doctrine of unconscionability. However, this claim carries little weight, because in *Berkeley*,[245] Morgan J, in referencing *Interfoto*, stated that: "Bingham LJ was regarding the subset of equity's intervention in the case of unconscionable bargains as part of the larger set of cases involving a requirement of good faith."[246] This reflects the same position that this thesis adopts – namely that unconscionability is an application of good faith.[247]

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[243] Ibid at [439]. Repealed by the Consumer Rights Act of 2015.
[244] Daniel Markovits, 'Good Faith as Contract's Core' in Gregory Klass, George Letsas and Prince Saprai (eds) *Philosophical Foundations of Contract Law* (Oxford Scholarship Online 2015) 277; A H Angelo and E P Ellinger, 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States' (1991) 14 (455) Loy LA Int'l & Comp LJ 455, 470.
[245] *Berkeley Community Villages Limited, Berkeley Group Plc v Fred Daniel Pullen, Kathleen Marguerite Pullen, Alan John Pullen* [2007] EWHC 1330 (ch) at [93].
[246] Ibid.
[247] Powell observes that, in English law, the result of applied good faith is implicitly achieved through the application of other rules. See Powell (n 120) 29. Dorfman has also suggested that unconscionability anticipates alternative solutions. See Dorfman (n 120) 91.

In further support, *Service Station Association Ltd*,[248] Gummow J. observed that Australian contract law evidences a preference for adopting specific terms,[249] thereby evidencing the same approach as English law. He also observed that in many doctrines and equity remedies, notions of good conscience assume a key role. Accordingly, "it requires a leap of faith to translate these doctrines and remedies into a new term as to the quality of performance, implied by law."[250] In other words, notions of good faith trigger, or at least play a part in, the recognition of some remedies or doctrines.

This statement can be interpreted in two ways. Firstly, taking into account Hesselink's explanation of good faith, in which he declares that good faith has three functions, which can be reduced to concretisation (or interpretation of the law), supplementation (mainly duties to protect, to be loyal, to inform or to co-operate) and correction (the prohibition of the abuse of rights and excessive disproportion).[251] In Hesselink's view, good faith spots the weaknesses in legal systems and works to resolve them by supplementation, interpretation or the correction of these weakness or flaws.[252]

He concludes that good faith is a cover that is used by judges when they create the law, something which, at least in civil law systems, falls beyond the remit of a judge's job.[253] This understanding addresses good faith as a background for legal rules and doctrines, which is also evidenced in the literature.[254] This establishes that good faith is a strong foundation that reinforces many contract law rules.

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[248] *Service Station Association Ltd v Berg Bennett* (1993) 117 ALR 393.
[249] Ibid at [406].
[250] Ibid.
[251] Hesselink (n 153) 478.
[252] Ibid 493.
[253] Ibid 495.
[254] O'Connor J F, *Good Fatih in English Law,* (England, Dartmouth Publication Company 1990) 17-49; Waddams (n 120) 56-57. See also: Johan Steyn (n 120); Summers (n 13) 277.

Another way to approach Gummow J.'s observation is by recognising good faith as a 'principle' that exists under the hierarchy of legal norms. The proposal that good faith is a principle that underpins more precise legal doctrines recalls the recognition of good faith in Canadian common law as advanced in *Bahsin*.[255] This case articulated good faith as a general organising principle that underpins and informs the various rules that apply in instances where common contract law recognises good faith.[256]

Bahsin observes that this recognition, when added to the fact that common law applies a duty of acting honestly in contract performance, will help to make common law more coherent and just.[257] The court proceeded to demonstrate that good faith, when applied as a general organising principle, does not stand as a free-standing rule; rather good faith "underpins and is manifested in more specific legal doctrines and may be given different weight in different situations… It is a standard that helps to understand and develop the law in a coherent and principled way."[258] This conclusion reflects the view of good faith as a general principle that governs contract performance.

In preceding the understanding that good faith cannot be applied as a standing rule in itself, *Bahsin* identifies two situations in which good faith plays a key role in contract law. In the first instance, specific legal doctrines may be derived from good faith as a general principle.[259] This instance illustrates how good faith gives rise to new doctrines that deal with new situations. In the second situation, good faith is applied through existing doctrines, usually being related to incidents where the law requires honesty, sincerity and reasonable

[255] Bahsin v Hrynew 2014 SCC 71 [2014] 3 S C R 494.
[256] Ibid at [62].
[257] ibid.
[258] Ibid at [64] (emphasis added). For a similar determination of good faith see the South African case of *Barend Petrus Barkhuizen v Ronald Stuart Napier* CCT 72/05 [2007] ZACC 5 at [82].
[259] Bahsin v Hrynew 2014 SCC 71 [2014] 3 S C R 494 at [64].

contractual performance. The manifestation of good faith may be developed in instances where the existing law is in need of this application; equally, it may occur incrementally, developing in a manner that gives due weight to the importance of certainty and private ordering in commercial events and which is consistent with the merits of the common law of contract.[260]

This conclusion raises some questions about the differences between the addressed situations, which pertain both to instances in which doctrines are derived from good faith and instances when good faith is applied through existing doctrines. Based upon *Bahsin*, it seems that when doctrines are derived from good faith the elements required to apply the doctrines are specific in character. Vitiating factors would be a relevant example in this respect, clearly bringing out how good faith has been applied.

In situations where good faith is manifested through existing legal rules or doctrines, a greater degree of subtlety would be necessitated, because no specific factors or elements are established as prerequisites; rather, in these situations, good faith works as a guiding force that clarifies the targets to which these rules or doctrines are addressed. Implied terms might be considered to exemplify how good faith is manifested in existing doctrines or remedies, as the content of the implied terms depends upon the context of each case.

Bridge[261] provides an example of how good faith is manifested in some rules. This was a case of a hire-purchase transaction where it is settled in law that the hirer has the right to withdraw from the contract without incurring further liability or any penalty. It is simply necessary that they return the goods and pay the monthly sum that is due. In this instance, the finance house inserted a

[260] Ibid at [66].
[261] *Bridge v Campbell Discount C Ltd* [1962] 2 WLR 439 [1962] AC 600.

stipulation of a 'minimum-payment' in its standard form.

Lord Denning qualified the stipulation as a penalty for termination, and described it as "oppressive and unjust" upon the basis that the termination of hiring was within a few weeks of its commencement.[262] Lord Denning observed that while equity's relief from penalty is confined to cases of breach of contract, equity can give relief from penalties for non-performance of a condition.[263] Lord Denning considered the penalty contained in the minimum-payment clause to be a condition that was inserted to ensure that the hirer should pay a minimum-payment.

It seems that Lord Denning's decision was strongly influenced by considerations of fairness, rather than by the rule that was to be applied, when he stated that "[if] I am wrong about all this, however, and there is no jurisdiction to grant relief unless the hirer is in breach, then I would be prepared to hold in this case that Bridge was in breach." In this application of penalty clauses, Lord Denning followed his sense of justice and thereby aligned himself with Stone's recognition that in conflict situations, judges tend to use concepts such as the reasonable man and good faith to give flexibility to the law and achieve the just solution, an arrangement that is essentially synonymous with society's understanding of fairness and justice. [264]

This use of good faith is acceptable in jurisdictions that recognise a general principle of good faith. A problem arises when laws do not recognise this general principle, as is the case with English law. This prevents courts from referencing decisions that invoke reasons based upon good faith. This appears

[262] Ibid at [628-629].
[263] Ibid at [629].
[264] J Stone, *Legal Systems and Lawyers Reasoning,* (Maitland Publications 1968) 21-22.

to have been the situation that prevailed in *Bridge*.[265] Had the law recognised the duty of good faith, Lord Denning would have adopted it.

While explaining how good faith operates as a general principle, French J., in *Bropho*,[266] observed that the enactment of good faith requires honest action and a clear fidelity to whatever norm the statute dictates. This required action should not conflict with any expressed or implied obligation in the contract. In this respect, fidelity can be said to involve more than mere compliance with the black letter of the law; it also necessitates abiding with the spirit of the law. This entails that the courts' judgment will, in accordance with the authorisation given to them, tend to be evaluative and liability may arise even when actions occurred within the margins of action established by the statutory provisions.[267]

In justifying his conclusions, French J. states that: "there is nothing in principle to prevent the legislature protecting a rule by attaching an uncertain risk of liability to conduct in the shadow of the rule."[268] This recalls Hesselink's observation that good faith has a supplementary function. It can be inferred that good faith as a principle has a potential application that extends beyond other legal precepts. This is consistent with this thesis's analysis of unconscionability, in which it is identified as a standard in the hierarchy of legal precepts, which will be fully explained in the following chapter.[269] Accordingly, unconscionability as a standard should be placed under good faith and functioning as a general principle in the hierarchy of legal precepts.

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[265] *Bridge v Campbell Discount Co Ltd* [1962] 2 WLR 439 [1962] AC 600.
[266] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [93] (French J).
[267] Ibid.
[268] Ibid.
[269] Refer to Chapter Six (text to n 154-190).

Now that the points at which unconscionability encounters good faith have been set out, it is instructive to observe that while unconscionability is a derived standard that can be traced back to good faith; it varies from the latter in some key dimensions. These variations are important within jurisdictions (such as the American one) where good faith and unconscionability doctrine are recognised in domestic law.

5.14 Unconscionability and Good Faith: Differences

It should initially be acknowledged that unconscionability differs from good faith in the extent to which it is applied. In the US, unconscionability evidences both procedural and substantive features. Procedural unconscionability is concerned with identifying defects at the formation stage of contracts; substantive unconscionability in contrast, is more preoccupied with assessing contract terms or results. However, good faith only applies to contract performance and enforcement.[270]

A similar hostility to the application of good faith at the negotiation stage has also been signalled within the English jurisdiction. *Walford*[271] declares that a duty to negotiate in good faith is inconsistent with parties' negotiating positions because this duty is "inherently repugnant to the adverserial position of the parties when involved in negotiations. Each party to the negotiations is entitled

[270] §1304 of the Uniform Commercial Code establishes that: "Every contract or duty within this code imposes an obligation of goodfaith in its performance and enforcement. In *In re Carter C A* it was clarified that: "[t]here must be good faith in performance of every contract or duty within the California Commercial Code." In re Carter C A 9 (Cal) 511 F 2d 1203 (1975) at [1205]. For further insight into how this has negated its application to the negotiation of contracts, refer to: *Racine & Laramie Ltd v Department of Parks & Recreation* 11 Cal app 4th 1026 1031-1032 14 Cal Rptr 2d 335 (4thDist 1992).

[271] *Walford v Miles* [1992] 2 WLR 174, [1992] 2 AC 128.

to pursue his (or her) own interest, so long as he avoids making misrepresentations."[272] It is therefore unworkable.

However, it should be acknowledged that some types of contract, such as insurance and employment contracts,[273] impose further duties upon their parties. Contractual parties, for example, are able to apply contract provisions that provide further protection by expanding the duty of good faith.[274]Under these circumstances, it is conceivable that good faith could be expanded to the negotiation stage.

A further difference between good faith and unconscionability originates within each concept's focus. Good faith is more closely related to people while unconscionability is more closely related to contracts, and is more concerned with an assessment of their content. This was clearly demonstrated by Fried's definitions of good faith and unconscionability. Fried observes that good faith is:

> [A] way of dealing with a contractual party: honestly, decently. It is an adverbial notion suggesting the avoidance of chicanery and sharp practice (bad faith) whether in coming to an agreement or in carrying out its terms… while unconscionability refers to a vice in the agreement itself: An unconscionable agreement is unfairly one-sided; it takes advantage of the weakness of one of the parties.[275]

The substantive part of unconscionability plays a significant role in this distinction. Burton similarly points out that the protection that good faith offers to the weaker parties is different from that provided by its unconscionability counterpart, a divergence that is in large part attributable to the fact that good

[272] Ibid at [129]. See also: *Petromec Inc v Petroleo Brasileiro SA* [2005] EWCA CIV 891 (116).
[273] *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6. See also: *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20.
[274] Robert S Adler and Richard A Mann, 'Good Faith: A New Look at an Old Doctrine' (1994) 28 (31) Akron L Rev 31, 46.
[275] Charles Fried, *Contract As Promise,* (Harvard University Press 1981) 74.

faith does not bear the substance fairness of the contract and parties' bargaining power.[276]

A third difference can be inferred from *W.L. May Co.*[277] Although good faith and unconscionability are categories that permit courts to nullify contracts in the name of fairness,[278] this case draws attention to the fact that unconscionability is normally a defensive rule.[279] Unconscionability establishes a basis on which weaker parties can defend themselves against oppression and the imposition of one-sided terms by asking the court to nullify unfair terms. It does not, to this extent, enable damages to be recovered, contrary to the breach of good faith, which provides a basis upon which damages could be recovered as in American law where good faith is adopted. [280]

The final difference is highlighted by Speidel's study, which points out that courts apply good faith in a limited way. Good faith is limited to expressed terms,[281] therefore, courts cannot sustain an interpretation that is different from the stated one.

In Speidel's view, courts may interfere to achieve fairness by using different doctrines such as unconscionability.[282] In *Highway Equipment Co.*[283] the court held that a termination clause (which explicitly permitted termination without a cause) could not be assessed under good faith, but it should instead be subject

[276] Burton (n 170) 383.
[277] WL May Co, Inc v Philco-Ford Corporation 543 P2d 283 (1975) at [286-288].
[278] Fried (n 275) 74.
[279] WL May Co, Inc v Philco-Ford Corporation 543 P2d 283 (1975) at [288].
[280] Ibid at [288-289]. Waddams also ascribes the same function to good faith. See Waddams (n 120) 56.
[281] For cases see: Camer Developers (California) Inc v Marthon Development California Inc Rpt 2d 467 826 2d 710 (1992); Tanner v Title Ins & Trust Co 20 Cal 2d 814 824 129 P 2d 383 (1942); First American Title Insurance Company v Spanish Inn Inc 239 Cal App 4th 598 605 191 Cal Rptr 3d 22 (4th Dist 2015). See also Feinman (n 171) 941.
[282] Speidel (n 174) 541.
[283] Highway Equipment Co v Caterpillar, Inc 707 F Supp 954 (S D Ohio 1989).

to a hearing on its unconscionability.[284] This establishes that, contrary to good faith, unconscionability is not confined to the expressed terms.

The observation of these differences does not substantially detract from the argument that unconscionability can be interpreted as a standard that is derived from good faith, because as explained above, unconscionability has much in common with the good faith requirements. Moreover, none of the observed differences highlights central contradictions in the essence and the general theme of both concepts is identical.

Having determined the main findings of this thesis that are related to demonstrating the various approaches to unconscionability and part of the theoretical bases of unconscionability, how e-wraps fit into these findings is the next point for elaboration.

5.15 Unconscionability Various Approaches and E-Wraps

The introduction of this thesis clarified that generally speaking, laws take different approaches in their treatment of e-wraps. Some laws prefer keeping traditional rules of contract law as they are and apply them to e-wraps without any adjustment, whereas other laws prefer to adjust and adapt traditional rules to correspond to the special peculiarities of e-wraps.

The English law position in this regard is not clear, for the lack of cases in which unconscionable e-wraps have been resolved by unconscionability. However, *Bassano* showed that English law will most likely treat any future cases by the same traditional rules without any adaptation, because this case did not attract any special enquiry although the contract disputed was a click-wrap one.

[284] Ibid.

Similarly, the limited number of unconscionable e-wraps in California clarified that this law preference is to keep the rules of unconscionability without any adjustments.

Accordingly, the analysis provided so far that is concerned with the application of unconscionability to traditional contracts, is applicable to e-wraps too in both English and California law. However, the question remains, which law adopts a more sufficient approach to unconscionability in the e-wraps context.

The analysis shows that both English and California law approaches to unconscionability have their strengths and weaknesses when they are considered in the context of e-wraps.

In English law, the analysis based on the findings related to unconscionability in traditional contracts shows that presumed unconscionability provides a possible approach to unconscionable e-wraps and that the adoption of this approach would support a relaxed view of e-wraps that would ease allegations of unconscionability.

Proposing treating e-wraps via presumed unconscionability is based on some indications in early cases of presumed unconscionability of expectant heirs. The analysis shows that cases of expectant heirs reflect two considerations in expanding the rules of unconscionability to cases of sales of reversions, annuities, and post-obit securities.[285] The first is related to relational inequality between contractual parties. The weaker parties in catching bargains as a category of contractors share the same position of online users in modern days,

[285] *Earl of Aylesford v Morris* (1873) 8 LR Ch App 484 at [490].

as the latter type of contractor is also exposed to online suppliers' imposition and hard terms. [286]

The second consideration is related to the specific peculiarities of this system of dealing that are in common with e-wraps. These are: systems of dealing that set a snare to catch weaker parties, who are generally as a class of contractors prodigals and known to be prodigals, without legal advice and power to take care of their interests.

Applying these considerations to e-wrap cases shows striking similarities that justify treating them in an equal manner as catching bargains.

However, hypothesising the application of presumed unconscionability to e-wrap cases shows that legal advice and knowledge as complementary elements, which have the power to break the circle of interaction between the essential elements of unconscionability, would have only a marginal effect in e-wraps, because these contracts are formed online immediately and at a distance. Accordingly, rebutting a raised presumption of unconscionability in e-wraps would require showing other factors to prove the fairness of any e-wrap disputed, as knowledge and legal advice would usually be absent.

Alternatively, it is possible to treat e-wraps cases as a classic case of unconscionability in which all the three essential elements would have to be proved. This approach conceivably is stricter than the one of presumed unconscionability. However, it might be relaxed, to some extent, when of research finding, that are relevant to e-wraps and standard behaviour of online users are endorsed.

[286] *Shelly v Nash* [1818] 56 Eng Rep 494 1815-1865 at [236].

The most important findings are: online users do not read their wraps most likely, because they do not understand them; the second is related to the position in which unusual terms are placed on webpages. Research proves that there are specific parts on webpages which usually attract online users' attention.

The endorsement of the first finding would imply that online suppliers always know that their customers do not read or understand their e-wraps, therefore knowledge as a complementary element in e-wraps would always be present unless the supplier took positive steps that would offset knowledge, such as requiring further a click alongside each unusual term or any other step that a decision-maker would view as a step that shows the supplier's good conscience.

Meanwhile, the endorsement of the second finding, which is related to areas of attraction on webpages, would imply that when online suppliers provide unusual terms in places that do not attract online users' attention, they do so intentionally, therefore knowledge would be present and strengthen allegations of unconscionability.

Eventually, choosing between a relaxed approach or a strict one to cases of unconscionable e-wraps is a matter of decision-makers' preference in English law.

As to California law, the limited number of cases hindered the possibility of deriving absolute findings. However, unconscionable e-wrap cases asserted the same findings of cases of unconscionability in traditional contracts. Specifically, regarding inconsistency in considering adhesiveness as minimum procedural unconscionability or not.

Moreover, while traditional cases show courts' tendency to determine steps and criteria through which they assess substantive unconscionability, unconscionable e-wraps cases show inconsistency in this regard too. The latter cases added some criteria in one of the eight cases without clarifying the basis on which the court's decision rested.

While there are attempts in the literature to seek to suggest reconstructing unconscionability when applied to e-wraps, this thesis argues that there is no need. On the contrary, unconscionability as applied in California law can advance the protection of online users via deciding to consider all e-wraps minimally procedurally unconscionable without a need for further investigation.

A higher degree of procedural unconscionability can be achieved via enhancing the role of surprise in e-wraps. This could be achieved by considering a 'reasonable, prudent user' which is applied by California courts when examining sufficiency of notice in e-wraps. Such incorporation would mean considering the same findings of the research that were addressed in the discussion related to the application of unconscionability in e-wraps in English law. Accordingly, different measures would be required from online suppliers in drafting their e-wraps to avoid a finding of surprise and consequently a higher degree of procedural unconscionability.

Again the adoption of this proposal would reflect a relaxed view of unconscionability that would enhance the protection offered to online users.

Having determined how e-wraps would fit into the approaches observed to unconscionability, a determination of what lessons can be derived from the observed approaches that would fit in Libyan law is addressed next.

5.16 Derived Lessons for Libya

This section addresses one of the main research questions of this thesis; what lessons can be derived for a reform of Libyan law?

The proposals for reforming Libyan law in this thesis is based on the lessons derived from English and California law. Hence, there is a need for a reading of unconscionability in Libyan law parallel with the findings resultant from analysis of unconscionability in English and California law, which sheds some light on the specific features of its test of unconscionability.

A sufficient proposal for reform must also determine any problems with the old law in order to overcome them. It follows that the identification of any restrictions in the proposed reform is critical. In other words, should one first identify differences and similarities between Libyan law and its counterparts in English and California law to decide to adopt unconscionability from law that is akin to Libyan law. Or on the other hand, is it necessary for the new reform to follow the previous approach of Libyan law as embodied in Article 129 of the Libyan Civil Code.

5.16.1 Aspects of Deficiency

As to the first aspect of the discussion, the analysis conducted in this thesis shows two possible reasons for the deficiency of the law of unconscionability in Libyan law.

First of all, Libyan law restricts the application of unconscionability to a great extent by: limiting the types of disadvantage that may cause relational inequality between contractual parties to 1) levity and 2) unbridled passion; placing a statutory limitation of one year from contracting time on unconscionability

claims; and, finally, by rejecting the adoption of presumed unconscionability. These constraints should be considered a starting point for any future reform, because it is believed that they are the main reason for the absence of unconscionability case law.

While it might be argued that since these restrictions are the reason for the deficiency of unconscionability in Libyan law, then a proposal for reforming the law should discharge them and consequently the problem would be solved. Although such a solution may initially solve the problem and bring unconscionability into action, its limitation is its lack of certainty and over simplicity.

Lack of certainty is caused by the fact that it is not certain that the restrictions adopted in current law are the only reason for the alleged deficiency. Meanwhile, over simplicity is attributable to the analysis conducted so far for unconscionability in English and California law, which shows the difficulty of comprehending the doctrine and its flexibility.

History shows that legislators should ensure the achievement of utmost benefits that can be achieved in the new law. Legislators in the new reform should consider taking reasonable steps to overcome ambiguity or any other drawbacks that may accrue in the future, especially as unconscionability in Libya will be adopted to resolve unconscionable e-wraps, which are in gradual change. Therefore, limiting the proposal for reform to treating the restrictions placed on the current law by removing them will not be sufficient.

5.16.2 Receptivity

The discussion here is based on the idea that the compatibility of the transplanted law with the initial order would offset the fact that the new law is borrowed from a foreigner jurisdiction. This is clearly acknowledged when reference is made to 'the receptivity of the transplants'.[287] Receptivity, can be defined as "the country's ability to give meaning to the imported law."[288]

The importance of addressing the receptivity of Libyan law to transplanted rules is based on the recognition of some criticisms to the idea of legal transplantation. Some scholars argue that legal rules have strong links to the social and economic structure of each society.[289] Therefore, transferring legal rules without a proper consideration of such ties would result in the failure of any attempt to transplant them.

In the view of Berkowitz, Pistor and Richard, the possibility of receptivity to voluntary transplant increases "when it makes a significant adaption of foreign formal legal order to initial conditions, in particular to the pre-existing formal and informal legal order."[290] This means that efforts must be taken to align the original rule of unconscionability (whether from English or California law) with the importing country (Libya), to increase chances of receptivity.

The need for adapting the borrowed rule of unconscionability to the conditions of Libyan law does not seem an obstacle for any proposal for reform, for two

[287] Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 (1) The American Society of Comparative Law 163, 179.
[288] Ibid.
[289] Montesquieu argues that laws are the spirit of the nation and that law is inextricably tied to the customs, politics and particular geographical position of each nation. For this reason, it is difficult to transfer legal institutions. See: Charles de Montesquieu, 'The Spirit of Laws' (1899) 2 Colonial Press < http://jb-hdnp.org/Sarver/AP_Government/Documents/Montesquieu,%20Spirit%20of%20the%20Laws%20excerpts.pdf> accessed 2 January 2014. Similarly Freund argues that the link between organic rules and politics, as opposed to other social, cultural or environmental influences, is the main influence that impedes the legal transplantation of organic rules. See: Otto kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 (1) The Modern Law Review 1, 18.
[290] Ibid.

reasons: firstly, the Libyan Civil Code seems receptive to a high extent and secondly, the nature of the doctrine of unconscionability itself.

The receptivity of Libyan law is based on its history. First of all, although Libya adopts a civil law system and the main source of law is codes and statutes, contrary to the common law system that is based on case law and judicial precedents, the Libyan High Court holds a position that is similar to the Supreme Court in England and its decisions are considered binding as precedents.

Moreover, Al-Sanhori, while describing the main feature of the Civil Code admits that although the law was initially based on the French Civil Code, it borrowed rules form other legal systems[291] and unconscionability is an example of this. Moreover, he remarks that the Code provides a mixture of values derived from classical contract law and neo-classical contract law, therefore: while the will theory and freedom of contract are central ideas in the Civil Code, there are rules which restrict this classical view such as the increase control over the fairness of contracts; In addition, the Libyan Civil Code adopts a modest position between subjectivity and objectivity. Frustration, for example, shows a tendency to subjectivity, on the other hand, stipulations in contracts in favour of future persons or institutions who are not identified at contracting time[292] show a tendency towards objectivity; furthermore, while courts should be concerned with contractual parties' real intentions, there are rules which rely upon the appearance of contractual parties' will, for example Article 120 on error in contracts provides that the error of one party is not a reason for

[291] Abd Al-Razig Al-Sanhori, *A Guide on Explaining the Civil Code,* vol1 (Lebanon: Dar Ihyaa al-Turath al-Arabi 1952) 51 (author's translation).
[292] Article 149, Libyan Civil Code. Meredith O Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code an English Translation and a Comparison with the Egyptian Civil Code* (The Oleander Press).

nullification unless "the other party had similarly committed the same error or had been cognizant of it or could have easily discovered it."[293] This means that a contract should be upheld when the other party did not know about the error and could have not realised it. This shows a preference for considering parties' will as appeared rather than their real intention to ensuring certainty in contracts.

The observed combination of different approaches in the Libyan Civil Code increases the possibility of receptivity.

The second reason for arguing that a reform of unconscionability in Libyan law that is based on English or California laws would not cause a problem, is the nature of unconscionability itself.

The analysis of unconscionability shows that this doctrine is capable of serving different rationales depending on the emphasis placed upon one of its elements over an other. The intrinsic nature of these elements produces a high degree of flexibility. For example, unconscionability is capable of serving a system that is based on consent such as Libyan law, [294] while it is also capable of serving a system that focuses on contract substance and their lawfulness such as California law, or alternatively unconscionability may be viewed as a response to the unconscionable conduct of the enforcer. Hence there are different views of unconscionability that vary according to their specific context. [295]

Accordingly, the nature of unconscionability itself illuminates the possibility of a failure of transplanting, because unconscionability is generally capable of being

[293] Article 120, Libyan Civil Code. Meredith O Ansell and Ibrahim Massaud al-Arif, *The Libyan Civil Code an English Translation and a Comparison with the Egyptian Civil Code* (The Oleander Press).
[294] On this rationale see Bigwood (n 42) 204-205; Spark (n 32) 2.
[295] Arthur Allen Leff, 'Unconscionability and the Code. The Emperor's New Clause' (1967) 115 (4) The University of Pennsylvania Law Review 485, 487.

consistent with other sets of principles that govern any legal regulation or system.

Furthermore, there are two techniques for a law reform depending on the urgently of the solution needed. The first would keep the current law, namely Article 129 as it is and provide judges with tools of interpretation that may loosen the restrictive rule that exists now. Choosing this solution is conceivable in situations when there is an urgent need for a solution that cannot await the long process of law reformation.

The second way takes longer as it proposes an adjustment to the current law by providing new rules that try to overcome the deficiencies of the old one.

The preference in this thesis proposal is for the second approach, because what initially triggered the idea for this research was the fact that a draft of a Bill for e-commerce has recently been issued, which did not include rules that deal unconscionable e-wraps. The Bill is still under consideration therefore, it is not too late to take a step ahead to consider the amendment of unconscionability in the Civil Code too.

5.16.3 Current Law

Reading Article 129 in light of the findings derived from the analysis of unconscionability in English and California law shows that Libyan law adopts a party-oriented approach that is similar to the English law approach. This is indicated in the adoption of a subjective test for substantive unconscionability and in adopting the protection rationale, which reflects an emphasis on the serious disadvantage element.

As to the type of interaction between the two main elements of unconscionability in Libyan law, there is no evidence that Libyan law recognises a specific type of interaction between substantive unconscionability and the psychological element. However the fact that Libyan law does not recognise degrees in both elements strengthens the belief that the sliding scale as one type of interaction between the elements of unconscionability is not recognised.

5.16.4 Proposal

A reform of Libyan Law would be through amending article 129 of the Libyan Civil Code. The fact that unconscionability is also codified in California law, which has been criticised for its vagueness, necessitates that any new reform of the Libyan Civil Code must avoid points of weaknesses observed in the California Civil Code. While this problem in California law was overcome by the accumulation of cases that clarified the test of unconscionability, the fact that Libyan law is a civil law system that does not rely on precedents, urges the need for a reform that explains precisely the elements of unconscionability, the types of interaction between the elements and whether the law recognises presumed unconscionability or not.

A proposal for reform that is based on the English and California law experience with regard to unconscionability requires first identifying points of weakness and strength in each jurisdiction to select the best approach for a new reform.

When English law is compared with California law it can be noticed that it is advantaged on two levels. Firstly, its adoption of the party-oriented approach allows the adoption of the protection rationale and the anti-exploitation rationale on two different periods of time. As explained above the party-oriented approach is attached to two of the unconscionability elements: serious

disadvantage and unconscionable conduct, which in turn introduce when emphasised; the protection rationale and anti-exploitation rationale respectively.

Secondly, circularity in English law and the adoption of presumed unconscionability loosened the test of unconscionability in favour of enhancing the weaker parties' protection. The circularity permitted proving unconscionability in three different ways, while presumed unconscionability shortened the steps needed to apply unconscionability by raising presumption without the need to prove some of the unconscionability essential elements.

Moreover, circularity provides more determination of the role of legal advice and knowledge elements. Legal advice and knowledge, as complementary elements, have the power to break the circle and consequently negate the application of unconscionability.

However, one weakness in the English law of unconscionability is in its lack of certainty with regard to constructive knowledge (whether it is recognised or not). Moreover one may argue that the adoption of a subjective test for substantive unconscionability is not certain. However, there are signs which indicate that had a case come before the courts in which contractual terms were substantively unconscionable if they are assessed subjectively, most likely subjectivity would have been endorsed.

By contrast, in California law points of weakness outnumber strengths. Aspects of weakness of the unconscionability test in this jurisdiction can be summarised under uncertainty, which is generated because of two facts.

First, the identification of different degrees of procedural and substantive unconscionability is one reason for uncertainty, because the test is based on

the operation of a sliding scale in which the more procedural unconscionability is proved the less substantive unconscionability is required and vice versa.

Chapter Three explained that while the degree of determination of procedural unconscionability is straightforward, the degree of substantive unconscionability is difficult to determine, because procedural unconscionability in California law constitutes two substantive-elements, namely, oppression and surprise. Thus, in cases where just one of the elements is proved, procedural unconscionability would be of minimum degree, while when both of the sub-elements are present procedural unconscionability would be of a high degree. The same argument is not applicable on substantive unconscionability as it does not constitute sub-elements as procedural unconscionability does.

Second, inconsistency in case law with regard to whether adhesiveness should be considered minimum procedural unconscionability or not, caused uncertainty in the law of unconscionability. The effect of such a presumption would be applying unconscionability in cases of an operated sliding scale. Therefore the issue is highly important.

Against these points of weakness, California law has a strong test for substantive unconscionability. This is achieved through the recognition of specific steps through which substantive unconscionability is usually assessed and through the identification of specific criteria for the assessment allegations of unconscionability related to arbitration in employment contracts. While courts misapplied these criteria in some cases, identifying them suggests that substantive unconscionability can be determined; therefore, such criteria if applied accurately, promote the strong possibility that in the future criticisms of

unconscionability that are usually based on the vagueness of substantive unconscionability would vanish.

Considering both points of weaknesses and strengths in English and California, a proposal for a reform of Libyan law should adopt the strongest aspects of each test.

In fact, the basis for this is already available in Libyan law. It has been observed that Libyan law adopts a party-oriented approach, which is preferable to viewing the strengths that were just specified in English law.

Moreover, Libyan law adopts a subjective test for substantive unconscionability. Nonetheless, the subjective test might not be preferable in the context of e-wraps, because of their special nature. The fact that Libyan law adopts a subjective approach to the assessment of substantive unconscionability is articulated by Al-Sanhori and in his articulation it is not clear whether Libyan law recognises an objective test of substantive unconscionability alongside the subjective one or not. This leaves the issue unclear.

Presuming that the discussion is limited to the subjective test, this means that e-wraps that are substantively unconscionable from an objective viewpoint cannot be nullified by unconscionability, because the law limits situations of substantive unconscionability to the one subjectively observed. This, coupled with the fact that Libyan law has not adopted other statutes that are similar to the English legislation of the Consumer Rights Act 2015, inspires a preference for proposing that in the reform the substantive unconscionability test should encompass both types of tests, namely an objective and a subjective test.

Moreover, a reform of unconscionability in Libya may be benefitted from the California law experience with regard to the criteria developed for the lawful arbitration in employment contracts. However, the fact is that the development of such criteria still seems under process, as it was recognised that courts sometimes adopt criteria that are slightly different from the ones already specified in *Armendariz*.[296]

Therefore, it seems best to leave at least for now the determination of such criteria to the accumulation of jurisprudence in Libya, which hopefully will emerge if a reform of Article 129 is adopted.

As to the psychological element in Libyan law, its first component is serious disadvantage. This element needs to be adjusted to open the door for encompassing different types of serious disadvantage. English law provides a good example.

A reform that would allow the inclusion of different types of serious disadvantage might be achieved via providing examples of serious disadvantage as demonstrated in *Alec Lobb* or via providing the justification for adopting unlimited types of serious disadvantage. The Bill of the Civil Code might be helpful in this respect, which after providing examples of serious disadvantage concludes by clarifying that serious disadvantage is present whenever there is a situation in which the contracting decision was not based on a meaningful choice.[297]

As to the second component of the psychological element ‘unconscionable conduct', presumably any type of advantage taking constitutes exploitation and

[296] Armendariz v Foundation Health Psychcare Servs, Inc, 99 Cal Rptr 2d 745 (2000).
[297] Al-Sanhori (n 291) 365.

therefore embodies unconscionable conduct. The language of Article 129 does not include further explanation. This causes great ambiguity as to whether the knowledge is required or not.

It has been referenced that Al-Sanhori views the unconscionable conduct element as one that signifies the enforcer's unlawful will. It has been also discussed that while this statement may indicate a reference to the enforcer's bad conscience, the fact that knowledge does not seem to be required in the test negates such inference. Therefore, whether knowledge is required or not cannot be assured.

However, as the proposal for reform is not confined to the adoption of a test of unconscionability that is similar to the one in Article 129, the question is: is it beneficial to include knowledge as a requirement for the application of unconscionability in the reform? Answering this question depend on the experience of English law, as California law does not recognise knowledge.

In English law the role of knowledge can be identified in three situations. The first situation is related to cases of passive acceptance of contractual benefits. In such cases knowledge shows the enforcer's bad conscience and consequently clarifies his/her unconscionable conduct. The second situation in which knowledge plays an important role is related to cases of presumed unconscionability in which knowledge may break circularity and consequently negate the application of unconscionability. The third situation is related to all other cases in which knowledge helps to signify the quality of the enforcer's conscience.

Applying these three occasions to Libyan law results in the exclusion of presumed unconscionability, because it is not recognised in current law. As to

the remainder of cases the question remains is it beneficial for Libyan law to include knowledge as one of the unconscionability elements? The answer seems to be in the negative for two reasons.

Knowledge is considered important in English law, because the moral aspect of unconscionability is significant in this law and frequently cited. On the contrary, Libyan law does not emphasis this aspect of unconscionability. This is indicated by the lack of language like ‘shocking the courts’ conscience’ and the enforcer’s conscience.

The second reason for not considering the inclusion of knowledge important in Libyan law is that although this proposal would affect the application of unconscionability on traditional contracts, the idea of proposing a reform was originally triggered to resolve unconscionable e-wraps. The analysis of the English test of unconscionability in e-wraps shows that knowledge is not an effective element in these contracts, because of their specific nature that does not allow direct communication between contractual parties. This would be the case unless it was decided to endorse the findings of research related to e-wraps. Such an endorsement would result in considering the online users’ lack of reading and understanding as common knowledge and consequently allows the presumption that all online suppliers are aware of the online users’ ignorance as a disadvantage.

Accordingly, it seems adequate not to include knowledge as a required element in any proposal for law reform. Otherwise there would be a need to specify the law’s position towards the mentioned research to decide whether to endorse it or not.

However, the decision to include knowledge or not ultimately depends upon the legislator's view of the whole unconscionability test and whether it should be relaxed to allow more allegations and consequently increase the complainants' protection or not. Such a relaxation would be further enhanced by the adoption of presumed unconscionability. According to the previous Bill of the Civil Code, cases in which substantive unconscionability was proved a presumption of the psychological element would rise.

While a decision to adopt presumed unconscionability depends on the legislator's point of view, it is certain that if such a decision was made there is a need to articulate how a presumption would arise. Moreover, the recognition of presumed unconscionability would eventually lead to the establishment of circularity or at least part of it, because the suggested presumption is limited to the one that is based on substantive unconscionability without the presumption that is based on unconscionable conduct as in English law.[298] It is not clear what benefits Libyan law could achieve by the recognition of part circularity compared with the full circularity that is adopted in English law.

Accordingly, it is safer to propose to keep the unconscionability test in Libya as it is similar to the classic cases of unconscionability that are recognised in English law, and if a decision-maker decides to adopt a relaxed approach to unconscionability in e-wraps, presumed unconscionability in this case will be the solution.

Thus, in e-wraps when substantive unconscionability is proved, it raises a presumption of the psychological element (that is serious disadvantage and unconscionable conduct). Such a presumption is discharged if the supplier

[298] Refer to Chapter Three (text to n 239- 349) for an exaplantion of presumed unconscionability.

proves that the e-wrap is fair and just. This proof cannot be achieved via legal advice or knowledge as in English law, rather it will require showing that reasonable steps were taken by the supplier to ensure the online user's awareness of the unusual terms.

The determination of these reasonable steps should be left to the legislator to specify, because it would require an analysis of the online users behaviour and may require a consideration of the findings of research that is concerned with the services of psychologists and anthropologists to offer analyses of online users' behaviour.[299]

To sum up, a proposal for reforming the Libyan Civil Code in relation to unconscionability should: first, keep the party-oriented approach that is already adopted; second, include an objective test of substantive unconscionability to ensure a wider application of unconscionability, especially in e-wraps, because a decision-maker may decide to treat e-wraps differently from traditional contracts, thus, keep the subjective test in traditional contracts and adopt an objective test in addition to e-wraps; third, knowledge should not be included in any future proposal as Libyan law does not place any emphasis on the moral aspect of unconscionability and consequently the quality of the enforcer's conscience; fourth, serious disadvantage must be explicitly relaxed to include any type of situation that may impair the complainant's consent. This is supported by the fact that Libyan law adopts the protection rationale for unconscionability and is specifically concerned with the complainant's consent; fifth, the adoption of the previous suggestions seems sufficient to treat

[299] See for example Intel Research Centers Driving critical research in computer science through academic collaboration. Available on: https://www.intel.com/content/www/us/en/education/highered/research-centers.html accessed 16 February 2016 and cited in Robert A Hillman and Jeffrey J Rachlinski, 'Standard-From Contracting in the Electronic Age' (2002) 77 NYUL Rev 429 <intl.westlaw.com> accessed 22 October 2015.

unconscionable bargains whether in traditional contracts or in e-wraps contracts.

These suggestions provide a modest approach to unconscionable bargains which does not look extremely relaxed when compared with the current approach of Article 129 of the Libyan Civil Code. However, if a decision-maker decides to adopt a more relaxed approach to unconscionable e-wraps, then presumed unconscionability would be a perfect solution.

As to benefitting from the California law experience with regard to the determination of substantive, the Libyan legislator should keep an eye on future developments in this jurisdiction in this regard, as what exists now does not seem sufficient for a system like Libyan law where reform is through legislation rather than precedent. Unless the Libyan High Court decides to do this job, which is highly doubtful in the light of Libya's previous experience in respect of unconscionability.

5.17 Conclusion

This chapter merged the findings of the previous chapters in an attempt to answer the main research questions.

In respect of the various approaches to unconscionability, it has been found that each jurisdiction (Libyan, English and California law) has adopted a different approach. Libyan law adopted a restrictive approach that favours focusing on contractual parties that has not been articulated through jurisprudence,which indicates its deficiency.

As to English law its approach is more advanced. English law also adopted a party-oriented approach with a circular interaction between the doctrine's main

elements. The circularity and the party-oriented approach allowed this thesis to build a theory that interpreted reasons why this law was capable of addressing different rationales and reasons why legal advice has had a different value in case law where in some cases it was recognised as a main element (*Fry v Lane*) while in other cases it was a complementary element (*Alec Lobb*).

California law provides a totally different approach to unconscionability that is contract-oriented with a focus on contractual terms rather than contractual parties. This was coupled with a sliding scale that ties up the doctrine's main elements of procedural and substantive unconscionability.

Observing these different approaches has taken the discussion a step ahead to address the insignificance. This was achieved by connecting the different approaches to the rationales that unconscionability can serve which according to the theory proposed affects the unconscionability position in contract law. This theory partly addressed the research question that is concerned with the theoretical bases of unconscionability. It argues that when unconscionability was justified in English law as a means to protect contractual weaker parties there were attempts to address it under inequality of bargaining power as a general principle.

Following the rejection of the adoption of inequality of bargaining power, which was coupled with a change in the unconscionability rationale towards the prevention of exploitation, unconscionability found its position in contract law as a doctrine derived from good faith, or in the language of English law as one of the piecemeal solutions that English law adopts to solve unfairness in contracts.

As to California law the contract-oriented approach links unconscionability to its substantive part, which consequently results in adopting the remedying

unfairness rationale. This in turn places unconscionability in this jurisdiction under unconscionability as a general principle.

Having identified the different approaches to unconscionability, the argument moved on to address how e-wraps would fit within these approaches. The argument in this regard addressed how unconscionability would be applied in each approach depending on the decision-maker's preference whether to relax the test of unconscionability in favour of further protection for online users, or to restrict its application in favour of the enforcement of e-wraps.

These findings allowed this chapter to conclude by proposing a reform for unconscionability in Libyan law that is based on the experience of English and California law.

While this chapter provides most essential points that are related to understanding unconscionability, a more enhanced insight into the theoretical bases of unconscionability is required, because the discussion so far has succeeded in putting unconscionability into context by demonstrating under which general principle in contract law it should be positioned. However, a contextualisation of unconscionability in contract law remains incomplete if it does not explain the doctrine in relation to the other main values in contract law such as freedom of contract, distributive justice and certainty in law. While addressing the doctrine in relation to these values enhances the understanding of the theoretical bases of unconscionability, which are related to one of the research questions, it also helps to defend any proposal to reform unconscionability to ensure its application in contract law. Therefore, these issues will be addressed in the next chapter to insure the completion of the full picture of unconscionability in contract law.

Chapter Six

The Theoretical Way Forward for Approaching Unconscionability in Context

6.1 Introduction

The findings of chapters two and three showed that unconscionability in English and California law is regulated to a great extent in both jurisdictions regardless of the fact that there are some issues that cause concern in its application in California. While Chapter Four was concerned with how e-wraps would fit into the recognised approaches to unconscionability in each jurisdiction, Chapter Five aimed to address the general findings in relation to the main research questions of this thesis. It proposed a theory for a better understanding of unconscionability.

This chapter is mainly concerned with how this theory fits into the general picture of unconscionability as demonstrated through several legal works; it also involves an evaluation in terms of the theory proposed in this thesis of how things actually are, as understood from the theoretical literature and the theory.

Accordingly, the discussion here generalises the wider meaning of the proposed theory. It is mainly a discussion about the implications of the findings of the previous chapters for existing knowledge.

In doing so, this chapter addresses the research question what is the theoretical basis of unconscionability? This chapter completes the answer to this question, as part of the theoretical basis of unconscionability was signified in the previous chapter in the theory of how unconscionability should be expressed in contract

law. This theory discussed under which general principle unconscionability should be placed in contract law.

Accordingly, it can be argued that this theory clarifies the vertical relationship of unconscionability with other general principles in contract law. Now the discussion moves on to address the horizontal relationship of unconscionability with other clusters of concepts in contract law.

The discussion in this chapter is held in light of a number of objections commonly raised in response to unconscionability. These objections are: 1) if the fairness of the contract is to be determined, it is necessary to place the litigated transaction within the context of the market because this context may determine the fairness of the transaction; 2) unconscionability may contribute to heightened uncertainty within law; 3) contract law should not be concerned with the redistribution of wealth.[1]

In fact, some of the theoretical frameworks that are related to understanding unconscionability were in response to these objections.

it is noticeable that the substantive part of unconscionability generates most objections. Therefore, some frameworks attacked Leff's theory of dividing unconscionability into procedural and substantive unconscionability. [2] A

[1] Ewan McKendrick, *Contract Law* (11th edn, Palgrave Macmillan, 2015) 306 (citation omitted). Closer inspection of McKendrick's objections shows that he objects to unconscionability in its general sense, that is, as a general principle rather than a vitiating factor.

[2] Arthur Allen Leff, 'Unconscionability and the Code. The Emperor's New Clause' (1967) 115 (4) The University of Pennsylvania Law Review 485, 487. However, most commentators adhere to this division. See for example Robert S Adler and Richard A Mann, 'Good Faith: A New Look at an Old Doctrine' (1994) 28 (31) Akron L Rev 31, 41; Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 (4) The University of Chicago Review 1203, 1279.

number of these frameworks are of marginal significance, and add little or nothing to Leff's framework.[3]

In contrast, some frameworks are more substantial. For example, Hillman argues that there is no need to require the combination of the substantive and procedural components of unconscionability: he maintains that traditional doctrines of duress, fraud, undue influence and lack of capacity will bar the enforcement of the contract if one of the parties has not voluntary agreed to it.[4] In his view, these doctrines provide protection against misconduct in the bargaining process; as such, he counsels an expansion of traditional doctrines. In doing so, he focuses on doctrines that protect contractual parties from misconduct in the bargaining process such as offer and acceptance, fraud and duress. [5]

Hillman claims that the expansion of traditional rules, to achieve the results that would otherwise have been achieved by the application of unconscionability, is sufficient. He maintains that this expansion should be perceived as a natural development of these rules.[6] It can be argued that viewing the expansion of traditional rules as a natural development of these rules does not appear to be different to the manipulation of traditional rules, which used to be followed, prior

[3] For example, Ellinghaus expresses a strong dislike of the division of unconscionability into procedural and substantive unconscionability. However, he ultimately accepted this division upon the grounds that it would ease the analysis of the doctrine. See M P Ellinghaus, 'In Defense of Unconscionability' (1969) 78 (5) The Yale Law Journal 757, 762. Schwartz also evidenced a preference for 'non-substantive', often applying it at the expense of 'procedural'. See Alan Schwartz, 'A Reexamination of Non Substantive unconscionability' (1977) 63 Virginia Law Review 1053, 1054-1055.
[4] Robert A Hillman, 'Debunking Some Myths About Unconscionability: A New Framework for UCC Section 2-302' (1981) Cornell Law Review 1, 6.
[5] Ibid.
[6] Ibid 15,17.

to the adoption of unconscionability in the US and was one of the main reasons behind the enactment of unconscionability in this jurisdiction.[7]

However, Hillman claims that it is possible to apply what he terms 'pure unconscionability', a form made up entirely of substantive unconscionability.[8] One clear limitation of this argument is the absence of cases in which unconscionability has been applied without the presence of procedural unconscionability, or at very least the presumption of procedural unconscionability.

Similarly, in Epstein's framework only procedural unconscionability applies.[9] Epstein's reluctance to adopt substantive unconscionability derives from his view that this part of the doctrine contradicts freedom of contract. According to him, substantive unconscionability "serves only to undercut the private right of contract in a manner that is apt to do more social harm than good."[10] Therefore, it should be wisely applied.

In another thread of theories, it seems that a response to the claims that unconscionability restricts freedom of contract, impelled some scholars to explain unconscionability in the light of assent (offer and acceptance) in contracts.[11]

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[7] Comment (1) on §208 of the Restatement (Second) of Contract.
[8] Hillman (n 4) 5.
[9] Richard A Epstein, 'Unconscionability: A Critical Reappraisal' (1975) 18 (2) Journal of Law and Econmic 293, 295.
[10] Ibid 315.
[11] The Restatement (Second) of Contracts establishes that assent refers to offer and acceptance and should, upon this basis, be labelled as 'mutual assent'. Refer to §22 of the Restatement "Mode of Assent: Offer and Acceptance". §17 establishes that "[e]xcept as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." See for example: Ellinghaus (n 3) 762-772. Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, Little, Brown 1960); John E Murray, 'Unconscionability: Unconscionability' (1969) 31 (1) University of Pittsburgh 1.

Murray explains how both types of unconscionability relate to assent. He observes that unconscionability governs the rule that 'one is bound by what he signs'. According to him, the ideal case of unconscionability is where one party transfers the burden of unexpected risk (values exchanged or rights and obligations) onto a counterpart. [12] In his view, each contract can be conceptualised with reference to a circle of assent. Normal risks fall within actual assent, while unexpected risks are instead placed outside of the assent circle.[13] When burdens of obligation target one party more than the other, they can be described as non-normal or unexpected risks that will be subject to the investigations of the court.

Murray suggests that, when it is clear that the complainant did not actually assent to the risk transference, the contract will be invalidated for its 'procedural unconscionability' and if it is instead demonstrated that he/she did not have any other choice than to assent, then this can be said to be a case of substantive unconscionability.[14]

However, Murray's placing lack of choice under substantive unconscionability can be legitimately questioned, as it can be argued that lack of choice is related to the procedural aspect of the doctrine, rather than its substantive aspect.

Llewellyn, in a related framework that is also based on assent, examines standard form contracts, and distinguishes between 'actual assent', which exists in what has been called 'dickered terms', and 'blanket assent', which is related to the pre-drafted terms.[15] This framework establishes that negotiated terms in standard form contracts are the only ones to which the complainant really

[12] Murray (n 11) 18.
[13] Ibid 15-16.
[14] Ibid 21.
[15] Llewellyn (n 11) 370-371.

assented. Thus, the pre-drafted terms were not actually assented to by the complainant, and can therefore be nullified.

The disparities between the aforementioned frameworks clearly highlight the divergence between scholars in relation to understanding unconscionability. Therefore, the analysis in this thesis departs from these frameworks and suggests an assessment of the unconscionability relationship alongside three main values in contract law that are: freedom of contract, certainty in law and distributive justice. The choice of these notions is grounded on the above highlighted objections, which in essence allege unconscionability conflicts with these notions.

When these allegations are viewed especially from the classical law perspective, it is easy to see how some frameworks have furthered the impression of an inherent conflict.

Firstly, unconscionability leads to setting the unconscionable bargain aside, while the key role of classical contract law is to enforce contracts as long as they are voluntarily entered into.[16] Secondly, unconscionability examines the fairness of contracts outcome, which is "inconsistent with individual freedom".[17] Thirdly, the connection of unconscionability to norms of fairness is difficult to be defined precisely and its lack of a precise meaning, raises issues of uncertainty.

[16] A H Angelo and E P Ellinger, 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States' (1991) 14 (455) Loy LA Int'l & Comp LJ 455, 461,citing *Earl of Ardglasse v Muschamp* 23 Eng Rep 438 (1684); H G Beale (ed), *Chitty on Contracts,* Vol1 (32nd edn, Sweet & Maxwell 2015) s1-026.

[17] Stephen A Smith, 'In Defence of Substantive Fairness' (1996) 112 L.Q R 138, 9. Atiyah has observed that, during the eighteenth century, the performance of judges evidenced a marked emphasis upon substantive justice. See P S Atiyah, *The Rise and Fall of Freedom of Contract,* (Oxford: Clarendon 1979).

A serious weakness with the foregoing argument, however, is that unconscionability was applied in English and California jurisdictions[18] during the late eighteenth century and nineteenth centuries when classic thought was the dominant theoretical framework.

This raises one of two assumptions, either, unconscionability as an equitable remedy was applied as an exception[19] to general classic law; or, alternatively, unconscionability does not actually contradict the central concepts of classic contract law.

While it is conceivable to interpret most criticisms as a reflection of these scholars' over-attachment to classic contract law that is based on freedom of contract and sanctity of contracts, who, therefore, view the adoption of unconscionability in domestic laws as a limitation of these conceptions, it is also possible to view unconscionability as a reflection of modern contract law that over-attachment to concepts of social justice and altruism and adopts a more relaxed approach to which freedom can be observed within modern applications of contract law.

This thesis takes the discussion a step further by investigating the doctrine's true relationship with the notions of freedom of contract, certainty in law and distributive justice, which triggered most criticisms in the first place. The argument here is based on a belief that a doctrine like unconscionability that enjoys great flexibility, as proved in the previous chapter, cannot contradict the main values of contract law that characterise this branch of the law.

[18] See for example: *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865; Jacklich v Baer 135 P 2d 179 (Cal Ct App 1943).
[19] Under classical law, equity is viewed as an exceptional jurisdiction. See Jack Beatson and Daniel Friedmann (ed), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, New York, Oxford University Press 1995) 11-12.

Therefore, the accuracy of the allegations of conflict is now examined below.

6.2 Unconscionability and Freedom of Contract

Freedom of contract is a crucial point to diagnose in contract law.[20] Most literature that engages with unconscionability stresses the importance of preserving freedom of contract as a core principle in contract law.[21] Legal scholarship can generally be divided into two schools of thought. The first presents a conflict between unconscionability and freedom of contract, and thereby furthers the impression that unconscionability is a restriction to freedom of contract.[22] The second envisages no contradiction, instead presenting the two concepts as being in a cooperative relationship. This has led some observers to argue that unconscionability strengthens freedom of contract.[23]

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[20] Commission of the European Communities, *First Annual Progress Report on European Contract Law and the Acquis Review* (Com(2005) 456 final) 5.

[21] See for example: Hillman (n 4) 1; Angelo and Ellinger (n 16) 455-56; Barry J Reiter, 'The Control of Contract Power' (1981) 1 (3) Oxford Journal Legal Studies 347; Epstein (n 9) 294.

[22] See for example: Anthony T Kronman, 'Paternalism and the Law of Contracts' (1983) 92 (5) The Yale Law Journal 763, 764; Spencer Nathan Thal, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 (1) Oxford Journal of Legal Studies 17,17; E Posner, 'Contract Law in the Welfare State: A Defence of the Unconscionability Doctrin, Usury Laws, and Related Limitations on the Freedom of the Contract' (1995) 24 Journal of Legal Studies 283, 297, fn:23; Mark Pettit, Freedom, Freedom of Contract, and the 'Rise and Fall' (1999) 79 BUL Rev 263, 296; Rick Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part I', (2000) 16 (1/2) Journal of Contract Law 1,1; Beale (n 16) s7-130; Hillman (n 4) 1; Angelo and Ellinger (n 16) 466; Steven J Burton, 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 (2) Harvard Law Review 369, 372.

Wille provided further insight in this respect. In this case it was stated that: "American courts have traditionally taken the view that competent adults may make contracts on their own terms, provided they are neither illegal nor contrary to public policy, and that in the absence of fraud, mistake or duress a party who has fairly and voluntarily entered into such a contract is bound thereby, notwithstanding it was unwise or disadvantageous to him. Gradually, however, this principle of freedom of contract has been qualified by the courts as they were confronted by contracts so one-sided that no fair minded person would view them as just or tolerable." Wille v Southwestern Bell Tel Co 219 Kan 755 (1976) at [757] (Citation omitted). In the same case at [759] it was stated that: "the doctrine of unconscionability is used by the courts to police the excesses of certain parties who abuse their right to contract freely."

[23] Charles Fried, *Contract As Promise,* (Harvard University Press 1981); John A Spanogle, 'Analyzing Unconscionability Problems' (1969) 117 (7) University of Pennsylvania Law Review 931; Peter A Alces, *A Theory of Contract Law: Empirical Insights and Moral Psychology* (Oxford University Press 2011) 128; S M Waddams, 'Unconscionability in Contracts' (1976) 39 (4) The Modern Law Journal 369, 372.

While both arguments have aspects that recommend them, this thesis argues in support of the second.

An examination of the accuracy of these contentions requires a review of the nature of freedom of contract and a demonstration of why restrictions to freedom of contract are acceptable in some situations. In concluding, this discussion demonstrates that unconscionability is not an exception to freedom of contract; rather it serves to strengthen it, because unconscionable bargains usually lack the presence of some specific aspects of freedom of contract. The argument in this regard, asserts that the test of the relationship between both concepts should also take into account both types of freedom (freedom to contract and freedom from contract), along with the general nature of contractual disputes (the adversarial interests of contractual parties).

6.2.1 The Nature of Freedom of Contract

In considering the nature of the freedom of contract that allows placing some restrictions on the concept, two separate contributions have been made to the legal literature. The first suggests that freedom of contract is not absolute therefore it can be restricted. The second maintains that freedom possesses two meanings and the alternation between the two, impacts profoundly upon its relationship with unconscionability.

6.2.2 Freedom of Contract: A Matter of Degree

In the first contribution, freedom of contract is essentially a matter of degree. This is consistent with the opinion that “no civilised system of law can accept

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Kugler v Romain clarified that this section of the Uniform Commercial Code, which authorised courts to decline the enforcement of unconscionable contracts, was not to erase the doctrine of freedom of contract. Kugler v Romain 58 N J 522 (1971) at [544].

the implications of absolute sanctity of contractual obligations." [24] The proposition that freedom of contract is not absolute is manifested in two attributes: its qualification and the fact that it does not exist independently from other values and concepts. In other words, the application of doctrines that restrict freedom of contract does not violate freedom of contract; rather, it reflects the fact that freedom of contract is not an absolute principle. This point is reiterated: when freedom of contract is balanced with other values; or when the quality of the advantages that have been taken in contracts are subject to assessment.

6.2.3 Balancing Freedom of Contract

With regard to the question of balancing freedom of contract with other values, freedom of contract might be restricted or mitigated by values that derive from case law or legislation.[25] For some, this stance reflects the natural order of things.[26] Raz suggests that the autonomy principle, which is the philosophical component of positive liberty, [27] is ultimately dependent upon its goals.

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[24] Waddams (n 23) 370. Thal similarly highlights the danger that freedom of contract may produce a range of unfair results, therefore, he argues in favour of a number of limitations. Thal (n 22) 33. Reiter also argues that "total freedom had to be limited in order that there could be any freedom." Reiter (n 21) 351-52.

[25] Chitty on contracts presents standard form contracts as a constraint upon the choice of contractual parties. Beale (n 16) s1-034; Atiyah also suggests that duress, undue influence and unconscionability are relevant examples. See Atiyah (n 17) 148-149 and 476-478; Bigwood (n 23) 4; Melvin Aron Eisenberg, 'The Resposive Model of Contract Law' (1984) 36 Stanford Law Review 1107, 1111-12, 1116; Pettit advances the same view when he suggests that the importance ascribed to freedom of contract ultimately depends upon the level of importance that is ascribed to other components of public policy. See Pettit (n 22).
In *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd v Rennie Hogg Ltd (Third Party)* [1973] RTR 95 at [103] Lord Denning, cited his previous statement in *John Lee*, in which he said: "The time may come when this process of 'construing' the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago: '… there is the vigilance of the common law which, while allowing of contract, watches to see that it is not abused'." See *John Lee & Son (Grantham) Ltd and Others v Railway Executive* [1949] 2 All ER 581 at [584].

[26] Waddams (n 23) 370.

[27] 'Positive and Negative Liberty', *The Stanford Encyclopaedia of Philosophy* (first published Feb 27, 2003; substantive revision Aug 2, 2016) < https://plato.stanford.edu/entries/liberty-positive-negative/ accessed 20 September 2016.

Autonomy can only be said to be of value if it contributes to the good; to encourage this end, the state is permitted and even required to intervene, with a view to limiting or curtailing actions directed to evil or bad.[28] Positive autonomy is therefore permitted insofar as it leads to the good, while state intervention is legitimate when it prevents harm.

Kennedy similarly argues in favour of a more general approach, noting that, in instances of ambiguities or gaps within the institution of freedom of contract, the decision maker, will need to choose between two sets of policy - an altruistic or an individualistic approach.[29] The approach chosen by the policy maker will determine the values that will be balanced with freedom of contract.

In another framework that presents the idea of balancing freedom of contract with other values, Waddams references unjust enrichment. According to him, freedom of contract permits enrichment via contracts by enabling the enforcement of the contract, but this permission is, to a certain extent, limited. When enrichments appreciate in scale and become coupled with disparities in bargaining power, the enforcement of the contract will be challenged by unconscionability.[30]

Unconscionability may, in the latter view, be considered as entailing a concern with social issues or fairness.[31] In this form it may be perceived as a mechanism that will help to prevent exploitation.[32]

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[28] J Raz, *The Morality of Freedom* (Oxford: Clarendon 1986) 426-427.
[29] Duncan Kennedy, 'Distributive and Paternalist Motives in Contract and Trot Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 (4) Maryland Law Review 563, 581.
[30] Stephen M Waddams, 'Good Faith, Unconscionability and Reasonable Expectations' (1995) 9 Journal of Contract Law 55, 60.
[31] Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine', (1985) 94 (5) The Yale Law Journal, 997, 1024.

From a wider perspective, balancing may be presumed to indicate a law that encompasses several values, objectives and contesting norms; upon this basis, a law may be criticised for lacking a unified theory or for being indeterminate. Alternately, balancing may orientate towards a law in which integration and coherence are pre-eminent. In this latter instance, legal principles have clear limitations, which are conducive to the promotion and cultivation of sound rules.[33] Within this approach, limitations are the key principle.

6.2.4 Quality of Advantage-Taking

The quality of advantage-taking, which frequently appears as an important consideration in unconscionability cases, is the second instance in which freedom of contract appears not to be absolute. In this respect, Kronman observes that in most "mutually advantageous exchanges, there is advantage-taking by both parties."[34] However, this does not mean that all types of advantage-taking should be permitted.

Kronman notes that legitimate advantage-taking in contracts does not invade the rights of the other party. In direct opposition, unjustified and illegitimate advantage-taking does invade the rights of the other party, and can to this extent be said to equate to coercion. According to Kronman, 'advantages' encompass all forms of 'common-pool' talents, benefits or resources. These include, *inter alia*, strength, knowledge and intelligence.[35] Kronman remarks

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[32] Seana Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' (2000) 29 (3) Philosophy of Law, 205, 227-228.
[33] Mindy Chen-Wishart, 'The Nature of Vitiating Factors in Contract Law' in Gregory Klass, George Letsas, and Prince Saprai (ed), *Philosophical Foundations of Contract law* (Oxford Scholarship Online 2015) 314-315.
[34] Anthony T Kronman, 'Contract Law and Distributive Justice' (1980) 89 (3) The Yale Law Journal, 472, 480.
[35] Ibid 493.

that there is no satisfactory test that enables a distinction of acceptable and unacceptable advantage-taking in contracts.[36]

Kronman suggests that an analysis of natural superiority; utilitarianism; and paretianism would assist in determining legitimate advantage-taking. Furthermore, he contends that paretianism is the only principle that is consistent with core libertarian beliefs. He then distinguishes two types of paretianism. The first type operates at the individual level, and is consequently directed towards the individual victim in the transaction. Accordingly, advantage-taking will only be permitted if the disadvantaged party benefits in the long run from the advantage that has been taken.[37] The second type is instead directed towards a concern that the advantage that has been taken will in the long-term benefit most people (as opposed to the disadvantaged party).[38]

Kronman expresses a clear preference for the second type, because it provides a better justification for the permitted advantage-taking. He consequently suggests that the possession of advantages provides the holder with a prima facie right to exploit them for his/her benefit. This right can, however, be defeated by others' legitimate claims.[39] When the advantage-taking is not paretian, the disadvantaged party can ask for the invalidation of the contract.

This preference has been criticised for offering a one-sided focus upon paretianism, it being argued that Kronman took into account the perspective of those who had been disadvantaged, failing to take into account the welfare of the enforcer in the process.[40] Baker therefore advanced another justification for

[36] Ibid 478-483.
[37] Ibid 486.
[38] Ibid 487.
[39] Ibid 493.
[40] C Edwin Baker, 'Starting Points in Economic Analysis of Law' (1980) 8 (4) Hofstra Law Review, 939, 970.

advantage-taking, drawing upon a set of moral principles to assess the advantage-taking that should be permitted in different circumstances.[41] However, both approaches make a significant contribution; helping to establish that not all advantage-taking in contracts should be permitted and freedom of contract cannot help in determining which type should be permitted.

Any determination must incorporate other values and instruments. The essential preoccupation can be said to be balancing – this should be evidenced and sustained across two levels. At the first level freedom of contract is defined in wide perspective, with reference to other values. The second level is narrower, and instead focuses upon the proposition that individuals have the right to follow their interests insofar as it does not harm the other contractual party's interests. If this proposition is threatened, then unconscionability and similar doctrines will intervene with a view to restricting the first party's freedom to contract.

Unconscionability aligns closely with this concern, because one of the doctrine's main elements is unconscionable advantage-taking.[42] Here it should also be noted that Backer's suggestion of resorting to moral principles to assess permitted advantage-taking is compatible with the moral aspect of unconscionability that invokes morality in deciding what is right and wrong, whether this applies to the enforcer's conduct or the terms of the contract.

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[41] Ibid.

[42] Refer to Frankfurter J's statement in United States v Bethlehem 315 U S 289 (1942) [326]. *Wille* also declared that: "the doctrine of unconscionability is used by the courts to police the excesses of certain parties who abuse their right to contract freely." Wille v Southwestern Bell Tel Co 219 Kan 755 (1976) [759]. In advancing the same point, Lord Denning observed that: "Above all, there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused." See *John Lee & Son (Grantham) Ltd and Others v Railway Executive* - [1949] 2 All ER 581 at [584].

6.2.5 Freedom of Contract: Meanings

The second argument that is advanced with reference to the nature of freedom of contract ascribes traditional/formal and substantive meanings to freedom of contract. This view establishes that freedom of contract is still the starting point for any investigation that is conducted under contract law. It maintains that equality and freedom of contract require substantive rather than formal understanding. The substantive meaning of equality "includes the need for positive action to counterbalance existing factual and social imbalances that make people dramatically unequal."[43] Meanwhile, the substantive meaning of freedom of contract "includes the need for positive action to counterbalance existing factual and social constraints that make one contractual party dramatically less than the other."[44]

In contrast, the formal understanding of freedom of contract "presupposes only *juridical* freedom to enter into a contract and to decide upon its content."[45] Closer reflection suggests that the formal meaning should be placed within classic contract law while the substantive meaning should be situated within the modern image of contract law,[46] because contrary to modern contract law, classic contract law adopts a rigid view of freedom of contract based on its preference for individualism and formalism in contracts.

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[43] Aurelia Colombi Ciacchi, 'Freedom of Contract as Freedom from Unconscionable Contracts' in Mel Kenny, James Devenney, Lorna Fox O'Mahony (ed) *Unconscionability in European private financial transactions* (Cambridge University Press, 2010) 8.
[44] Ibid.
[45] Olha O Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party,* (Munchen, Sellier. European Law Publisher 2007) 10.
[46] Wilson has also suggested that it is necessary to reconsider the meaning of freedom of contract. Nicholas S Wilson, 'Freedom of Contract and Adhesion Contracts' (1965) 14 (1) International and Comparative Law Quarterly, 172, 192. Carolyn Edwards, 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues' (2009) 77 (3) UMKC Law Review, 647, 647.

Cherednychenko, for instance, suggests that the substantive understanding of freedom of contract "focuses on the existence of a *real* freedom to make one's decision on these matters."[47] This corresponds with an observed tendency in modern law, in which there has been a clear drift towards a more individualised approach[48] that is engaged with the actual intention of contractual parties. In keeping with this development, it has been suggested that principles of contract law can be situated on a spectrum. At one end of this spectrum there are objective and standardised principles; at the other, there are subjective and individualised principles.[49] Formal freedom is situated at one end and its substantive counterpart at the other.

The substantive meaning therefore seeks to secure a real meaning for both parties. Cherednych explains that substantive freedom in modern contract law requires that the interests of the disadvantaged party (complainant) be taken into account. Upon this basis, control over the bargaining process should be enhanced. This control "aims to secure a real freedom of contract for *both* parties to the contract rather than the protection of the weaker party for its own sake."[50] Cherednychenko expands upon this contribution to recognising that modern contract law does not question the protection of the weaker party. Rather, the question in modern contract law is concerned with the extent to which the weaker party should be protected, with a view to ensuring that he/she enjoys *real* freedom.[51] Therefore freedom of contract is still a dominant principle

[47] Cherednychenko (n 45) 11; Ciacchi (n 43) 9-13.
[48] Eisenberg outlines this model in more depth. See Eisenberg (n 25) 1107-1108.
[49] Ibid.
[50] Cherednychenko (n 45) 11 (author's emphasis).
[51] Ibid.

and the real question is "how formally it be conceived, or how much materialization is needed, acceptable, and can be justified."[52]

Applying the preceding account to unconscionable bargains, it can be argued that unconscionability may conflict with the traditional formal understanding of freedom of contract. [53] However, there is no contradiction between unconscionability and substantive freedom. The latter does not just imply the freedom to make a contract, but also precludes detriment to the party that was not in a position to make a free choice.[54] This claim is consistent with the preceding analysis, along with the suggestion that unconscionability should be viewed as a tool of state intervention, operating as an exception to freedom of contract. Still, some theories suggest the opposite view and hold that unconscionability co-operate with freedom of contract in contracts without the need to distinguish between the different meanings of freedom of contract.

6.3 Unconscionability as a Supplementary Doctrine

Fried has advanced the argument that unconscionability is a supplementary doctrine. He bases his theory of contract upon the liberal principle that "the free arrangements of rational persons should be respected". [55] He argues that: "these doctrines [duress and unconscionability] perform distinct functions that are not only compatible with the concept of contract as promise but even essential to it."[56] While some bargains may meet all the formation tests, they

[52] Ibid (citation omitted).
[53] Ciacchi (n 43) 15.
[54] Ibid 8. Ciacchi makes it clear that his preference is to apply formal and substantive freedom of contract, which both possess the same aspects of freedom of contract (positive and negative freedom).
[55] Fried (n 23) 35.
[56] Ibid 93.

may also be too harsh to enforce.[57] If this argument is to be sustained it will be necessary to demonstrate that unconscionability does not contradict the main concepts in contract law, primarily freedom of contract itself.

Similarly, Spanogle divides procedural unconscionability [58] into 'surprise' (resulting from misleading bargaining conduct) and 'oppression' (resulting from inequality of bargaining power and the lack of bargaining over contract terms).[59] In cases of procedural unconscionability the actor chooses to enter into the contract, despite the lack of co-determination of contractual terms, which is a key requirement of freedom of contract. The non-satisfaction of freedom of contract requirements calls for further scrutiny of contracts via unconscionability. Accordingly, unconscionability promotes freedom of contract.[60]

The use of unconscionability to examine the pre-drafted terms, in addition to the application of freedom of contract to the negotiated terms, will encourage the contractual parties to work together to determine the terms of the contract. If this does not occur, there is a clear danger that the contract will be nullified.[61] To put it slightly differently, positive freedom sustains self-determination, and enables the contractual party to determine his/her contract terms; meanwhile, unconscionability enables closer scrutiny of un-bargained terms. These propositions provide further insight into the claim that freedom of contract is the

[57] Ibid 109. Thal offers the same view. He cites *Fry v Lane* [1888] 40 Ch D 312 as an example of a harsh bargain that works against freedom of contract. See Thal (n 22) 17.
[58] This interpretation originates within the approach that American courts have consistently applied in unconscionability cases.
[59] Spanogle (n 23) 935-936, 968.
[60] Ibid 935-936, 968. Gluck develops a similar argument with reference to standard form contracts without engaging with unconscionability. See George Gluck, 'The Contract Theory Reconsidered' (1979) 28 (1) The International and Comparative law Quarterly, 72, 85-86.
[61] Spanogle (n 23) 935-936.

origin of unconscionability.[62] However, they ultimately fail to encompass all aspects of positive freedom. This point will now be investigated with reference to the proposed relationship between unconscionability and the freedom that this thesis expounds.

6.4 Model of Complementarity and Context for Freedom of Contract and Unconscionability

In engaging with the relationship between unconscionability and freedom of contract, this thesis offers an interpretation that clearly recalls Spanogle's suggestion that unconscionability strengthens freedom of contract. However this thesis provides a number of supplementary contributions. Isaiah Berlin's insights into the general meaning of freedom are particularly important in this regard,[63] leading to specific insight into the meaning of freedom in contract law. This will ultimately contribute to a fuller grasp of the relationship between unconscionability and freedom of contract.

In Isaiah Berlin's account, freedom is positive and negative.[64] While both aspects can be clearly distinguished, they both feed into arguments relating to free will.[65]

Berlin explains that both aspects of freedom are, in addition to being distinct, also associated with very different practical predispositions.[66] 'Negative

[62] Angelo and Ellinger (n 16) 459.
[63] Various contributions to the literature have attempted to explain freedom. Belrin's work makes a particularly important contribution because he defends both aspects of freedom. His approach diverges significantly from the literature, which is instead more predisposed to defend one aspect. Pettit for example argues in favour of negative freedom. See Pettit (n 22) 282.
[64] This distinction can be traced back to the work of Immanuel Kant. See 'Positive and Negative Liberty', *The Stanford Encyclopaedia of Philosophy* (first published Feb 27, 2003; substantive revision Aug 2, 2016) < https://plato.stanford.edu/entries/liberty-positive-negative/ accessed 20 September 2016.
[65] Ibid.

freedom' is associated with the proposition that freedom should be protected from state intervention, while 'positive freedom' gives rise to the proposition that liberty should be limited with a view to achieving self-realisation or self-determination.[67] In other words, the former is the absence of something (obstacles or interventions) whereas the latter implies a presence of control or self-realisation. The same distinction applies in a contractual context, with freedom of contract dividing into 'freedom to contract' and 'freedom from contract'. The former is positive whereas the latter is negative.

6.4.1 Positive Freedom

Berlin refers to 'positive freedom' as "[w]hat, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"[68] The positive freedom of contractual parties is therefore manifested in them being "free to choose whether, when, and to what they bind themselves via contracts."[69] While most accounts in the literature adopt this definition,[70] a number of contributions add that contracts concluded freely are legally binding, thereby establishing that parties have "the right upon the government to enforce them."[71]

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[66] Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin and Henry Hardy *Liberty: Incorporating 'Four Essays on Liberty'* (Oxford Scholarship Online 2003) 169.
[67] 'Positive and Negative Liberty', *The Stanford Encyclopaedia of Philosophy* (first published Feb 27, 2003; substantive revision Aug 2, 2016) < https://plato.stanford.edu/entries/liberty-positive-negative/ accessed 20 September 2016.
[68] Berlin (n 66) 169.
[69] Mindy Chen-Wishart, *Contract Law* (5th edn,Oxford University Press 2015) 14. In *Prime Sight Ltd* Lord Toulson explained that freedom of contract is when "[P]arties are ordinarily to contract on whatever terms they choose and the courts' role is to enforce them." *Prime Sight Ltd v Lavarello* [2013] UKPC 22; [2014] AC436 at [47].
[70] Angelo and Ellinger (n 16) 455; Axel Flessner, 'Freedom of Contract and Constitutional Law. General Report' in Alfredo Mordechai Rabello, Peter Saracenic (ed) *Freedom of Contract and Constitutional Law* (Jerusalem, Hamaccabi Press 1998) 11; Wilson (n 46) 172; Carolyn Edwards (n 46) 654; C Mac, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (The Netherlands, Kluwer Law International BV 2008) 26; Pettit (n 22) 332.
[71] Pettit (n 22) 311. Similalry see: Kronman (n 34) 506; Todd D Rakoff, 'Is "Freedom of Contract" Necessarily a Libertarian Freedom' (2004) Wis L Rev 477, 480. Meyer assigns a different order

In explaining positive freedom of contract, Adams and Brownsword reference partner-freedom,[72] an aspect of freedom of contract that is rarely engaged within legal scholarship. This component of 'freedom to contract' provides further weight to Spanogle's argument, further reinforcing the reasoning that unconscionability does not contradict freedom of contract. While Spanogle focuses on the lack of freedom to determine contractual terms (term-freedom) in unconscionable contracts, this thesis instead adopts a different line of analysis, arguing that the lack of partner-freedom is another factor that may be encompassed under unconscionable bargains. It has already been observed that Adams and Brownsword situate partner-freedom next to term-freedom within the broader framework of 'freedom to contract'. According to them, positive freedom of contract involves the freedom to choose contractual terms (term-freedom) as well as the freedom to choose the contractual partner (partner-freedom).

While it is argued that partner-freedom is less important than term-freedom,[73] it should be recognised that it has important implications for the consideration of the relationship between unconscionability and freedom of contract, because of the inequality of bargaining power that characterises unconscionable bargains. These bargains invariably involve a bargain in which a complainant is under distress to the extent that he/she has no choice but to accept the offer of a contract. This is frequently observed in older cases, most notably those that entail catching bargains. In these cases, judges often addressed, prior to deciding the case, the question of whether the complainant was the one who

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of significance to the enforcement of contracts, and thereby reiterates that the freedom to draft contracts does not necessarily imply their enforcement. See Alfred W Meyer, 'Contracts of Adhesion and the Doctrine of Fundamental Breach' (1964) 50 (7) Virginia Law Review, 1178, 347.

[72] John N Adams and Roger Brownsword, 'The ideologies of contract' (1987) 7 Legal Stud, 205, 208-209

[73] Ibid.

offered to contract first.[74] This establishes whether the complainant had hawked around or whether his/her offer was rejected by most of the market.

This is essential if it is to be established that he/she had a choice other than to contract with the enforcer. While recent cases have not engaged with this question of who first offered the contract, it is clear that the inability to choose with whom to contract is usually a sign of pressure that is evidenced within unconscionable contracts. This also supports the argument that, during the time when classical law was dominant, unconscionability helped to compensate the impairment of partner-freedom – in these instances it did not restrict freedom but instead filled the gap that had been created by the unconscionable circumstances.

The contemporary absence of partner-freedom and term-freedom can be clearly observed in a standard form contract. Although, it is not necessary that all standard form contracts be unconscionable,[75] the nature of standard form contracts means that there is a substantial risk that unconscionable terms will be present but not observable.[76] This risk is particularly pronounced within unconscionable bargains, as these contracts are usually predicated upon inequalities of bargaining power between contractual parties. In *Suisse Atlantique*,[77] Lord Reid's statement with reference to standard forms contracts is applicable to unconscionable bargains in general. His Lordship declares that

[74] See for example: *Gwynne v Heaton* [1778] 28 Eng Rep 949 1557-1865; *Peacock v Evans* [1809] 33 Eng Rep 1079 1557-1865; *Gowland v De Faria* [1810] 34 Eng Rep 8 1557-1865; *Bowes v Heaps* [1814] 35 Eng Rep 423 1557-1865; *Shelly v Nash* [1818] 56 Eng Rep 494 1815-1865; *Baker v Bent* [1830] 39 Eng Rep 86 1557-1865; *Dally v Wonham* [1863] 55 Eng Rep 326 1829-1865. *Newton* differed because it was indirectly indicated that the complainant initially proposed to contract. See *Newton v Hunt* [1833] 58 Eng Rep 430 1815-1865.
[75] Graham v Scissor-Tail, Inc 28 Cal 3d 807 (1981).
[76] It should be noted that standard form contract is understood to qualify freedom of contract. See J Beatson, *Anson's Law of Contract* (New York, NY: Oxford University Press 2016) 6.
[77] *Suisse Atlantique Société d'Armement Maritime SA Appellants v NV Rotterdamsche Kolen Centrale Respondents* [1966] 2 WLR 944.

"[f]reedom to contract must surely imply some choice or room to bargain."[78] This declaration is basically a reference to the right of self-determination that operates under positive freedom. It also implies that the impairment of this right is a defect that establishes the basis upon which ameliorative court action can be undertaken.

Similarly, *Kugler*[79] states that:

> The intent of [§2-302, that is concerned with unconscionability] is not to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion. Viewed in that sense, freedom to contract survives, but marketers of consumer goods are brought to an awareness that the restraint of unconscionability is always hovering over their operations and that courts will employ it to balance the interests of the consumer public and those of the sellers.[80]

This statement clearly demonstrates how unconscionability overcomes the lack of choice that resulted from the inequality of bargaining power.

Thus, unconscionability when viewed from a positive freedom perspective resembles an incapacity case, falling some distance from a restriction of freedom case. This explains why expressions such as 'falls short of incapacity' were used in early unconscionability cases[81] to describe the position of the complainant.

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[78] Ibid at [406].
[79] Kugler v Romain N J 279 A 2d 640 N J 522 (1971).
[80] Ibid at [544].
[81] See for example: *Peacock v Evans* which states: "No difficulty could have arisen upon this case, if it had not been that of an expectant heir, dealing for his expectancy during his father's life. To that class of persons this Court seems to have extended a degree of protection, approaching nearly to an incapacity to bind themselves by any contract." *Peacock v Evans* [1809] 33 Eng Rep 1079 1557-1865 at [514] (Sir Win Grant).

6.4.2 Negative Freedom

Berlin defines negative freedom as "the answer to the question '[w]hat is the area within which the subject – a person of group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?"[82] This definition can be compared with 'freedom from contract', which is usually defined as "freedom of the parties from the state as well as freedom from imposition by one another."[83] Although there is no difference between the two definitions, two additional observations should be extracted from Berlin's definition: firstly, there is a permitted interference that falls beyond the realm of negative freedom. Secondly, it is clear that Berlin concludes that there are limits to negative freedom that need to be preserved.[84] This can be understood as the realm of negative freedom.

In expanding upon this realm, Berlin demonstrates that negative freedom can be said to be intact insofar as "no man or body of men interferes with my active political liberty."[85] He then proceeds to distinguish incapacity and coercion by clarifying that "[c]oercion implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by human beings. Mere incapacity to attain a goal is not a lack of political freedom."[86] Additional insight was provided in his distinction of 'economic freedom' and 'economic slavery'. He explains that:

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[82] Berlin (n 66) 169.
[83] Duncan Kennedy (n 29) 570. For further insight on this point see: Meyer (n 71) 1184; Pettit (n 22) 268; Angelo and Ellinger (n 16) 455; Wilson (n 46) 172; Mac (n 70) 25.
[84] Berlin argues that English thinkers reason that it is not possible to reconcile human purposes and activities. If culture, justice and security were to prevail, it was therefore necessary for an individual's free action to be limited by law. Berlin (n 66) 170-171.
[85] Ibid 169.
[86] Ibid 169.

> [i]t is argued, very plausibly, that if a man is too poor to afford something on which there is no legal ban ... he is as little free to have it as he would be if it were forbidden him by law. If my poverty were a kind of disease which prevented me from buying bread… this inability would not naturally be described as a lack of freedom, least of all political freedom. It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery.[87]

Applying this understanding to unconscionability cases shows that unconscionability does not restrict freedom of contract, because, although in such cases the complainant was not able to achieve his/her desires, this inability cannot be described as a lack of freedom, according to Berlin's explanation. Rather the unconscionable circumstances, which restrict the complainant's ability to conclude a better contract could better be described as cases of coercion. From such a perspective the focus is on the victimisation aspect of unconscionability, that is taking advantage of the complainant's disadvantage.

This conception of unconscionability relies on Berlin's explanation of positive and negatives freedom generally could be advanced through considering the legal literature's definition of *freedom of contract*.

The literature does not restrict a 'freedom from contract' (negative freedom) to a freedom from state intervention within an individual's transactions. One definition equates it with the "the idea that as a general rule there should be no

[87] Ibid 170.

liability without consent embodied in a valid contract."[88] When presented in this form it appears to be freedom from contractual liability.

Rakoff quotes another definition, in which a freedom from contract is "the ability of parties to make legally unenforceable promises."[89] In further unravelling this definition, he maintains that a 'freedom from contract' refers to the absence of legal enforcement, thus contrasting with the positive meaning of freedom to contract, which involves enforcement.

At first glance, this does not appear to significantly diverge from the definition of freedom from liability. However, it should be acknowledged that the previous quotation from Rakoff places particular emphasis upon *the ability* of the parties. In acknowledging that he is referring to legal ability, he concludes that "the absence of enforcement is not meant to connote positive outlawry."[90] In other words, a freedom from contract describes a legal contract because it fulfills all the requirements of the law to conclude a contract; however, this contract is unenforceable.

This basically corresponds to unconscionable contracts in instances where unconscionability has been applied. A 'freedom from contract' therefore "describes a realm of activity protected from direct governmental intervention either by way of enforcement or by way of prevention. It is purely negative freedom."[91] Speidel also defines a 'freedom from contract' as "the exercise of the unilateral power to avoid or exit from a contractual relationship with little or no cost."[92]

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[88] Beatson (n 76) 4, 7; Beatson and Friedmann (n 19) 8.
[89] Rakoff (n 71) 481.
[90] Ibid.
[91] Ibid.
[92] Richard E Speidel, 'The New Spirit of Contract' (1982) 2 (193) JL & comparative, 193,197.

When these different definitions are taken into consideration, it will be observed that a 'freedom from contract' is the aspect of freedom that best captures the nature of contractual disputes in which two parties are involved. The first actor seeks to enforce the contract that has been consented to, thereby practicing a positive freedom. The other party instead seeks to exit from the contract, which he/she has consented to. In an unconscionable bargaining case, the enforcer seeks the enforcement of the unconscionable contract/term while the complainant seeks to escape the unconscionable contract/term.

By virtue of the fact that 'freedom to contract' has been interpreted as emphasising contract enforcement, while 'freedom from contract' instead privileges non-enforcement, it may be argued that the observed emphasis upon freedom from contract, as presented by Rakoff and Speidel, is a development that has emerged with a view to justifying doctrines as unconscionability.

Accordingly, many of the rules that result in contractual parties withdrawing with relative impunity are an application of 'freedom from contract'. Speidel provides a useful survey of classic contract law that provides particular insight into these rules,[93] most notably the rules of mirror image of offer and acceptance,[94] the requirement of certainty in contract terms [95] and the preference for damages rather than specific performance in instances where breaches have occurred.[96]

[93] Ibid 197-98.
[94] *Buttler v Ex-Cell O Crop (England) Ltd* [1979] 1 WLR 401.
[95] *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209.
[96] McKendrick (n 1) 330.
§359 of the Restatement (Second) of Contract therefore suggests that: "Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party." §358 of the Restatement (First) of Contract.

Moreover, Rakoff considers the requirement of contracts to be definite, and questions the rationale of the enforcement test under this requirement.[97] In doing so, he asks whether the test should be placed under positive freedom. If so, the test will ask whether the contractual parties truly meant to conclude a contract. Rakoff also introduces the possibility that the test may be considered an application of positive freedom with an element of negative freedom. If so, the test will also seek to protect the parties from contracts that they did not truly mean to conclude.[98]

Accordingly, if definiteness serves a cautionary rationale then a freedom from contract must play a role in its test, if not, then its test should be viewed under positive freedom. Under positive freedom, the test would reflect that the parties did not truly intend to contract, or it might be rationalised under negative freedom and therefore a non-definite contract reflects the parties' weak or irrational decision which calls for protection to be provided by the non-enforcement of the contract.[99]

If the same narrative was adopted in an unconscionability test, unconscionability could be explained from both perspectives of freedom, because they serve the protection and the anti-exploitation rationales of unconscionability. More precisely, when the focus is more on positive freedom the unconscionability rationale would be anti-exploitation, because this aspect of freedom attempts to ensure the parties' true and free choice. While if the

[97] According to Rakoff "contracts that can lawfully be made but will not be enforced" are the heartland of (freedom from). Rakoff (n 71) 486.
[98] Ibid.
[99] Ibid.

focus is more on negative freedom the unconscionability rationale would be the protection of weaker parties from their irrational decisions.[100]

However, it could be suggested that the unconscionability test encompasses both types of freedom, because it assesses the conduct of the enforcer, which ensures that the complainant was not compelled to contract and that he *freely entered* the contract (positive freedom). The test also includes an assessment of whether the complainant's decision to contract was an informed one. Here the test seeks to protect the complainant (negative freedom).

Thus, any chosen perspective to the relationship of unconscionability to freedom of contract must ultimately engage with the issue of whether both aspects of freedom are equal or whether one aspect predominates. This question was raised by Berlin and has still not been sufficiently addressed. It can be argued that there is no basis upon which positive freedom can be said to be more important than its negative counterpart. If allegations of an inclination of freedom from contract are to be offset, it is preferable to situate any examples provided in support of 'freedom from' within the wider context of contract law.

It has been claimed that the law of contract, in establishing a sharing of the wills of the respective parties, ultimately favours the strong; however, it could be legitimately responded that, in sharing the wills of the judge and legislator, it ultimately favours the weak.[101] It can therefore be argued that the identification of positive freedom or negative freedom of contract ultimately reflects a bigger

[100] For further insight on the different rationales that unconscionability may serve refer to Chapter Five (text to n 35-85).
[101] H Havighurst, *The Nature of Private Contract* (William S Hein & Co Inc 1961) 131.

purpose – namely that the purpose of contract law is to serve the fact that transactions involve two parties.

In making decisions, the courts balance and assess the basis upon which claims of 'freedom to contract' and 'freedom from contract' are advanced. In addition, arguments that assert 'freedom to contract' should not be understood to imply that the positive aspect of freedom is more important than its negative counterpart. Such arguments should be understood and interpreted as part of the context in which the argument is situated[102] - if this is not the case, there is clear danger that flawed targets and other values may intrude. For example, it has been suggested that the emphasis upon freedom to enter contracts has prevented courts from responding fairly to onerous clauses within standard form contracts.[103]

Accordingly, when the unconscionability relationship with freedom of contract is analysed in light of the latter's positive and negative components, it is observed that unconscionability strengthens positive freedom by filling the gap created by the absence of relevant freedoms (term-freedom and partner-freedom) that is clearly evidenced in unconscionable bargains.

As to negative freedom it has been evidenced that unconscionability does not restrict freedom from contracts, rather it is an application of this freedom. However, the conceptualisation of the type of relationship unconscionability has with freedom from contract depends on the rationale that unconscionability serves. In addition, it is also clear that any tests related to freedom of contract

[102] In *Director General of Fair Trading* it was asserted that: "Regulation 3(2) is of crucial importance in recognising the freedom of contract with respect to the essential features of their bargain." This establishes that the idea of freedom of contract is not absolute, because it is relative to the context in which it is articulated. See *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 AC 481 at [491].
[103] Roy Goode, 'The concept of 'Good Faith' in English law' (Roma 1992) 80.

should not be isolated from their context. Hence, unconscionability does not restrict freedom of contract; therefore it should not be treated as an exception to this main concept in contract law.

As the stance of the thesis towards the relationship between unconscionability and freedom of contract has been clarified, the next sub-section will analyse the relationship between unconscionability and uncertainty.

6.5 Unconscionability and Uncertainty

It can legitimately be argued that a certain degree of uncertainty in law is inevitable.[104] Uncertainty arises with reference to "the fact that it is difficult to predict perfectly *ex ante* how the law will be applied *ex post* by the courts."[105] The claim that unconscionability produces uncertainty has arisen from different grounds. The first is the doctrine's lack of a precise definition. This contradicts the proposition that the law should be specific, with a view to providing certainty "about who and what will come within the law's proscription."[106] The alleged lack of precision in unconscionability is also connected to its link to fairness – this is a theme that will be explored later.[107]

The second foundation is the division of unconscionability into its procedural and substantive components. It has been argued that this division raises questions, both with regard to the relative emphasis upon both elements and

[104] H L A Hart, *The Concept of Law* (2 edn, Oxford University Press 1994) 12-13; Llewellyn (n 11) 20; Giuseppe Dari-Mattiacci and Bruno Deffains, 'Uncertainty of Law and the Legal Process' (2007) 163 (4) Journal of Institutional and Theoretical Economics, 627 <http://ssrn.com/paper=869368> accessed 4 April 2015, 4.
[105] Dari-Mattiacci and Deffains (n 104) 4.
[106] Gillian K Hadfield, 'Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law' (1994) 82 (3) California Law Review 541, 541.
[107] Refer to this chapter (text to n 200- 245).

the extent to which both elements need to be present for unconscionability to be said to exist.

The third foundation relates to the doctrine's connection to issues of fairness. This feature has been particularly emphasised because it allegedly heightens the court's discretion,[108] prevents predictability,[109] increases uncertainty [110] and has significant implications for business stability.[111]

Two key arguments need to be taken into account if issues of uncertainty are to be fully addressed. The first argument relates to the question of whether there are some legal situations when uncertainty is desirable. The discussion of this proposition will assume that unconscionability generates uncertainty. This assumption will then be unravelled with a view to identifying if there is theoretical space that will accommodate unconscionability within the desired certainty. The discussion then advances along a very different tangent by rejecting the proposition that unconscionability produces uncertainty. In proceeding along this track, it draws strongly upon the classification of unconscionability within law and the alternative tools that are provided in law to govern situations of unconscionable bargains.

6.5.1 Desirable Uncertainty

Feldman and Lifeshitz claim that, in certain circumstances, uncertainty in law is desirable.[112] This proposition can be developed with reference to a first type of

[108] Ibid 542. This should not be understood to imply that discretion always contradicts with certainty in law. The key point is instead that discretion does not offer any level of certainty.
[109] McKendrick (n 1) 306.
[110] Evelyn L Brown, 'The Uncertanity of UCC Section 2-302: Why Unconscionability Has Become a Relic' (2000) 105 (287) Com L J 287, 303; Hillman (n 4) 21.
[111] *Union Eagle Ltd v Golden Achievement Ltd* [1979] 2 All ER 215 at [218] (Lord Hoffmann).
[112] Yuval Feldman and Shahar Lifshitz, 'Behind the Veil of Legal Uncertainty' (2011) 74 (2) Law and Contemporary Problems, 133.

situation, in which the law attempts to prevent a case where individuals decide *ex ante* to be in a specific situation *ex post*.[113] In this instance, uncertain rules will help to achieve this aim. In a second situation, the law requires specific actions only if they are undertaken without any strategic motives. This applies in tax cases, where the law may permit some actions, but not the ones that have been undertaken with a view to avoiding taxes.[114]

The third type of situation is concerned with instances in which the party is engaged in a socially desirable action, such as the donation of organs, but is unaware of any legal benefits. The lack of awareness of these benefits is related to fears of "the inadvertent harm of incentives for donors."[115] From the perspective of this thesis, the first type of situation is the most directly relevant to unconscionability, because the benefits of unconscionability would be most clearly evidenced within this type of situation.

In the first type of situation policy-makers would provide legal relief in an *ex post* case without, *ex ante*, changing the decision that had been made.[116] This has important implications for the basic assumption that economists favour standard form contracts because of their efficiency. The improper use of these contracts through the inclusion of unfair terms is to be discouraged because, in the long run, unfair terms will negatively impact upon consumers' willingness to make transactions on the basis of standard form contracts. Into this situation certainty in law introduces moral hazard. This offers a sufficiently strong response to any claim that unconscionability produces uncertainty.

[113] Ibid 137.
[114] Ibid 139.
[115] Ibid 135.
[116] Ibid 137.

The premise of this exception to required certainty in law arises within the distinction between two functions of legal rules: the (*ex ante*) guidance function (where the law attempts to direct individuals' behaviour) and the (*ex post*) responsiveness function (where the law issues specific rules in response to individuals' behaviour).[117] While the former encourages beneficial behaviour towards society, the latter instead helps individuals who are in a critical situation that needs to be solved. Feldman and Lifeshitz observe that the inculcation of uncertainty within *ex post* rules may help to prevent inefficient moves by individuals, whose actions will be clearly conditioned by an awareness of legal *ex post* reaction. To put it slightly differently, the provision of vague rules will help to ensure that individuals' *ex ante* actions are not calculated with reference to the legal response – this is a clear moral hazard.[118] Uncertain *ex post* legal rules will ensure that relief is given to innocent people who did not purposefully act with a view to attaining a future reward. However, another dimension of the argument presents itself within the insight that the concept of moral hazard rests at the foundation of the theory.

This concept, which is usually discussed within the context of legal and economic analysis, has been described in the following terms: "[I]f you cushion the consequences of bad behaviour, then you encourage that bad behaviour. The lesson of moral hazard is that less is more."[119] This concern with proportionality (which Baker reaffirms when he observes that less health

[117] Ibid 135-137.
[118] Ibid 138.
[119] Tom Baker, 'On the Genealogy of Moral Hazard' (1996) 75 (2) Texas Law Review, 237, 237-238.

insurance means more health and less product liability leads to safer homes)[120] will frequently recur in our subsequent engagement with moral hazard.

The key assumption in this instance is that individuals will adopt rational behaviour to minimise costs; as such, in situations where the cost is covered or compensated, the agent's behaviour will be accordingly adjusted. One example is the assumption that health insurance results in more visits to doctors,[121] which could be expanded to the broader proposition that insurance affects behaviour.[122] Baker observes that the use of moral hazard in economics is based on an assumption that people are able to control themselves and their situation.[123] This is an assumption, which has significant implications for the application of the theory to unconscionable bargains.

When the theory is related to the unconscionability doctrine, it will be noted that the absence of a specific determination of the situations in which unconscionability may be applied may result in contracts not being made (*ex ante* action). This will occur on the grounds that relief will be granted, providing sustenance to those most in need of it – that is, disadvantaged, ignorant and vulnerable parties in general. In ensuring that vulnerable parties are given relief in accordance with their intentions, the unconscionability goal of fairness and justice is upheld, although, the previous inspection of unconscionability in practice suggests that intention does not appear to be an explicitly significant

[120] Ibid 238.
[121] Ibid 242.
[122] The concept originated in insurance – moral hazard was extensively used in the nineteenth century to justify the insurance industry. During the twentieth century, Arrow generalised the concept and applied it to any situation in which there was a risk that one party would, as the consequence of another party's behavior, incur a loss. Ibid 244-264, 272. By analogy, unconscionability can therefore be said to entail actions by a stronger party which exploit the other party's disadvantages, and which expose the latter's interests to heightened risk as a consequence.
[123] Ibid 243-244. Baker also criticises the way that the concept has been used to undervalue social benefits.

part in the identification of unconscionable contracts/terms. However, this attribute can be seen to exist when moral hazard theory is viewed from the perspective of the complainant.

However, it should be noted that perceiving the theory from the perspective of the enforcer would conceivably produce a more efficient result. This is a particularly important consideration because moral hazard is preceded by the assumption that individuals have control over their behaviour and situations. In other words, while the disadvantaged and vulnerable party has the ability to control his/her behaviour, he/she lacks the power to control the situation. This is clear, for example, in situations where the complainant is an unsophisticated consumer who has been offered a standard form contract and is left with no choice but to contract or abandon the whole transaction.

Little or no control can be expected from the vulnerable actor, who in all likelihood, will not understand the contract. It would be unrealistic to expect this individual, in this circumstance, to strategically form a contract with a view to being, *ex post*, relieved by unconscionability. To the same extent, the enforcer who possesses complete information is likely to be in a position to ensure that the final terms serve his/her interests, most likely by putting in place provisions that cannot henceforth be nullified upon the basis of their unconscionability. Under this circumstance, a lack of clarity would be a benefit.

Lord Hardwick's statement in *Earl of Chesterfield* supports this theory.[124] In explaining why there are no detailed rules in equity that relate to unconscionable bargains, his Lordship states that "[c]ourts of equity, not being tied up to rules, consider questions of this kind [unconscionable bargains] in a

[124] *Earl of Chesterfield v Janssen* [1750] 28 Eng Rep 82 1557-1865.

more extensive manner, and in general have avoided laying down any particular rule, as that would (like old statutes of usury) teach persons, how far they might safely go".[125]

It has been observed that uncertainty, even when desired, may present a clear drawback. It may harmfully impact upon wealthier parties who are predisposed to act strategically in legal situations.[126] When perceived through the lens of unconscionability, what might under one circumstance be viewed as a drawback instead becomes a justification. However, it should also be acknowledged that uncertainty in legal rules may also adversely affect the weaker party by deterring him/her from pursuing legitimate rights within the courts. This debate highlights how the assessment of uncertainty can vary in accordance with different situations and given exceptions, thereby reiterating that uncertainty is not an absolute idea.

6.5.2 Spectrums of Uncertainty

"*to be certain of uncertainty… is to be certain of at least one thing*"[127]

An opposing argument holds that unconscionability does not generate uncertainty in law. This proposition is supported by several sources – some relate to claims that unconscionability produces certainty while a counterpart holds an opposed assertion that unconscionability produces uncertainty. Others instead pertain to the conceptual roots of uncertainty. Each source will now be examined in further detail.

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[125] Ibid at [128].
[126] Feldman and Lifshitz (n 112) 158.
[127] Robert A Hillman, *The Richness of Contract Law* (Vol 28, Kluwer Academic Publishers 1997) 169 citing Milton Y Dawes, *Multiordinality: a Point of View,* Et Cetera, Summer 1986, 123,131.

In taking the courts' attitude to resolving cases of unfair terms, it seems preferable to determine unconscionability in relation to certainty. Some commentators suggest that unconscionability helps to achieve certainty, because the use of unconscionability as a tool to nullify unfair contracts will displace the courts' use of traditional rules for this purpose.[128] Waddams observes that when courts start to recognise the appropriate principle (specifically unconscionability) that should be applied to unfair contracts, they will come to reason their decisions, and start to develop rational criteria for unconscionability.[129]

Spanogle observes that when there is enhanced predictability (e.g. the respective parties are able to anticipate how courts will decide disputes), the stability of contracts will increase in proportion.[130] The application of unconscionability will directly address the forms of manipulation associated with traditional rules, thus improving the determination, certainty and overall efficacy.[131] These contributions further underline that unconscionability produces certainty in law.

In the era before unconscionability was enacted in the Uniform Commercial Code, the courts tended to use traditional concepts, such as consent, to invalidate contracts.[132] The use of traditional rules of law to solve fairness problems is acknowledged within the Code's Official Comments, and is explicitly

[128] Waddams (n 23) 391; Spanogle (n 23) '936; Jeffery L Harrison, 'Quality of Consent and Distributive Fairness' in Larry Dimatteo and Martin Hogg (ed) *Comparative Contract Law: British and American Perspectives* (Oxford Scholarship Online, 2016). Similarly, Epstein asserts that unconscionability gives courts flexibility and the power to govern contracts directly. Epstein (n 9) fn:15; Hillman (n 4) 16.
[129] Waddams (n 23) 391.
[130] Spanogle (n 23) 936.
[131] Hillman (n 4) 16.
[132] Waddams (n 23) 391.

referenced in §2-302.[133] These comments do not clarify how contract law rules had been previously applied.[134] To the same extent, there is no affirmative study that explains this use of traditional rules.[135]

Karl Llewellyn, in the course of the hearings on the Uniform Commercial Code,[136] explains that the essential purpose of the unconscionability section is to provide certainty in law. Llewellyn notes that it is the established practice of business lawyers to draft contracts to their outermost limits. As a direct consequence, questions of unconscionability invariably arise;[137] in large part, this is because clients' risks exceeded the margin of safety, and businessmen allowed themselves to obtain more than 80 per cent of the pie.[138]

Llewellyn has illustrated that many of the problems that have been encountered have arisen as a result of the use of covert tools of construction with a view to achieving fairness. [139] Llewellyn pithily summarises the benefits of unconscionability when he observes that "[w]hen it gets too stiff to make sense, then the court may knock it out [the unconscionable contract]". [140] If unconscionability is adopted, a body of principles of construction will replace

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[133] The Legislative Committee Comment (1) on California Civil Code. §1670.5 is identical to §2-302 of the Uniform Commercail Code and Comment (1) The Official Uniform Commercial Code. Comment (1) provides that: "Section 1670.5 is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability."

[134] Sinai Deutch, *Unfair Contracts the Doctrine of Unconscionability* (Lexington Books 1977) 11-13. Roos also, with reference to similar examples, refers to California law. Peter D Roos, 'The Doctrine of Unconscionability Alive And Well in California' (1972-1973) 9 Cal W Rev 100.

[135] Deutch references US cases in which mutual assent, public policy, the mutuality of obligation and other construction tools have been used to nullify unfair terms or contracts. See Deutch (n 134) 11-18.

[136] State of New York Law Revision Commission Report: *Hearings on the Uniform Commercial Code* (1954) 1.

[137] Ibid 177.

[138] Ibid.

[139] Ibid 178; Llewellyn (n 11) 364-365.

[140] Ibid.

principles of misconstruction.[141] With a view to achieving this goal, §2-302 of the Code "is taken out of the realm of the jury. Anything is done under this section is going to make precedent…We regard it as a section which greatly advances certainty in a now most baffling, most troubling, and almost unreckonable situation."[142]

In English law unconscionability was not enacted by statute – the exclusion of the jury's control is achieved by recognising unconscionability as an equitable remedy. The use of traditional doctrines with the intention of achieving fair decisions can also be recognised in this jurisdiction. *John Lee & Son (Grantham) Ltd,*[143] which is concerned with an indemnity clause, observes that a narrow construction of the clause under investigation would lead to an "extravagant result."[144] For this reason, the court decided upon a wider construction, in the expectation that this would avoid unfair consequences.[145] This danger could only be offset if "the words are so plain that there is no doubt about their meaning."[146] Lord Denning was quite clear that, in the given instance, "[t]his clause is not so plain as that."[147] The implication was that unreasonableness would be accepted if plain words were used.

Lord Denning therefore observes that: "Above all, there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is

[141] Ibid.
[142] Ibid.
[143] *John Lee & Son (Grantham) Ltd and Others v Railway Executive* [1949] 2 All ER 581. This was a case in which tenants were affected by a fire. This was alleged to have been started by a spark that was ejected from a railway engine that belonged to the Railway Executive, the landlords of the warehouse.
[144] Ibid at [583] (Sir Raymond Evershed MR).
[145] Ibid.
[146] Ibid.
[147] Ibid.

not abused."[148] This contribution reiterates that, while freedom of contract may govern the making of contracts, it should not be used in an abusive way, which may contribute to an unfair result. This case shows how traditional instruments (here construction) could be used to enhance fairer decisions. If the application of traditional doctrines of contract law achieves the same result as the application of unconscionability, then this raises the question of why the latter is necessary.

Deutch describes how the application of traditional rules to the fairness context can endanger contract doctrines and contribute to deficiencies in their application.[149] Spanogles similarly describes how the use of traditional doctrines in this manner has negatively impacted the stability of contracts.[150] It contributes to uncertainty because it does not clarify which rule would be applied and how it would be applied. This unfortunate outcome can be avoided through the adoption of unconscionability.

Llewellyn's encounter with deficiencies in the application of traditional rules provides a different perspective. He suggests that the application of traditional rules creates the assumption that the aforementioned terms are permissible (whether in purpose or content). This will encourage their continued use by the draftsmen of standard form contracts.[151] To put it differently, the courts would not directly state that the term was unfair or seek to nullify it. Deutch, in acknowledging this, suggests that draftsmen over time would develop the terms they drafted, thereby leaving no room for them to be nullified by courts.[152] This

[148] *John Lee & Son (Grantham) Ltd and Others v Railway Executive* [1949] 2 All ER 581 at [584]. Similarly see: *Gillespie Brothers & Co Ltd v Roy Bowles Transport Ltd and another* [1973] 1 All ER 193.
[149] Llewellyn (n 11) 15 -16.
[150] Ibid.
[151] Ibid 364-365.
[152] Deutch (n 134) 14.

assertion is however open to question because it suggests that particular features can be derived from the courts' application of traditional rules in unconscionable contracts.

This suggests that such an application provides some sort of certainty, which is contrary to the argument which holds that the direction of traditional rules to the control of contract fairness contributes to uncertainty; to the same extent, it also contradicts the second point that Llewellyn puts forward. He contends that the usage of traditional rules to resolve unfairness issues, will prevent developing rules to rely upon in the course of future cases. [153] He maintains that the usage of these rules is unreliable – instead of clarifying contract and terms, as the tools are supposed to do, it may contribute to misinterpretations and misunderstandings, thereby significantly undermining later attempts to construe the contracts or terms.

The end result is an inadequate remedy that is complemented by unnecessary confusion and unpredictability. [154] In emphasising these points, Llewellyn evidences a clear concern with the long-term implications which stem from the unclear use of traditional rules. Unconscionability may therefore be said to be of considerable assistance in preventing the misuse of traditional rules that may produce uncertainty in law. This is achieved through the specific classification of the doctrine in legal precept deemed relevant. This is a theme that will now be developed in more depth.

It can be argued that the absence of a fixed definition of unconscionability can be justified by its classification within the law, because the degree of precision of the legal statement is related to which legal perception the doctrine should be

[153] Llewellyn (n 11) 364-365.
[154] Ibid.

placed under.[155] This entails that unconscionability oscillates between standards and principles. Ellinghaus maintains that the doctrine can be recognised under so-called 'standards'.[156] Ellinghaus maintains that Leff's criticism[157] (that the doctrine lacks precise definition) is false. He observes that if Leff acknowledged that the doctrine is a standard he would be able to recognise some of the ways in which it is defined.[158]

The claim that unconscionability produces uncertainty would be undermined if this classification were accepted. Ellinghaus's critique was founded upon Pound's analysis, which had sought to explain the meanings of the rule of law, principles and standards.[159] A quick review of Pound's explanation of these legal tools will help to bring out the key differences between them.

Pound initially establishes that rules are applied when there is a definite legal consequence that can be ascribed to specific circumstantial facts.[160] For example, offer, acceptance and consideration when combined with an intention produce a legally binding relationship. Pound defines rules "as the full or nearly full *ex ante* assignment of legal entitlements, or the complete or nearly complete *ex ante* specification of legal outcome."[161] In this sense, when a decision needs to be taken, there is a need to undertake a precise analysis of the existing basis for the application of the law.[162]

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[155] Dari-Mattiacci and Deffains (n 104) 7.
[156] Ellinghaus (n 3) 759; Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 (8) Harvard Law Review, 1685, 1688; Hillman (n 4) 15.
[157] Leff (n 2) 485.
[158] Ellinghaus (n 3). 775.
[159] Roscoe Pound, 'The Theory of Judicial Decision I. The Material of Judical Decision' (1923) 36 (6) Harvard Law Review, 641, 645-646.
[160] Ibid 645.
[161] Case R Sunstein, 'Problems with Rules' (1995) 83 (4) California Law Review, 953, 961-962.
[162] See also: Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) 139.

Principles are the second legal precept, and are clearly differentiated from rules because they do not provide a definite detailed statement of facts that are associated with a definite detailed legal result.[163] In addressing principles, legal authorities enjoy considerable latitude with regard to establishing the most accurate basis for judicial reasoning. Pound demonstrates this by referring to legal liability, a principle which establishes that a person can only be held to be legally liable if he/she has been at fault.[164] In further clarification, Sunstein recognises that principles are "both deeper and more general than rules."[165] They provide the moral and political 'background' that is needed to interpret and justify rules. For example, they establish that contracts are binding because it is morally wrong not to uphold promises.[166]

Pound observes that standards exist in instances where there are sets of facts (defined in a narrow sense) that are attached to more than one definite legal result. To this extent, it is possible to proceed from a narrow set of facts to legal standards that can be applied. Even in instances where facts are not applied within a clear scope of limitation, it is still possible to infer a rule via logical assumption from the given facts.[167] Pound illustrates this by referring to a rule that binds someone to the standard that actions should be conducted with due care. In instances where compliance with this standard is not evidenced, he/she will be held to be liable. However, the precise definition of this liability is not

[163] Pound (n 159) 645.
[164] Ibid 645-646. Sunstein distinguishes between two instances in which the word 'principles' is applied. In the first instance it relates to the justification or 'drivers' of rules; in the second, it instead pertains to the set of legal principles that are explicitly indicated in law. See Sunstein (n 161) 966. The current chapter focuses upon the second application.
[165] Ibid (citation omitted).
[166] Ibid.
[167] Brownsword observes that calculability is the main advantage that derives from rules on standards; while standards are less calculable they offer better normative accuracy. Roger Brownsword, 'Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law' in Roger Brownsword, Norma J Hird and Geranint Howells (ed), *Good Faith in Contract Concept and Content,* (Dartmouth Publishing Company, 1999) 47-48. However, other observers note that there is no rigid distinction between rules and standards. Chen-Wishart (n 69) 17.

conditional upon a detailed set of facts. In addressing the existence or non-existence of liability, the judgement will ultimately need to take into account the circumstances of the action.

This assessment is not, it should be acknowledged, grounded within legal knowledge;[168] rather, it is deduced from what is held to be fair and reasonable, in addition to the knowledge of those within the community who are already familiar with such actions.[169] In other words, the assessment is addressed to the actual (what actually happened) rather than the ideal (what should have happened in the same situation).[170] When this explanation is compared to the unconscionability test, the similarities between the two are brought out in fuller perspective. To the same extent, unconscionability takes the circumstances and the commercial background into account, with a view to establishing what is fair and reasonable.

The preceding discussion has established that rules are more precise than standards; standards, in turn, are more precise than principles, which function as a wider legal precept. While there is a view which holds that unconscionability is a standard, there is an alternative perspective which holds that it is a principle.[171] Fort's engagement with this question does not provide any explanation or reasoning.[172] However, Raz, in explaining principles, observes that the distinction between rules and principles derives from a prior insight that rules stipulate a specific set of facts or actions. In contrast,

[168] Pound (n 159) 646. The same example is provided by Hart and Sacks. See Hart and Sacks (n 162) 140.
[169] Pound (n 159) 646.
[170] Hart and Sacks (n 162) 140.
[171] Jeffrey C Fort, 'Understanding Unconscionability: Defining the Principle' (1978) 9 (765) Loy U Chi LJ 765, 768.
[172] Ibid.

principles do not rest upon the precondition of specific facts or actions.[173] In this respect, there appears to be no clear difference between this understanding and the one advanced by Pound. Raz, however, provides an important clarification in recognising that unspecific facts under principles "can be performed on different occasions by the performance of a great many heterogeneous generic acts on each occasion."[174]

Here the key assertion that is being made in relation to unconscionability is that the unconscionable conduct in unconscionable bargains may take several forms such as deceit and placing pressure upon the complainant. This suggests that unconscionability might be legitimately conceived as a principle. Raz then proceeds to cite a number of unspecific actions as relevant examples – these include respecting human dignity and behaving negligently, unjustly or unreasonably.[175] These examples are broad-ranging in character and can easily be connected to moral yardsticks that generally govern the law.

Linking Raz's analysis of principles to Sunstein's study,[176] shows considerable confusion within the literature, which pertains to the precise meaning of the word 'principle'. Broadly speaking, as Sunstein observes, engagements with principles originate within two perspectives. In the first instance, principles are a justification of legal rules that have moral and political dimensions. In the second instances, principles are understood to be explicitly recognised and formulated, presenting themselves for consideration when courts resolve cases.[177]

[173] Ibid; Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 (5) The Yale Law Journal, 823, 838.
[174] Raz (n 173) 838.
[175] Ibid.
[176] Sunstein (n161) 966.
[177] Ibid.

Sunstein's engagement with both perspectives demonstrates that the main difference that distinguishes the two is the question of formulation in law. This suggests that principles, when not formulated in laws, help to drive the whole legal system, functioning as a justification of legal rules; meanwhile, principles formulated in law function more narrowly. While Sunstein correctly identifies the essential difference between the two he ultimately fails to adopt the correct terminology. Hart and Sacks provide an important clarification in this regard when they distinguish between polices and principles.[178] They first add an important caveat by highlighting the fact that, in many instances, there is no need to distinguish between the two.

Hart and Sacks tentatively provide a working distinction when they suggest that policy is the declaration of objectives (such as those that pertain to national security) while a principle is a description of the consequence that should be accomplished. The discussion of principles extends to the issue of why consequences should be accomplished (e.g. that no person should be unjustly enriched). They observe that this should not be taken to imply that policies do not have reasons or grounds; rather, their essential point is that policies are not usually justified.[179] When Sunstein's two perspectives of principles are taken into account, it is the first that can be conceptualised as a policy.

This thesis proposes that unconscionability can be classified as a principle in its wider sense; it therefore echoes Bamforth's argument. [180] When unconscionability is presented as a principle, it upholds the principle that no one should take advantage of another person's disadvantage or be enriched by an

[178] Hart and Sacks (n 162) 141-142.
[179] Ibid.
[180] Nicholas Bamforth, 'Unconscionability as a Vitiating Factor' (1995) Lloyds Maritime and Commercial Law Quarterly 538, 450.

unconscionable bargain. When conceived as a vitiating factor, unconscionability should be placed under standards rather than principles, an innovation which implies a narrow perspective for several reasons. Firstly, the unconscionability test becomes compatible with the standards test. Standards are subject to change in accordance with the circumstances that surround each case; this does not apply to principles, or at least not to a significant degree. A closer examination of Pound's discussion of standards, which provides an assessment of the facts relative to the specific industry and community standards, reiterates this point.

Here it should be noted that standards are subject to change because they are related to several factors, such as time, place and the degree of industrial development. By analogy, it will be noted that unconscionability is also dependent upon context. For example, the type of unconscionable conduct is heavily dependent upon the commercial background that frames the contract.[181] It should also be noted that conceiving of unconscionability as a 'standard' is consistent with general trends within modern law. This provides a clear contrast to classic contract law, which inclines much more closely towards the application of rigid rules.[182] This development is consistent with accounts that conceive of unconscionability as a response to wider legal changes.

It has also been observed that the choice between 'legal rules' or 'standards' is frequently contingent upon the frequency of the activities that are governed by them.[183] The cost of the proposed measure is also frequently an important

[181] In *A & M* it was clarified that "we keep in mind that while unconscionability is ultimately a question of law, numerous factual inquiries bear upon that question." A & M Produce Co v FMC Corp 135 Cal App 3d 473 (1982) at [488].
[182] Kennedy (n 156) 1685; Chen-Wishart (n 69) 17.
[183] Yuval Feldman and Alon Harel. "Social norms, self-interest and ambiguity of legal norms: An experimental analysis of the rule vs. standard dilemma." (2008) 4 (1) Review of Law &

consideration.[184] It has therefore been established that 'rules' should not be designed to govern rare situations. This is attributable to the considerable costs that are associated with design and the establishment of 'standards'. The key issue at stake is whether situations governed by 'standards' should always be rare or infrequent.

The use of standard form contracts, cannot be described as rare. By virtue of their specific nature, unconscionability is most likely to exist in these contracts.[185] There is no evidence in the reviewed literature which suggests that the design of standards is conditional upon governing rare situations. Therefore it seems that the high costs of designing 'standards' is not a central determinant of the decision to adopt unconscionability as a 'rule' or 'standard'.

A quick acquaintance with the literature suggests that differences in cost are subject to degree. When costs do exist, the central consideration is time. In the instance of 'rules', the cost is *ex ante* while in the case of 'standards' the cost is *ex post* (being subject to the scrutiny of relevant facts by adjudicators). Here it should also be acknowledged that the number of available precedents has important implications for the cost of standards. Accordingly more precedents will result in less cost.

A theoretical intervention by Feldman and Harel highlights the need for the degree of certainty in legal norms to be examined with reference to prevailing social norms. In their view, this is justified by its impact upon individuals'

Economics, 81, 87; Louis Kaplow, 'Law Rules versus Standards: An Economic Analysis' (1992) 42 (3) Duke Law Journal 557, 563.

[184] Part of the legal and economic literature distinguishes rules and standards with reference to cost. See for example: Kaplow (n 183). Costs may be accrued: by individuals for example, for legal advice; by relevant authorities, for example for advice to legislators upon the design of rules; and by courts for example, for the application of standards becacuse they are less easy to determine than legal rules.

[185] Refer to Chapter One (text to n 78-89).

abidance.[186] Their contribution has an increased importance when it is engaged and considered in context.

In further proceeding with this approach, Feldman and Lifeshitz observe that if social norms are aligned with the law, then the use of standards will be favourable; as an added consequence, decision-making will be governed by non-legal factors.[187] In this eventuality, any possible conflict between social and legal norms is overcome.[188] Once this theory is taken into account, it can then be combined with the insight that the doctrine of unconscionability seeks to achieve fairness and equity, both of which can be said to be social norms. In working to achieve this, it is clearly premised upon flexibility, something that is more likely to be furthered by standards than rules.

Moreover, factors which impact upon unconscionability (such as poverty and ignorance) are liable to change.[189] This also recommends standards while simultaneously downgrading rules.

The basis upon which unconscionability can be conceived as a 'standard' has been set out. However, there is another aspect of the discussion that needs to be explored in more depth – namely certainty. A few preceding remarks should first be made. The determination of what is certain is ultimately a matter of discretion – uncertainty is not an absolute idea.[190] As Hart notes, the concept varies in accordance with different situations, societies and time. Hart also observes that legislators, in the process of making law, tend to be governed by the need for certainty and the need to leave some issues to be resolved at a

[186] Feldman and Harel (n 183) 112.
[187] Feldman and Lifshitz (n 112) 160.
[188] Ibid 112.
[189] The importance of changing circumstances was highlighted in *Cresswell v Potter* [1978] 1 WLR 255 (Ch) 257 at [257].
[190] See G *Scammell and Nephew, Limited Appellants; v H C and J G Ouston* [1941] AC 251, 255; Waddams (n 23) 375; Chen-Wishart (n 69) 17.

later date.[191] The latter situation most frequently arises when the establishment of certain rules will contribute to injustices, which arise when the given legal rule fails to respond to similarities and differences between different situations.[192] In these instances, it is preferable for a space to be left open, so that judges are free to align each rule with every given situation.

Because uncertainty is not an absolute idea, any matter under assessment will be reviewed in accordance with the views and predispositions of each adjudicator. Unconscionability law overcomes this to some extent by offering a heightened degree of certainty. This is a reflection of the fact that its two aspects (procedural and substantive) have been continually determined and reviewed in US cases. English law also sets out a clear and coherent basis for the application of unconscionability. It can also be argued that the lack of a high specification of doctrine is intentional – by implication, this suggests that uncertainty is a marginal consideration.[193] An added degree of plausibility is provided by the insight that the overall degree of certainty required by any law is ultimately a matter of debate.

Fundamentally the whole issue of uncertainty can be viewed as a stage in the development of the unconscionability doctrine. In this respect, a clear analogy is provided by 'consideration'; this is a general principle in contract law that has developed over time on a case-by-case basis.[194] This feature has not acted to the detriment of its validity or value. Thus, if it is not sufficient to determine unconscionability through an analysis of its definition and its relationship with

[191] Hart (n 104) 130.
[192] Ibid.
[193] Melvin Aron Eisenberg, 'The Bargain Principle and Its Limits' (1982) 95 (4) Harvard Law Review, 741, 769-770.
[194] Laurence Koffman and Elizabith Macdonald, *The Law of Contract* (Oxford University Press 2010) 60.

other central concepts in contract law, it can instead be suggested that unconscionability can be developed over time on a case-by-case basis.[195]

While the literature frequently claims that unconscionability cases lack precision in reasoning,[196] these claims can be questioned. Judicial decisions should not be accorded a disproportionate significance or importance. There are a number of competing factors that feed into a situation under assessment.[197] In unconscionability, one of the key considerations is fairness, a concept which escapes rigid categorisation.

A number of the debates that relate to uncertainty are ultimately a matter of degree - the legislator's choice between rules or standards is ultimately subject to a balancing between calculability and normative accuracy, a balancing that must ultimately be adjusted in accordance with each given context.[198] However, the clarity of the criteria that judges reference in the course of applying a legal rule is important if it is to be ascertained whether a rule is certain or not. [199].

Issues of uncertainty have now been established and the relationship between unconscionability and distributive justice will now be examined.

6.6 Distributive Justice Model of Unconscionability

It has been suggested that the justice of a contract is invariably investigated whenever questions of enforceability are subject to closer examination. [200] Hence under unconscionability questions of justice most frequently emerge. It

[195] Murray (n 11) 79; Kennedy (n156) 1690.
[196] McKendrick (n 1) 304-305.
[197] Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 (4) The University of Chicago Law Review, 1175,1178.
[198] Brownsword and Hird (n 167) 48.
[199] Dari-Mattiacci and Deffains (n 104) 5.
[200] Michel Rosenfeld, 'Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory' (1984) 70 Iowa L Rev 769, 771.

has already been noted that one of the main objections to the adoption of unconscionability holds that the doctrine has a distributive effect that contradicts with the traditional view of contract law[201] (which holds that its essential purpose is to apply corrective justice).

The origin of dividing justice into corrective/commutative and distributive justice can be traced back to Aristotle.[202] Each can be said to be qualitatively disparate or fundamental forms of justice.[203] Corrective justice "applies to immediate interactions 'transactions' and requires that the parties to an interaction be treated as 'arithmetically' or absolutely equal with respect to their entitlements to their holdings, regardless of their relative virtue, wealth, need, or other proposed measure of merit."[204] Distributive justice "applies to mediated relations 'distributions' and requires, with respect to their shares in a distribution, that the parties to the distribution be treated as proportionally equal in accord with their relative merit."[205] Distributive justice therefore refers to both the process of distribution and the product of the distribution.[206]

It has often been argued that the classic law of contract emphasises corrective justice.[207] This assertion is leant further weight by the individualist ideology that governs this law. Equality, when conceived within this ideology, entails "equality of autonomy and an equal right to freedom from interference by other individuals in the exercise of control over one's own person and faculties. Equality of freedom, in turn, entails equality of opportunity for each individual to

[201] Bigwood (n 22) 19.
[202] P Benson, 'The Basis of Corrective Justice and its Relation to Distributive Justice' (1992) 77 Iowa L Rev 515; E J Weinrib, 'Substantive Corrective Justice' (1992) 77 Iowa LR, 625; Gordely; Rosenfeld (n 200) 780.
[203] Benson (n 202) 527.
[204] Richard W Wright, 'Substantive Corrective Justice' (1992) 77 Iowa L Rev 625, 641.
[205] Ibid.
[206] Rosenfeld (n 200) 780; Bigwood (n 22) 26.
[207] Bigwood (n 22) 24; Benson (n 202) 540, fn: 49; W N R Lucy, 'Contract as a Mechanism of Distributive Justice', (1989) 9 (1) Oxford Journal of Legal Studies, 132,132.

exploit his or her own faculties as he or she best sees fit."[208] It has been appropriately observed that the indifference of contract law to the endowment of people and differences "bears fundamentally upon our understanding of corrective justice and its relation to distributive justice."[209] This will now be demonstrated with some of the main arguments that are advanced in support of distributive/corrective fairness.

6.6.1 Distributive Justice

Two distinct arguments that relate to the role of contract law in the distribution of justice can be extracted from the literature. The first argument maintains that the rules of contract law should be connected with corrective justice;[210] in contrast, the second argument asserts that it is acceptable for the rules of contract law to further distributive justice under some circumstances.[211] With regard to unconscionability, two types of justification can be extracted from the literature. The first argument maintains that unconscionability is a non-distributive tool;[212] in contrast, the second argument holds that it is permissible for contract law to have distributive justice implications.[213]

In advancing the first argument, Benson notes that unconscionability is a regulative doctrine, which provides a basis for the definition of each party's intention. A fair and enforceable contract is one that respects each party's capacity or intention to receive equal value.[214] Consequently, if an unconscionable bargain infringes upon this intention it should not be enforced.

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[208] Rosenfeld (n 200) 778.
[209] Bigwood (n 22) 24.
[210] Epstein claims that contract law provides individuals with a "sphere of influence" in which they are not required to justify their activity to the state. Epstein (n 9) 293-94.
[211] Kennedy (n 29) 563.
[212] Peter Benson, *The Unity of Contract Law' in Peter Benson* (ed), *The Theory of Contract Law, New Essays* (Cambridge University Press 2001).
[213] Kronman (n 34).
[214] Benson (n 212) 191.

Benson grounds his analysis in the substantive component of unconscionability, which requires *gross* inadequacy of consideration.[215] The key point is how an inadequacy of consideration can be judged to be gross. Consideration is usually assessed in reference to the market price. There is no single precise and stable market price for a commodity,[216] but rather, a dynamic range of such prices. It can therefore be reasonably assumed that the parties agreed to the contractual price with reference to this range of market prices. Accordingly, when the contractual price falls outside the market range of prices, it will be deemed unconscionable for its gross inadequacy. In such a case, the unconscionable contract/term would be null because it violated the requirement that the contractual parties' intention was for equal value.[217]

This understanding establishes the expectation that reasonable contractual parties begin with an intention to exchange for equal values. This assumption becomes a normative criterion against which the enforceability of the contract can be assessed. A contract will be enforced if it can be demonstrated that freely contracting parties, whether through risk or donation, intended the gross undervaluation. [218] In other words, the party who intended the risk or donation actually waived his right to contract for equal value. This is why Benson presents contract as a tool to transfer rights which are enacted through exchange or gift. This view establishes that no other form of transfer is imaginable or possible. Unconscionability places the disputed contracts under one of these forms of contract, acting to nullify contracts in which no intention of donation or risk was proven.

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[215] Ibid 184-185, 190.
[216] Here it should be noted that the theory applies to cases in which the item subject of the test is ordinarily exchanged in the market. Items of unique value to one party or the other are not therefore part of this discussion.
[217] Ibid 190.
[218] Ibid 191.

Benson proceeds to demonstrate that the non-distributive character of unconscionability derives from the fact that it deals with contractual parties as equal participants that are possessed of equal rights or capacity to receive values that are equal to the ones they gave or transferred. This applies regardless of any advantages, purposes or needs that might otherwise distinguish them. This deep commitment to equality, in the view of Benson, defines corrective justice.[219] In his view, this form of justice

> entails a certain conception of equality, namely, formal equality of treatment. Corrective justice treats persons as equals by disregarding all differences between interacting parties save this, that an entitlement belongs to one of them and its violation has been caused by the other; and it requires the correction of the violation… irrespective of the particularities of the persons involved.[220]

Upon this basis, unconscionability corrects instances where the right or capacity of contractual parties to contract for equal value has been violated.

The main advantage of this theory is that it aligns with the traditional view that contract law functions as a means of corrective justice. It also reiterates the baseline of classic contract law, namely a presumed equality between contractual parties. However, the main limitation of this theory derives from its claim that unconscionability is mainly based upon substantive unfairness. This, it should be noted, is a source of considerable disagreement. Furthermore, this prior understanding has implications for the whole understanding of the unconscionability doctrine, extending to issues such as the doctrine's rationale and its place within the hierarchy of principles that govern contract law.

The second thread of argument maintains that it is acceptable for contract law

[219] Ibid 192.
[220] Benson (n 202) 530.

to sometimes engage with themes of distributive justice.[221] Kronman has been one of the main proponents of this view.[222] In arguing that voluntary exchange, one of the dominant notions of contract law, is a distributive concept, he equates the assessment of voluntariness in contracts with the assessment of advantage-taking in contracts.[223] Because freedom is an essential element of voluntary contract, the exploitation of a given advantage should not be permitted if it infringes upon the other party's freedom. Kronman concludes that the paretianism principle offers an accurate baseline that will enable this question to be answered. Paretianism establishes that the advantage-taking that should be allowed is the one that, in the long run, benefits most people in society.[224]

In relating to distributive justice, the paretianism principle establishes that all of the dispersed advantages should be gathered and concentrated under this principle. Contract law therefore permits and includes distributive justice. In reiterating this point, Lucy presents the paretianism principle as "an end state principle of distributive justice."[225] It is consequently a mistake "to keep what seem to be actor specific considerations of voluntariness distinct from universal questions of distributive justice."[226] This understanding is closely aligned with Bigwood's analysis of distributive justice and corrective justice in contracts, which seeks to connect both forms of justice within the wider context of contract adjudications.

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[221] Kronman (n 34) 472, 510.
Kennedy claims that contract law an "ideal context" for the judicial task of creating "altruistic order". Kennedy (n 156) 1778.
[222] This theory has already been discussed in this chapter with reference to freedom of contract. The following discussion will incorporate an analysis of distributive justice. Refer to (text to n 35-42)
[223] Kronman (n 34) 480.
[224] Ibid 482. For further insight on this theory refer to (text to n 38-39) of this chapter.
[225] Lucy (n 207) 136.
[226] Ibid.

Bigwood justifies the inclusion of distributive justice within contract law by drawing upon Rawls's thesis, which distinguishes the practice and system of rules applied by social institutions. This bases the argument that, if an easing over practice is to be achieved, it is legitimate to govern practice by a form of justice that is different from the one that operates within the institution.[227] In developing this argument Bigwood conceives of contract law as a social institution that "can be justified or assessed on instrumental, consequentialist, or teleological grounds".[228] The control of the operation of this institution might be achieved "by using non-instrumental, non-consequentialist, or deontological criteria."[229] Again, this reiterates that the form of justice that governs the practice may be different from the one that governs the institutions.

In applying this understanding to contracts, Bigwood argues that the institution of contract law should be governed by distributive justice, and therefore concerned with the extent to which "a contract [should] serve as a system for the allocation or distribution of resources among members in our society."[230] This suggests that contracts are governed by the principle of corrective justice. Here the concept of 'contract' can be said to refer to "the specific legal rules or criteria that govern and determine the validity of particular contracts between people."[231]

This explains why judges, in overseeing contract disputes, will focus upon applying corrective justice rules that are connected to the contract, with a view to ensuring justice, defined as the appropriate distribution of resources that have resulted from the contract. The infringement of corrective justice has

[227] Bigwood (n 22) 31, citing J Rawls, 'two Concepts of Rules' (1955) 64 Philosophical Review, 3.
[228] Ibid.
[229] Ibid 32.
[230] Ibid 33.
[231] Ibid.

occurred as a result of wrongful gains at the expense of the other party, or actions that inflict harm or loss.[232] In these situations, corrective justice will attempt to reverse the gains that have been wrongfully achieved.[233] To put it differently, distributive justice is concerned with the relative worthiness of the parties, while corrective justice is preoccupied with the contribution that each party has made in relation to an inflicted harm.

Accordingly, it will be noted that corrective justice assumes that political authorities have made a just or fair distribution of entitlements.[234] In other words, transactions governed by corrective justice are basically a conveyance of the individual's entitlements, being achieved by the distribution of resources in society and directed towards the end objective of corrective justice (the rectification of violations within contracts). Corrective justice is achieved when "each has what belongs to him."[235]

When markets function in a defective manner, it is possible that the application of corrective justice may result in unjust outcomes; in these circumstances, it will be incumbent upon contract to intervene with a view to applying rules of distributive justice.[236] The distribution of resources that have resulted from contracts will be subject to redistribution, with a view to correcting outcomes that have been produced by the application of contract as an instrument.[237] In engaging with this theory, Bigwood justifies the application of rules of distributive justice in the adjudication of contracts. In short, this theory enables the use of both corrective justice and distributive justice in contract law. This in turn raises the question of whether there is a need to distinguish between

[232] Ibid 27.
[233] Ibid.
[234] Benson (n 202) 531.
[235] Bigwood (n 22) 28.
[236] Ibid 34.
[237] Ibid 34-35.

corrective justice and distributive justice.

6.6.2 Unconscionability and Justice

The proposal advanced under this heading is that unconscionability is justifiable under the unitary or 'total' notion of justice. If this proposition is accepted, then there will be no need to address unconscionability in terms of distributive and corrective justice.

This argument originates from two foundations. The first pertains theories which seek to legitimise unconscionability, a number of which have already been engaged. The preceding discussion has illustrated that the subject of unconscionability has given rise to numerous debates and that there is little or no consensus upon the subject. This is evidenced by the fact that the issue of whether unconscionability is a distributive device remains unresolved. With a view to achieving consistency, coherence and demystification, each of which contributes in a cumulative effect to certainty, it will therefore be preferable to engage the issue under justice in general.

It has been claimed that contemporary distributive justice is wider than it used to be.[238] This claim is sustained by the fact that its modern usage simultaneously encompasses distributions between private individuals and political authorities.[239] If it is acknowledged that unconscionability leads to a distribution of justice, it can conceivably be argued that the extension of distributive justice to the realm of contract will contribute to the adoption of rules that result in the redistribution of burdens and rights in contracts. This expansion will elicit a situation in which distributive justice overlaps with corrective justice. Because issues related to both divisions of justice are controversial and because a

[238] Rosenfeld (n 200) 780 (citation omitted).
[239] Ibid.

detailed analysis of corrective and distributive justice falls beyond the scope of this thesis, unconscionability will subsequently be considered under the heading of justice in general.

Unconscionability is perfectly consistent with the general notion of justice. It will therefore be noted that "[j]ustice looks towards the individual, but with a dispassionate gaze. It sees him not in himself, with his own aspirations, idiosyncrasies and foibles, but in relation to other men, with whom he must be compared, assessed and weighed."[240] When conceived within the context of contracts, justice can be conceived as a balancing of the contractual parties' interests. Each party needs to take into account the interest of their counterpart, while taking care to preserve his/her interests.

Pao On[241] was instructive in this respect. Here it was declared that: "justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress." There is nothing that prevents equitable fraud from being included within this category. While justice in contracts requires their enforcement, the enforcement of unconscionable contracts will be unjust, because equitable fraud is one of the main elements that determines unconscionability. Unconscionability, *a fortiori,* contributes to an enhanced understanding of the contracting parties' interests.

When perceived from a general perspective, unconscionability can be seen to manifest a concern with justice within its constitutive elements. Balcombe J. in commenting upon the requirement of gross unfairness in unconscionability

[240] J R Luca
s, 'Justice' (1972) 47 (181) Philosophy 229, 229. Wright determines that "Aristotle describes justice in its particular sense as the virtue of behaving equably in our external relations with others that involve claims to goods or advantages, broadly conceived." See Wright (n 204) 641.
[241] *Pao On v Lau Yiu Long* [1980] AC 614 at [634] (Lord Scarman).

demonstrates that this requirement implies that an order would be "repugnant to anyone's sense of justice."[242] The transaction brought before his honour was repugnant to his sense of justice. Upon this basis, he decided to give the wife a share in the capital asset of the matrimonial home.[243] This also applies to unconscionability cases in which it has been suggested that the disclosure of all information that clarifies the essence of the unfair transaction would have impaired the decision of unconscionability.

While there is no duty of disclosure by law, the inclusion of the information that fully explains to the complainant the nature of the unconscionable contract and its implication for him/her, would ultimately grant the enforceability of the contract.[244] This rule encourages the enforcer to consider the other party's interest. The requirement which establishs that the enforcer should have insisted upon the other party seeking independent legal advice also makes it incumbent to take the other party's interests into account.[245]

The preceding analysis demonstrates that unconscionability is in harmony with core values that are preserved in contract law. As a result, there is a need to contextualise unconscionability by clarifying why unconscionability should be adopted and where it should be situated in contract law? In addressing these questions, this section will explore the doctrine's rationales, along with their impacts.

[242] *Backhouse v Backhouse* [1978] 1 WLR 243 at [252] citing Lord Denning' statement in *Wachtel v Wachtel* [1973] Fam 72, 90.
[243] *Backhouse v Backhouse* [1978] 1 WLR 243 at [254].
[244] *Cresswell v Potter* [1978] 1 WLR 255.
[245] Ibid at [259].

6.7 Conclusion

This chapter makes an important contribution by examining key elements for analysing unconscionability within the wider context of contract law and existing knowledge. It is a continuation of the theoretical bases of unconscionability presented in the previous chapter.

The main point is that unconscionability is a doctrine that is intelligible in relation to the angle or perspective from which it is engaged. Its perceived relation to the other main values of contract law can be seen to vary in accordance with the stand point from which any analysis starts.

This insight echoes allegations that unconscionability contradicts freedom of contract, certainty in law and distributive justice, should not be viewed unconditionally as these notions are not absolute. Therefore, criticisms of unconscionability are not intrinsic to the doctrine. On the contrary the intrinsic attributes of unconscionability enable it to support some of these notions such as freedom of contract.

Chapter Seven

Conclusion

7.1 Overview

This thesis aimed to find the best possible formula of unconscionability to resolve unconscionable e-wraps in Libya. To achieve this aim, this thesis, first, investigated the various approaches to unconscionability in traditional contracts in Libyan, English and California law. Investigating how e-wraps would fit into each approach followed this investigation.

The general findings, when addressed in connection with the research questions, helped this thesis reconceptualise and analyse unconscionability in contract law and proposed a reform for Libyan law based on lessons derived from the analysis of unconscionability in English and California law.

7.2 Distinct Remarks

The comparative jurisdictional analysis in this thesis developed a theory that enhanced the understanding of unconscionability. The analysis shows that the doctrine is capable of serving varying rationales in different laws and sometimes within the same law. This capability is closely related to the approach adopted to the analysis of unconscionability in case law, which varies between an approach that focuses on contractual parties (party-oriented approach) and one that focuses on contractual terms (contract-oriented approach). Flexibility is, therefore, one of the doctrine's main strengths.

The doctrine's ability to serve different rationales was explained as a reflection of the emphasis placed on one of the doctrine's elements. When unconscionability's rationale is to protect the weaker party in unconscionable contracts, the focus would be upon the element of serious disadvantage. When the rationale is to prevent exploitation, attention would focus on the centralisation of the element of unconscionable conduct. Finally, if the rationale is to remedy substantive unfairness in contracts, the focus would instead be on the element of unconscionable terms.

These observations have a wider impact upon the doctrine's position in contract law. It was further observed that, corresponding to the policy-maker's preference for one of the three rationales (protection of the weaker party, prevention of exploitation and the remedying of substantive unfairness) or another, the doctrine of unconscionability would assume a specific position within the hierarchy of contract law rules.

Unconscionability would be a rule that is derived from the general principle of good faith when the focus is upon the unconscionable conduct element, and the rationale would be to prevent exploitation. When the focus is instead on the serious disadvantage element, the rationale would be to protect the less powerful complainant, and as a result, the doctrine would be placed under a general principle of inequality of bargaining power. If the focus is upon the unconscionable terms element, the rationale would be to remedy substantive unfairness in contracts and the doctrine would be placed under the general principle of unconscionability.

Applying these theoretical insights on the jurisdictions compared in this thesis proved its accuracy.

7.2.1 English Law

As to English law, its party-oriented approach to unconscionability has allowed it to serve the protection rationale and the anti-exploitation rationale throughout two different periods of time in the history of unconscionability case law. The alteration in rationales reflects the fact the party-oriented approach implies a focus on the serious disadvantage and the unconscionable conduct elements.

At one stage when the rationale was on protection of weaker parties, inequality of bargaining power was proposed as a general principle under which unconscionability should be placed.[1] However, when the unconscionability rationale shifted to the anti-exploitation rationale in modern case law, unconscionability is viewed as one of the English law's piecemeal solutions to treat unfairness in contracts, which is basically an application of good faith.

This thesis re-categorised the elements of unconscionability into essential elements (serious disadvantage, unconscionable conduct and substantive unconscionability) and complementary elements, namely, legal advice and knowledge.

A review of case law and how these elements cohere, demonstrated that the unconscionability test diverged from objectivity, because the test was tainted by subjectivity. Subjectivity in unconscionability highlights two significant points. Firstly, it confirms the belief advanced in this thesis that unconscionability in English law is one of the piecemeal solutions this law adopts to solve unfairness issues, as an alternative to recognising a general principle of good faith. Thus, unconscionability in English law is derived from good faith. Secondly subjectivity indicates a preference to restrict the application of the doctrine.

[1] *Bundy Lloyds Bank Ltd v Bundy* [1975] QB 326.

It was also observed that English law appeared to have decided, with the exception of one case in which constructive knowledge was adopted,[2] to limit the knowledge element to actual knowledge. One way to explain this is the fact that constructive knowledge negates victimisation, which is an important feature in the anti-exploitation rationale[3] and English law adopts this rationale. Not adopting constructive knowledge also indicates an intention to limit the number of cases to which the doctrine can be applied. However, the fact that English law encompasses different perspectives of actual knowledge helps to offset and mitigate this limitation.

Moreover, the analysis of how case revealed the observed elements shows they need not always be proved, sometimes they are presumed in specific circumstances. This thesis emphasises the test of presumed unconscionability as an essential part of unconscionability that explains some phenomena that were vague or explained inaccurately in the literature.

This focus on presumed unconscionability obligated the need for a coherent understanding of presumed unconscionability, which was achieved by conducting a comparison between presumed undue influence, and presumed unconscionability. This comparison resulted in proposing that both concepts are akin.

The comprehension of presumed unconscionability in English law enabled identifying a type of interaction between the essential elements of unconscionability called circularity. Circularity appears to be one of the main reasons for the flexibility of unconscionability in English law.

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[2] *Ayres v Hazelgrow* [1982] unreported 1982/NJ/1003 (QB) (Russell J). Source pages are not numbered.
[3] Refer to Chapter Five (text to n 74-75).

It was established that the circular relationship between the essential elements of unconscionability is the main reason why it is possible to begin the test with any of the doctrine's main elements. It was also suggested that this relationship helped to explain why the existence of one element would most likely result in the existence of the next. This was particularly apparent in cases of presumed unconscionability.

While legal advice and the knowledge element do not appear in the given circular relationship, which is mainly defined by the main elements of the doctrine (serious disadvantage, unconscionable terms and the unconscionable conduct elements) it was demonstrated, with reference to relevant cases, that both elements impact upon the doctrine's application: they therefore initially break the circle and subsequently deny the unconscionability of the disputed contract. Accordingly, the preference of this thesis to view legal advice and knowledge as complementary elements, in contrast with the main elements of unconscionability, was justified.

As to presumed unconscionability, it helped to understand the reason why legal advice in some early cases, specifically the line of cases following *Fry v Lane,* was treated as a main element instead of the unconscionable conduct element. Investigations proved that these were cases of presumed unconscionability and in such cases legal advice becomes significant, as it is the usual tool through which the circularity might be broken and consequently negates the application of presumed unconscionability. Hence it was addressed as an essential rather than a complementary element in these cases.

7.2.2 California Law

By contrast, unconscionability in California law, which adopts a contract-oriented approach, serves the remedying unfairness rationale because of the law's focus on substantive unconscionability. The contract-oriented approach restricted the doctrine's flexibility to change rationales, therefore the anti-remedying rationale is the only reflection of this approach and consequently unconscionability in this law is recognised under unconscionability as a general principle.

The analysis of the unconscionability test in California law established that it is less evolved than its English counterpart. A number of explanations for this position were put forward. Firstly, the sliding scale, which was identified as the bond which holds procedural and substantive unconscionability together, institutes a situation in which different degrees are required for the identification of procedural and substantive unconscionability. These degrees are usually difficult to be determined, especially in relation to substantive unconscionability.

In addition, inconsistencies observed within the case law that relate to some aspects of the unconscionability test have contributed to the significantly increased diagnosis of uncertainty in this jurisdiction.

However, California law is a step ahead of its English law counterpart in the determination of substantive unconscionability. Examination of case law manifested that California courts tended to set out criteria against which substantive unconscionability was tested to establish an unconscionability case. This was specifically adopted in arbitration cases in employment contracts. However, the fact that California courts did not adhere rigidly to these criteria

undermined the significance of these attempts to offer fixed criteria for the establishment of substantive unconscionability.

Thus, any suggestions for improving the California law approach to unconscionability must lay emphasis on demanding that the California courts adhere to the recognised criteria, as this may be the first step for more certainty and predictability.

Furthermore, there is a need for clarifying the law's position towards presumed procedural unconscionability as a key element for certainty, and for any future development. This need is a direct result of inconsistency in cases.

The comparison of English law and its California counterpart also brought out a clear contrast between the party-orientated approach of the former and the contract-orientated approach of the latter. It was argued that this clear distinction explains why the moral attribute of the doctrine that is not usually present in California's unconscionability test is considerably more pronounced in its English counterpart's application of the same test. Moreover, this distinction underpins 'subsequent' differences between both jurisdictions within the doctrine's structure and test.

Firstly, the way that the elements of unconscionability are divided within the respective legal frameworks can be said to be an assertion of the recognised orientation of each law. Since California law focuses on the contract itself, procedural unconscionability is related to *contract* formation or process; substantive unconscionability, meanwhile, is related to *contractual* terms. A clear contrast is rendered by the fact that the serious disadvantage and the unconscionable conduct elements in English law are strongly attached to the complainant and the enforcer respectively.

Secondly, objectivity as the main characteristic of the unconscionability test in California law can be said to result from the contract-oriented approach. This contrasts with the subjectivity that is observed in English law. This in turn broadens the possibility of applying unconscionability in electronic and traditional contracts in California. For instance, in some cases the mere presence of adhesion contracts provides a satisfactory basis for the recognition of procedural unconscionability in California. In addition, the isolation of procedural unconscionability from the investigation of the enforcer's conscience creates greater scope for the application of unconscionability, subject to the initial confirmation of substantive unconscionability.

It is therefore the case that the enforcer's actions (such as providing the complainant with sufficient time to consider the contract) do not enhance the enforcer's chances of retaining his/her contract.[4] This approach, in which the unconscionability test is isolated from the assessment of the enforcer's conscience, is more convenient for the application of the doctrine on e-wraps. This is particularly relevant given the special nature of this contractual type, which is embodied in a number of attributes: these contracts are mass produced; operate over long distances and national boundaries; and function in a virtual world in which there is no direct contact between contractual parties.

Thirdly, California case law clearly demonstrates that the impairment of the complainant's consent is not specifically emphasised within the California law of unconscionability. This is demonstrated by the general lack of language that asserts this aspect of unconscionability. While this approach reflects the contract-oriented character of this law, it also highlights the fact that California law is mainly concerned with the substantive element of the doctrine.

[4] Ingle v Circuit City Stores, Inc 328 F 3d 1165 (9th Cir 2003).

Fourthly, the contract-oriented and party-oriented approaches help to explain what might otherwise be seen as a contradiction in this thesis. In Chapter Five it was recognised that unconscionability can be placed under the general principle of good faith in English law. Its extension to California law may be questioned upon the basis that this law already recognises the general principle of good faith. This raises two clear questions: If unconscionability is really a doctrine that is derived from good faith, then how is it possible for both concepts to be clearly identifiable in California law? Is it not the case, given that both concepts share similar attributes, that the recognition of good faith should prevent the recognition of unconscionability?

It can be argued that the contract-oriented approach to unconscionability that has been adopted in California lends support to the conclusion outlined in Chapter Five, namely that unconscionability is derived from good faith. It has already been explained, with an implicit acknowledgement of the unconscionability rationale in English law, that good faith *implies an assessment of the quality of the conduct*.

In contrast, the contract-oriented approach in California law establishes a situation in which the scope of unconscionability and good faith clearly differ. This justifies the simultaneous recognition of good faith and the unconscionability doctrine by California law. It is accordingly plausible to find a case that encompasses a plea of unconscionability and good faith as an alternative plea as in the case of *California Grocers Assn.*[5] The fact that the unconscionability doctrine is viewed differently under California law allows it to be recognised alongside good faith.

[5] Refer to California Grocers Assn v Bank of America, 22 Cal App 4th 205 (1994).

7.2.3 E-Wraps

The exploration of the application of unconscionability in paper contracting and in e-wrap contracts shows that California law does not treat e-wraps and traditional contracts differently. Hence, there was no adjustment for the test of unconscionability. In English law, *Bassano*[6] which is related to an e-wrap, provides evidence that this law in the future will most likely retain the traditional rule of contract law when applied to e-wraps.

An investigation on how e-wraps would be treated in English law concluded that both presumed and classic unconscionability are applicable. However in cases of presumed unconscionability it has been noticed that knowledge and legal advice would not play a crucial role in breaking the circle and negating unconscionability, because both elements would have a marginal role in e-wraps as a reflection of the nature of these contracts. Alternatively, other ways to discharge the presumption needs to be developed that are consistent with the nature of e-wraps.

As to classic cases of unconscionability, where the three essential elements should be proved, its application on e-wraps does not seem problematic. However, it was observed that a decision-maker has the choice between adopting a relaxed approach to unconscionability that offers more protection to online users via adopting some findings of research on e-wraps which determine the 'reasonable, prudent online user' behaviour. Such an adoption would result in presuming that online suppliers know that their customers are

[6] Bassano v Toft [2014] EWHC 377 (QB).

ignorant in respect of their e-wraps, therefore suppliers need to take positive steps to ensure their enforcement. The determination of such steps should rely on research that is based on psychologists and anthropologists' analysis of online users' typical behaviour.

As to resolving unconscionable e-wraps in California, no specific issues could be derived from the limited amount of unconscionable e-wraps case law. On the contrary these cases reasserted the fact that California courts' approach to adhesion contracts remains unsettled. Furthermore, e-wraps cases reiterate the inconsistency in treating substantive unconscionability and the criteria specified for its test.

A review of theories that proposed a reconstruction of unconscionability in e-wraps, guided this thesis to argue that such a reconstruction is not needed, because the test of unconscionability in California has aspects which might advance the protection of online users if used wisely, namely considering adhesiveness as minimum procedural unconscionability in all e-wrap cases and amending the surprise element test to encompass considerations of the reasonable behaviour of online users.

7.2.4 Contextualisation

Having determined the approaches of unconscionability in the jurisdictions compared and discussed how it would be applied in e-wraps, this thesis concluded with an analysis of how unconscionability would fit into contract law and the existing knowledge related to unconscionability. Doing so, this thesis proposes and demonstrates a complementarity and context model for freedom of contract, certainty in law and a distributive justice model of unconscionability. The analysis advanced proves that unconscionability does not contradict these

main themes. It asserted that the alleged contradiction between unconscionability and the three themes of contract law was heavily dependent upon perspective, and the specific stance that each observer adopted towards each theme. In many respects, these stances were preceded by a narrow interpretation of each of these themes that had been adopted in the first instance. The thesis went beyond these points to engage with the foundations of unconscionability in contract law, and therefore endeavoured to bring out points of convergence and divergence with these key principles of contract law.

In summary, the theory proposed to understand unconscionability does not just describe how the doctrine developed, rather it also provides the basis for an analysis of how the doctrine is applied in other jurisdictions. A clearer understanding of the emphasis placed upon each of the doctrinal elements also provide a clearer response to the question of why unconscionability has been adopted; in addition, it would also provide insight into how it is positioned under a general principle within the examined jurisdiction. The thesis' emphasis upon the prior orientation of the unconscionability test and the factors that underpin its capacity for change are also both important, as previous research was clearly deficient in both of these respects.

7.3 Recommendations

As to Libyan law, drawing upon the recognition of the different approaches to unconscionability in English and California, defends the following recommendation for a reform of unconscionability in the Libyan Civil Code.

First, the reform should be through amending Article 129 rather than by issuing guidelines for Libyan judges based on current law.

Second, there is a need to remove the restrictions currently in Article 129. This would mean: adopting an open view on what might be considered serious disadvantage instead of limiting the test to situations of levity and unbridled passion; expanding the statutory limitation of one year to a longer period such as fifteen years like other vitiating factors; substantive unconscionability should not be limited to cases in which this element is proved subjectively. An adoption of an objective test is necessarily especially in e-wraps.

Third, the adoption of knowledge in the unconscionability test is not advisable in the new reform. The analysis that considered differences between Libyan law and English law, which adopts this element, reiterated the fact that the unconscionability test in Libya does not assert the moral aspect of the doctrine therefore the inclusion of knowledge would not have a significant effect. Moreover, knowledge has a marginal effect in e-wraps, because of their special nature (being formed online, without negotiation and without face-to-face interaction), unless Libyan legislators decided to consider findings of some research that points out the usual behaviour of online users.

Fourth, the adoption of presumed unconscionability would be advisable if a decision-maker decided to relax the test of unconscionability in favour of offering further protection for online users. In such a case, a presumption of the psychological element would arise if substantive unconscionability was proved. Knowledge and legal advice would not be sufficient to rebut such a presumption therefore, legislators need to consider research related to e-wraps to identify the best actions that suppliers may take and one considered sufficient to rebut the presumption.

Fifth, it is early to recommend an adoption of specific criteria for testing substantive unconscionability. However, the Libyan High Court may decide to recognise any future developments in this regard. Otherwise, the job would be left to the Libyan legislator to consider this point and devlope their own crtiteria based on lessons derived from California law.

Generally, the recognition of the limited number of unconscionable e-wrap cases in California reiterates the need for a more sustained investigation that seeks to identify why this is such a conspicuous feature of the case law. The need to engage with this research puzzle is further stressed by the huge number of unconscionability cases that pertain to traditional contracts – in the period since 1979, approximately 3000 cases have been brought before the California Court of Appeal.

The identification of specific criteria that enables the assessment of substantive unconscionability in California's arbitration employment contracts has important future implications. Most notably, it raises the possibility that future research will be directed to this area of the unconscionability test. This research will make an important contribution by challenging one of the main arguments that is usually made against unconscionability, namely that the specification of the terms that may be considered substantively unconscionable is still afflicted by considerable uncertainty.

This thesis has repeatedly emphasised the flexibility of unconscionability, which has been labelled, with considerable justification, as "chameleon-like". [7] However this ascription should not be understood to imply that the doctrine

[7] Morris v Redwood Empire Bancorp, 128 Cal App 4th 1305 (2005) at [1316] (Aronson J) citing Steinhardt v Rudolph, Fla Dist Ct App (1982) 422 So 2d 884, 890.

lacks determination. On the contrary, this thesis has evidenced that unconscionability in both English and California law is determined to a great extent and that the uncertainty recognised in the doctrine in California law is mostly a result of issues in its application rather than in the law itself.

Bibliography

Books

Abuda A A, *The Law of Civil Procedure* (Naser University Press 1991).

Al-Azhari M, *The General Theory of the Law of Obligation* (Libya, The National Books Press 2013).

Al-Fasi A A, *al-Itkan wa al-Ihkam Sharh Tuhfat al-Hukkam fi Nukat al-Ukud wa al-Ahkam* (vol i, Cairo: Dar al-Hadeeth 2011).

Al-Sanhori A A, *The Theory of Obligations* (Lubnan: Dar Ihyaa al-Turath al-Arabi 1952).

Al-Sanhori A A, *A Guide on Explaining the Civil Code,* vol1 (Lebanon: Dar Ihyaa al-Turath al-Arabi 1952).

Amos, Shedon M, *Amos and Walton's Introduction to French Law* (3ed, Oxford: Clarendon Press1967).

Ansell M O and al-Arif I M, *The Libyan Civil Code an English Translation and a Comparison with the Egyptian Civil Code* (The Oleander Press).

Anson W R, *Principles of the English Law of Contract* (Oxford: Clarendon Press 1879).

Alces P A, *A Theory of Contract Law: Empirical Insights and Moral Psychology* (Oxford University Press 2011) .

Atiyah P S, *From Principles to pragmatism,* (Oxford : Clarendon 1978).

— —, *The Rise and Fall of Freedom of Contract,* (Oxford: Clarendon 1979).

— —, *Essays on Contract* (Oxford : Clarendon 1986).

Association Henri Capitant Des A..., *European contract law: Materials for a common frame of reference: Terminology, guiding principles, model rules* (Benedicte Fauvarque-Cosson and Denis Mazeaud eds, Sellier European Law Publishers 2008).

Barral-Vinals I, 'Freedom of Contract, Unequal Bargaining Power and Consumer Law on Unconscionability' in Mel Kenny, James Devenney, Lorna Fox O'Mahony (ed) *Unconscionability in European private financial transactions* (Cambridge University Press 2010)

Beale H G (ed), *Chitty on Contracts,* Vol1 (32nd edn, Sweet & Maxwell 2015).

Beatson J and Friedmann D. (ed), *Good faith and fault in contract law,* (Oxford : Clarendon Press; New York: Oxford University Press 1995).

Beatson J, *Anson's Law of Contract* (New York, NY: Oxford University Press 2016).

Benson P (ed), *The Theory of Contract Law, New Essays* (Cambridge University Press, 2001).

— —, 'Contract' in Dennis Patterson (ed) *A Companion to philosophy of Law and Legal Theory* (2ed edn, Blackwell Publishing Ltd 2010).

Berlin I, 'Two Concepts of Liberty' in Isaiah Berlin and Henry Hardy *Liberty: Incorporating 'Four Essays on Liberty'* (Oxford Scholarship Online 2003).

Rick Bigwood, 'Exploitative Contracts' (Oxford University Press 2003).

Birk and Chin, 'On the Nature of Undue Influence' in Beaston J.; Friedman, D (eds); Good Faith and Contract Law (Oxford: Clarendon Press 1995).

Brownsword R, 'The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract' in Roger Brownsword, Geraint Howells and Thomas Wilhelmsson (eds) *Wellfarism in Contract Law* (Dartmouth 1994).

Brownsword R, 'Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law' in Roger Brownsword, Norma J. Hird and Geranint Howells (ed), *Good Faith in Contract Concept and Content,* (Dartmouth Publishing Company 1999).

Brownsword R, Hird N. J. and Howells G. (ed), *Good Faith in Contract Concept and Content,* (Dartmouth Publishing Company 1999).

Capper D, 'Protection of the Vulnerable in Financial transactions - What the Common Law vitiating Factors Can Do for You' in Mel Kenny, James Devenney, Lorna Fox O'Mahony (ed) *Unconscionability in European private financial transactions* (Cambridge University Press 2010).

Chen-Wishart M, *Unconscionable Bargains,* (Wellington, N.Z.: Butterworths 1989).

Cherednychenko O, *Fundamental Rights, Contract Law and the Protection of the Weaker Party,* (Munchen, Sellier. European Law Publisher 2007).

Choudhury M A and Malik U. A, *The Foundation of Islamic Political Economy* (Palgrave Macmillan 1992).

Chynoweth P, 'Legal Research' in Andrew Knight and Les Ruddock (ed) *Advanced Research Methods in the Built Environment* (2008) available at

http://www.sociology.ed.ac.uk/__data/assets/pdf_file/0005/66542/Legal_Research_Chynoweth_-_Salford_Uni..pdf accessed 13 December 2016.

Ciacchi A C, 'Freedom of Contract as Freedom from Unconscionable Contracts' in Mel Kenny, James Devenney, Lorna Fox O'Mahony (ed) *Unconscionability in European private financial transactions* (Cambridge University Press 2010).

Clark R W, *Inequality of Bargaining Power,* (The Carswell Company Ltd 1987).

Cohen M R*'Reason and Law'* (New York : Collier 1961).

De Cruz P, *Comparative Law in a Changing World* (London, 3rd, Routledge-Cavendish 2007).

Deutch S, *Unfair Contracts The Doctrine of Unconscionability* (Lexington Books 1977).

Judge Eileen C Moore, Michael Paul Thomas*, California Civil Practice Procedure,* Chapter 26 Alternative Dispute Resolution I. Legal Principles D. Arbitration 3. Contractual Arbitration (b) Unconscionability at <intl.westlaw.com>.

Expert Series, California Affirmative Defenses (2d ed, 2017).

Fauvarque-Cosson B and Mazeaud D (eds), *European Contract Law Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Sellier european law publishers 2008).

Flessner A, 'Freedom of Contract and Constitutional Law. General Report' in Alfredo Mordechai Rabello, Peter Saracenic (ed) *Freedom of Contract and Constitutional Law* (Jerusalem, Hamaccabi Press 1998).

Franceshchi A D, (ed), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution* (Intersentia Ltd 2016).

Freeman M, *Lloyd's Introduction to jurisprudence*, (9th edn, Sweet & Maxwell 2014).

Fried C, *Contract As Promise,* (Harvard University Press 1981).

Fuller L L, *The Morlity of Law* (New Haven, Yale University Press 1969).

Furmston M, *Cheshire, Fifoot & Furmston's Law of Contract* (6th edn, Oxford University Press 2012).

Girot C, *User Protection on IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology* (Kulwer Law International 2001).

Gordley J, 'Contract Law in the Aristotelian Tradition' in Peter Benson (ed), *The Theory of Contract Law, New Essays* (Cambridge University Press 2001).

Grundmann S and Mazeaud D (ed) *General Clauses and Standards in European Contract Law* (Kluwer law 2006).

Harrison J L, 'Quality of Consent and Distributive Fairness' in Larry DiMatteo and Martin Hogg (ed) *Comparative Contract Law: British and American Perspectives* (Oxford Scholarship Online 2016).

Harry R, *Primitive Society* (New York, Liveright Publishing 1947).

Hart H L A, *The Concept of Law* (2 edn, Oxford University Press 1994).

Hart H M and Sacks A M, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press 1994).

H Havighurst, *The Nature of Private Contract* (William S. Hein & Co. Inc. 1961)

Hassan A A H, *Sales and Contracts in Early Islamic Commercial Law* (Islamic Research Institute 1986).

Hesselink M W, 'The Concept of Good Faith' in Arthur S. Harkamp and others (ed) *Towards a European Civil Code* (4th edn, Kluwer Law International 2011).

Hijazi A A, *An Introduction in Intellectual Property and Consumer Protection in E-commerce Contracts* (1st edn, Dar Alfikr, 2005).

Hillman R A, *The Richness of Contract Law* (Vol 28, Kluwer Academic Publishers 1997).

Morton J Horowitz, *The Transformation of American Law 1780-1860* (Harvard University Press 1977)

— —, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy (Oxford University Press 1992).

Kamali M H, *Islamic Commercial Law* (The Islamic Texts Society 2000).

Kim N, *Warp Contracts: Foundations and Ramifications,* (Oxford Scholarship Online 2014).

Koffman L and Macdonald E, *The Law of Contract* (Oxford University Press 2010).

Law J (ed), *A Dictionary of Law* (8th edn, Oxford University Press 2015) (online version).

Lawson R, *Exclusion Clauses and Unfair Contract Terms* (8th edn, Sweet & Maxwell 2005).

Llewellyn K N, *The Common Law Tradition: Deciding Appeals* (Boston, Little, Brown 1960).

Lloyd D, *The Idea of Law* (Penguin Books 1991).

B Lunger, 'The Social Side of Contract Law and the New Principle of Regard and Fairness' in A S Hartkamp M Veldman et al (eds.) *Towards a European Civil Code.*

Mac C, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (The Netherlands, Kluwer Law International BV 2008).

Markesinis B S, Jonathan A. C, Unberath H, *The German law of contract* (Bloomsbury UK 2006).

Markesinis B, *The German law of contract* (2 edn, Oxford, Hart Pub 2006).

McConville M and Chui W H (ed), *Research Methods for Law* (Edinburgh University Press 2010).

McKendrick E, *Contract law* (11th edn, Palgrave Macmillan 2015).

McKendrick E, 'Good Faith in the Performance of a Contract in English Law' in Larry DiMatteo and Martin Hogg (eds), *Comparative contract law: British and American perspectives* (Oxford University Press 2015).

Tamblyn N, *The Law of Duress and Necessity: Crime, Tort, Contract,* (Routledge 2017).

Nassar N, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (The Netherlands, Martinus Nijhoff Publishers 1995).

Barry Nicholas, *The French Law of Contract,* (2nd edn, Clarendon Press Oxford 1992).

O'Connor J F, *Good Fatih in English Law,* (England, Dartmouth Publication Company 1990).

— —, *Good Fatih in International Law* (England, Dartmouth Publication Company 1991).

Parry D H, *The Sanctity of Contracts in English Law,* (London, Stevens & Sons Limited 1959)

Poole J, *Textbook on Contract Law* (13th edn, Oxford University Press 2016).

Powell J J, *Essay upon the Law of contracts and agreements,* 2 vols (London 1790).

Radin M J, *Boilerplate The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2013).

Rahimuddin M (tr), *Muwatta Imam Malik* (SH. Muhammad Ashraf 1980).

Rayner S E, *The Theory of Contracts in Islamic Law* (Graham & Trotman 1991).

Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986).

Reimann M and Zimmerman R. (ed), *The Oxford handbook of Comparative Law* (Oxford University Press 2006).

Ruxton F H (tr), *Maliki Law* (London, Luzac & Company 1916).

Saleh N A, *Unlawful gain and legitimate Profit in Islamic law* (Cambridge University Press 1986).

Saintier S, 'Reply to Jeffrey L Harrison, 'Quality of Consent and Distributive Fairness' in Larry DiMatteo and Martin Hogg (eds), *Comparative contract law: British and American perspectives* (Oxford University Press 2015).

L. A. Sheridan, *Fraud in Equity,* (London, Sir Isaac Pitman1957)

Shimizu H, *Philosophy of the Islamic Law of Contract* (The Institution of Middle East Studies 1989).

Sheridan L A, *Fraud in Equity,* (London, Sir Isaac Pitman 1957).

Smith S A, *Contract Theory* (Oxford Scholarship Online 2012).

Spark G, *Vitiation of Contracts International Contractual Principles and English Law,* (Cambridge University Press 2013).

Stone J, *Legal Systems and Lawyers Reasoning,* Maitland Publications (1968).

Story J, *Commentaries on Equity Jurisprudence, as Administered in England and America* (2nd edn, London, A Maxwell 1839).

Treitel G H, *The law of contract* (7th edn, Stevens and Sons 1987).

Turner A K and Sutton R J, *Actionable Non-Disclosure* (Butterworths, London 1990).

Twining W, *Karl Llewellyn and the Realist Movement,* (2nd edn, Cambridge : Cambridge University Press 2012).

Verplanck G C, *An Essay on The Doctrine of Contracts: An Inquiry How Contracts are Affected in Law and Morals* (New York, G.&C. Carvill 1825)

Voyiakis E, 'Unconscionability and the Value of Choice' in Mel Kenny, James Devenney, Lorna Fox O'Mahony (ed) *Unconscionability in European private financial transactions* (Cambridge University Press 2010).

Watson A, *Legal Transplants* (2nd ed, Georgia, University of Georgia 1993).

Watkins D and Burton M(ed), *Research Methods in Law* (Routledge 2013).

Weber M, *Economy and Society: An Outline of interpretive Sociology* (New York, Bedminster 1968).

Whittaker S, 'Theory and Practice of the General Clause in English Law: General Norms and the Structuring of Judicial Discretion' in Stefan Grundmann and Denis Mazeaud (ed) *General Clauses and Standards in European Contract Law* (Kluwer law 2006).

Wightman J, ' Good Faith and Pluralism in the Law of Contract' in Roger Brownsword, Norma J Hird and Geraint Howells (ed) *Good Faith in Contract* (Dartmouth Publication 1999).

Wilhelmsson T and Willet C, 'Unfair Terms and Standard Form Contracts' in Gearing Howells, Iain Ramsay and Thomas Wilhelmsson with David Kraft (ed) *Handbook of Research on International Consumer Law* (Edward Elgar Publishing Limited 2010).

Willett C, 'Good Faith and Consumer Contract Terms' in Roger Brownsword, Norma J. Hird and Geranint Howells (ed), *Good Faith in Contract Concept and Content,* (Dartmouth Publishing Company 1999).

— —, '*Fairness in Consumer Contracts The Case of Unfair Terms'* (Ashgate Publishing Limited 2007).

Chen-Wishart M, *'Unconscionable Bargains'* (Butterworths, Wellington 1989).

— —, *Contract Law* (5th edn,Oxford University Press 2015).

Ziyada N, *Libya in 1948, Official Transcript* (American university Press, Bairut 1966).

Zweigert K and Kotz H, *Introduction to Comparative Law* (first published 1977, 3rd edn, Oxford Clarendon Press 1998).

Journals

Adams J N and Brownsword R, 'The ideologies of contract' (1987) 7 Legal Stud 205.

Adler R S and Mann R A, 'Good Faith: A New Look at an Old Doctrine' (1994) 28 (31) Akron L Rev 31.

Andersen E G, 'Good Faith on the Enforcement of Contracts' (1987-1988) 73 (299) Iowa L Rev 299.

Angelo A H and Ellinger E P, 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States' (1991) 14 (455) Loy L A Int'l & Comp LJ 455.

Atiyah P S, 'Contract and Fair Exchange' (1985) 35 (1) University of Toronto Press 1.

Baker T, 'On the Genealogy of Moral Hazard' (1996) 72 (2) Texas Law Review 237.

Baker C E, 'Starting Points in Economic Analysis of Law' (1980) 8 (4) Hofstra Law Review 939.

Bakos Y, Marotta-Wurgler F, and Trossen D, 'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts' (2009) CELS 4th Annual Conference on Empirical Legal Studies Paper 1.

Balloon A M, 'From Wax Seals to Hyper Text: Electronic Signature, Contract Formation, and A New Model for Consumer Protection in Internet Transactions' (2001) 50 Emory L.J. 905. <intl.westlaw.com> Accessed 22 October 2015.

Bamforth N, 'Unconscionability as a Vitiating Factor'(1995) Lloyds Maritime and Commercial Law Quarterly 538.

Barkhuysen T and Van Emmerik M, 'Constitutionalism of Private Law: The European Convention on Human Rights Perspective' (2006) *Constitutionalisation of Private Law*, Tom Barkhuysen, Siewart Lindenbergh, (eds.), Martinus Nijhoff Publishers, 2006. Available at SSRN: http://ssrn.com/abstract=1896149 accessed 3 December 2014.

Balloon A M, 'From Wax Seals to Hyper Text: Electronic Signature, Contract Formation, and A New Model for Consumer Protection in Internet Transactions' (2001) 50 Emory L.J. 905. <Westlaw international> Accessed 22/10/2015 (real electronic).

Barnes R L, 'Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability' (2005) 66 (123) La L Rev 123.

Barnett R E, 'A Consent Theory of Contract' (1986) 86 (2) Columbia Law Review 269

Bebchuk L A and Posner R A, 'One Sided Contracts in Competitive Consumer Markets' (2006) 104 Mich L Rev 827

Beale H, 'Unfair Contracts in Britain and Europe' (1989) 42 Current Legal Problems 197.

Beck T, Kunt A D and Levine R, 'Law and Finance: Why Does Legal Origin Matter?' (2003) 31 (4) Journal of comparative economics 653.

Beheshi B, 'Cross-Jurisdictional Variation in Internet Contract Regulation'(2013) 8 Journal of International Commercial Law and Technology 49.

Beishuizen M, 'Just Click Here: A Brief Glance at Absurd Electronic Contracts and the Law Failing to Protect Consumers' (2005) 14 (35) Dalhousie J Legal Stud 35.

Ben-Shahar O, 'The Myth of the "Opportunity to Read" in Contract Law' (2008) 5 (1) European Review of Contract Law 1.

Benson P, 'The Basis of Corrective Justice and its Relation to Distributive Justice' (1992) 77 Iowa L Rev 515.

Berkowitz D, Pistor K and Richard J F, 'The Transplant Effect' (2003) 51 (1) The American Society of Comparative Law <http://www.jstor.org/stable/3649143> accessed 5 February 2014.

Bick J, 'Unconscionable Terms Prevent Enforcement of E-commerce Contract Clauses: Fairness Comes with a Fair Presentation of the Terms' <http://www.bicklaw.com/Publications/UnconscionableTermsandE-contracts.htm> accessed 12 November 2016.

Bigelow M M, 'Definition of Fraud' (1887) 3 L Q Rev <http://heinonline.org> accessed 13 April 2016.

Bigwood R, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part I', (2000) 16 (1/2) Journal of Contract Law 1.

— —, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part II' (2000) 16 (3) Journal of Contract Law 191.

— —, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25 (1) Oxford Journal of Legal Studies 65.

Bix B H, 'Contract Law Theory' University of Minnesota Law School http://ssrn.com/abstract=892783 accessed 2 November 2015.

Brand FDJ, 'The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution: notes' (2009) 126 (1) The South African Law Journal.

Bridwell P, 'The Philosophical Dimensions of the Doctrine of Unconscionability' (2003) 70 (1513) U Chi L Rev <http://heinonline.org> accessed 2 January 2014.

Broome S A, 'An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act' (2006) 3 Hastings Bus LJ 39 <intl.westlaw.com> accessed 12 May 2016.

Brown E L, 'The Uncertanity of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic' (2000) 105 (287) Com LJ 287.

Brownsword R, 'Two Concepts of Good Faith'(1994) 7 Journal of Contract law 197.

Brudner A, 'Reconstructing Contracts' (1993) 43 U of Toronto LJ 1.

Andrew Burgess, 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and A Suggestion' (1986) 15 (255) Anglo-Am L Rev <http://heinonline.org> accessed 8 June 2014.

Burton S J, 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 (2) Harvard Law Review <http://www.jstor.org/stable/1340584> accessed 14 January 2014.

Burton S J, 'More on Good Faith Performance of a Contract: A Reply to Professor Summers' (1983-1984) 69 (497) Iowa L Rev 497.

Calloway T J, 'Cloud Computing, Clickwrap Agreements, and Limitation on Liability Clauses: A Perfect Storm?' (2012) 11 (163) Duke L & Tech Rev <http://heinonline.org> accessed 8 November 2012

Canino E, 'The Electronic 'Sign-in-wrap' Contract: Issues of Notice and Assent, the Avrage Internet User Standard, and Unconscionability' (2016) 50 U.C. Davis L. Rev. 535 <intl.westlaw.com> accessed 12 May 2017.

Capper D**,** 'Undue Influence and Unconscionability: A Rationalisation', (1998) LQR <login.westlaw.co.uk> accessed 9/04/2014.

— —, 'The Unconscionable Bargain in the Common Law World', (2010) 126 LQR 403 <login.westlaw.co.uk> accessed 8 May 2014.

Carter J W and Courtney W, 'Good Faith in Contracts: is there an Implied Promise to Act Honestly?' (2016) 57 (3) Cambridge Law Journal 608.

Cassels J, 'Good Faith in Contract Bargaining: General Principles and Recent Developments' (1993) 15 (56) Advoc Q <http://heinonline.org> accessed 13 September 2015.

Cellini D B & Wertz B L, Comment, 'Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC', (1967) 42 Tul L Rev 193.

Chikofsky E J & Cross J H, 'Reverse engineering and design recovery: A taxonomy' (1990) 7 (1) IEEE <http://win.ua.ac.be/~lore/Research/Chikofsky1990-Taxonomy.pdf> accessed 16 June 2014.

Clark, 'The Unconscionability Doctrine Viewed from an Irish Perspective' (1980) 31 NILQ 114.

Dan-Cohen M, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 (3) Harvard Law Review <http://www.jstor.org/stable/1340892> accessed 12 November 2014.

Collins H, 'Methods and Aims of Compartaive Contract Law' (1991) 11 Oxford J Legal Stud 396.

— —, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 (1) Current Legal Problems 297.

Conklin R S, ‘Be Careful What You Click For: An Analysis of Online Contracting’ (2007) 20 (325) Loy Consumer L Rev <http://heinonline.org> accessed 17 December 2013.

Coote B, ‘Unfair Contract Terms Act 1977’ (1978) 41 (3) The Modern Law Review <http://www.jstore.org/stable/1094816> accessed 8 June 2014.

Corbin A L, ‘The Uniform Commercial Code-Sales; Should it be Enacted? (1950) 59 (5) The Yale Law Journal 821.

Dalton C, ‘An Essay in the Deconstruction of Contract Doctrine’, (1985) 94 (5) The Yale Law Journal 997.

Davenport W B, ‘Unconscionability and the Uniform Commercial Code’, (1967) 22 U Miami L Rev <http://heinonline.org> accessed 11 December 2015

Das K M, ‘Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonable Communicated” Test’ (2002) 77 (481) Wash L Rev <http://heinonline.org> accessed 29 December 2013.

Davidson D, ‘Click and Commit: What Terms are Users Bound to When They Enter Web Sites?’ (2000) 26 (1171) Wm Mitchell L Rev <http://heinonline.org> accessed 17 January 2014.

Davis N J, ‘Presumed Assent: The Judicial Acceptance of Clickwrap’ (2007) 22 (577) Berkeley Tech LJ <http://heinonline.org> accessed 11 December 2013.

Das K M, ‘Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonable Communicated” Test’ (2002) 77 (481) Wash L Rev <http://heinonline.org> accessed 29 December 2013.

DiMatteo L A and Rich B. L, ‘A Consent Theory of Unconscionability: An Empirical Study of Law in Action’ (2005) 33 (1067) Fla St U L Rev <http//www.heinonline.org> accessed 14 January 2014.

Dorfman R S, ‘The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment’ (2015) The NEWJURIST <http://newjurist.com/fairness-in-english-contract-law.html> accessed 23 December 2015.

Del Duca L F and Levasseur A A, ‘Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System’ (2010) 58 The American Journal of Comparative Law <http://www.jstor.org/stable/20744530> accessed 25 Decemebr 2013.

Duggan, A J, ‘Till Debt Us Do Part: A Note on National Australia Bank Ltd v. Garcia.’ (1997) 19 Sydney L Rev 220.

Dugan R, ‘Standardized Forms: Unconscionability and Good Faith’ (1978) 14 (711) New Eng L Rev <http//www.heinonline.org> accessed 21 January 2015.

— —, ‘Good Faith and the Enforceability of Standardised Terms’ (1980) 22 (1) William and Mary Law Review <http//www.heinonline.org> accessed 24 January 2015.

— —, ‘Application of Substantive Unconscionability to Standardized Contracts- A Systematic Approach’ (1982) 18 New Eng L Rev 77.

Duggan T, ‘Unconscientious Dealing’ in P Parkinson (ed) *The Principles of Equity* (LBC Information Services, North Ryde NSW, 1996).

Dworkin R M, ‘The Model of Rules’ (1967) 35 (1) The University of Chicago Law Review 14.

Edwards C, ‘Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues’ (2009) 77 (3) UMKC Law Review, 647.

Ehrenzweig A A, ‘Adhesion Contracts in the Conflict of Laws’ (1953) 53 Colum L Rev 1072.

Eisenberg M A, ‘Donative Promises’ (1979) 47 (1) The University of Chicago Law Review, 1.

— —, ‘Principles of Consideration’ (1981) 67 Cornell L Rev 640.

— —, ‘The Bargain Principle and Its Limits’ (1982) 95 (4) Harvard Law Review 741

— —, ‘The Resposive Model of Contract Law’ (1984) 36 Stanford Law Review 1107.

— —, ‘The Theory of Contracts’ in Peter Benson, *The Theory of Contract Law: New Essays* (ed) (Cambridge University Press 2009).

Ellinghaus M P, ‘In Defense of Unconscionability’ (1969) 78 (5) The Yale Law Journal 757.

Epstein R A, ‘Unconscionability: A Critical Reappraisal’ (1975) 18 (2) Journal of Law and Econmic, 293.

— —, ‘Contracts Small and Contracts Large: Contract Law Through the Lens of Laissez-Faire’ (1997) Program in law and Economics Working Paper No.49 <http://chicagounbound.uchicago.edu/law-and_economics> accessed 23 June 2014.

Ewald W, ‘ Comparative Jurisprudence (I): What Was It like to Try a Rat?’ (1995) 143 (6) University of Pennsylvania Law Review, <http://www.jstor.org/stable/3312588> accessed 10 February 2014.

— —, ‘Comparative Jurisprudence (II): The Logic of Legal Transplants’ (1995) 43 (4) The American Society of Comparative Law, <http://www.jstor.org/stable/840604> accessed 10 February 2014.

— —, ‘The Jurisprudential Approach to Comparative Law: A Field Guide to “Rats”’ (1998) 46 (4) The American Society of Comparative Law 701.

Farnsworth E A, ‘Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code’ (1963) 30 (4) The University of Chicago Law Review 666.

— —, ‘The Restatement (Second) of Contracts’ (1983) 47 (2) The Rabel Journal of Comparative and International Private Law 336.

— —, ‘The Concept of Good Faith in American Law’ (1993) 10 Centro di studi e ricerche di diritto comparato e straniero <http://www.cisg.law.pace.edu/cisg/biblio/farnsworth3.html> accessed 11 Decemebr 2015.

Feinman J M, ‘Critical Approaches to Contract Law’ (1982-1983) 30 UCLA L Rev 829.

— —, ‘Relational Contract Theory in Context’ (2000) 94 Nw U L Rev 737.

— —, ‘Good Faith and Reasonable Expectations’ (2013) 67 (525) Arkansas Law Review <http://ssrn.com/abstract=2245144> accessed 14 April 2015.

— —, ‘The Duty of Good Faith: A Perspective on Contemporary Contract Law’ (2014-2015) 66 Hastings L J 937.

Feldman Y and Harel A, ‘Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule vs. Standard Dilemma’(2006) Bar-Ilan University; Hebrew University. By Cambridge University Library accessed 26 January 2015.

Feldman Y and Lifshitz S, ‘Behind the Veil of Legal Uncertainty’ (2011) 74 (2) Law and Contemporary Problems, 133.
‘Behind the Veil of Legal Uncertainty’ (2011) 74 Law and Contemporary Problems <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633429> accessed 12 November 2014.

Finn P, ‘Unconscionable Conduct’ (1994) 8 Journal of Contract Law.

Fort J C, ‘Understanding Unconscionability: Defining the Principle’ (1978) 9 (765) Loy U Chi LJ 765.

Freund O K, ‘On Uses and Misuses of Comparative Law’ (1974) 37 (1) The Modern Law Review <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1974.tb02366.x/full> accessed 12 January 2014.

Friedman S E, 'Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching' (2010) 44 (2) Georgia Law Review http://ssrn.com/abstract=1572901 accessed 25 July 2016.

Garoupa N and Ogus A, 'A Strategic Interpretation of Legal Transplants' (2006) 35 (2) The Journal of Legal Studies 339.

Gava J, 'Contract Law and Inequality - A Response to Frank Carrigan' (2013) 13 (1)

Gergen M, 'A Cautionary Tale About Contractual Good Faith in Texas' (1993-1994) 72 Tex L Rev <http://heinonline.org accessed 12 Septemebr 2015.

Gianmaria A, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) The American Journal of Comparative Law <http://www.jstor.org/stable> 12 January 2016.

Gluck G, 'The Contract Theory Reconsidered' (1979) 28 (1) The International and Comparative law Quarterly 72.

Goode R, 'The Concept of Good Faith in English Law', (1992) Centro di studi e ricerche di diritto comparator e straniero, diretoo da M J Bonell.

Goodman B, he Concept of Good Faith in English Law', (1992) Centro di studi e ricerche di diritto comparator e Cardozo L Rev 319 <http://heinonline.org accessed 7 Februry 2019.

Gordley J, 'Equality in Exchange' (1981) 69 (6) California Law Review, 1587

Hadfield G K, 'Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law' (1994) 82 (3) California Law Review 541.

Harrington E. M, 'Unconscionability Under the Uniform Commercial Code' (1967-1968) 10 S Tex LJ 203.

Hewitt C M, 'Good Faith or Unconscionability-Franchisee Remedies for Termination' (1973) 29 (1) American Bar Association 227.

Hillinger I M, 'The Article 2 Mechant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law' (1984) Geo L J 1141.

Hillman R A, 'Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress' (1979) Iowa L Rev 849.

— —, 'Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302' (1981) Cornell Law Review, 1.

— — and Rachlinski J. J., 'Standard-From Contracting in the Electronic Age' (2002) 77 NYUL Rev 429 <login.westlaw.co.uk> accessed 22 October 2015.

— —, 'Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?' (2006) 104 (5) Michigan Law Review Association <http://www.jstor.org/stable/40041468> accessed 25 June 2014.

Holmes E M, 'A Contextual Study of Commercial Good Faith: Good Faith Disclosure in Contract Formation' (1978) 39 (3) U PITT L REV <http://heinonline.org> accessed 15 December 2015.

Hölmstrom B, 'Moral Hazard and Observability' (1979) 10 (1) The Bell Journal of Economics <http://www.jstor.org/stable/3003320> accessed: 28/12/2014

Hornle J, 'Disputes Solved in Cyberspace and the Rule of Law' (2000) 2 J Inform L & Tech <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_2/hornle/> accessed 26 June 2014.

Horowitz C, 'Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts' (1985) 33 (940) UCLA <http://heinonline.org accessed 14 January 2014.

Hoskins H, 'Contractual Obligations to Negotiate in Good Faith: Faithfulness to the Agreed Common Purpose' (2014) Law Quarterly Review <login.westlaw.co.uk> accessed 06 May 2014.

Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 (1) Deakin Law Review 83.

Kamp A R, 'Between-the-Wars Social Thought: Karl Llewellyn, Legal realism, and the Uniform Commercial Code in Context' (1995) 59 Alb. L. Rev. <http://repository.jmls.edu/facpubs/204> accessed 06 July 2016.

Kanda H and Milhaput C J, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51 (4) The American Journal of Comparative Law <http://www.jstor.org/stable/3649132> accessed 30 Decemebr 2013.

Kaplow L, 'Law Rules versus Standards: An Economic Analysis' (1992) 42 (3) Duke Law Journal, 557

Kennedy D, 'Form and Substance in Private Law Adjudication' (1976) 89 (8) Harvard Law Review 1685.

Kennedy D, 'Distributive and Paternalist Motives in Contract and Trot Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 (4) Maryland Law Review 563.

Keren H, 'Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity' (2016) 2 (1) CJCCL 339.

Kessler F, 'Contracts of Adhesion--Some Thoughts About Freedom of Contract' (1943) 43 Colum L Rev 629 <http://heinonline.org> accessed 7 February 2019

— — and Fine E, ‘Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study’ (1964) 77 (3) Harvard Law Review 401.

Kidner R, ‘The Unfair Contract Terms Act 1977- Who Deals as Consumer?’ (1987) 38 (46) N Ir Legal Q <http://heinonline.org> accessed 8 May 2014.

Kim N. S, ‘Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes’ (2005) 84 Neb L Rev 506.

Kimel D, ‘Neutrality, Autonomy, and Freedom of Contract’ (2001) 21 (3) Oxford Journal of Legal Studies 473.

Klare KE, ‘Contracts Jurisprudence and the First-Year Casebook’ (1979) 54 New York University Law Review 876.

Kornhauser L A, ‘unconscionability in Standard Forms’ (1976) 64 (5) California Law Review <http;//www.jstor.org/stable/3480052> accessed 28 November 2014.

Korobkin R, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 (4) The University of Chicago Review, 1203

Kronman A. T, ‘Contract Law and Distributive Justice’ (1980) 89 (3) The Yale Law Journal 472.

— —, ‘Paternalism and the Law of Contracts’ (1983) 92 (5) The Yale Law Journal 763.

Kunz C L, Del Duca M F, Thayer H and Debrow J, ‘Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent’ (2001) 57 Bus Law 401.

Kunz C, Ottiviani J, Ziff E, Moringiello J M, Porter K M and Debrow J C, ‘Browse-Wrap Agreement: Validity of Implied Assent in Electronic Form Agreements’ (2003) 59 (1) The Business Lawyer 279.

La Porta R, Silanes F L D, and Shleifer A, ‘Law and Finance’ (1998) 106 (6) Journal of Political Economy <http://works.bepress.com/florencio_lopez_de_silanes/18 accessed 24 Decemebr 2013.

Lawson RG, ‘The Law Relating to Improvident Bargains’ (1973) 24 NILQ 171.

Leff A A, ‘Unconscionability and the Code. The Emperor’s New Clause’ (1967) 115 (4) The University of Pennsylvania Law Review 485.

— —, ‘Unconscionability and the Crowd-Consumers and the Common Law Tradition’ (1969) 31 (349) UPill L <http://heinonline.org. accessed 12 January 2014.

— —, ‘Contract as Thing’ (1970) 19 (131) Am UL Rev <http://heinonline.org> accessed 1 October 2014.

— —, ‘Thomist Unconscionability’ (1979) 4 Can Bus LJ 424

Legrand P, ‘European Legal Systems Are Not Converging’ (1996) 45 (1) International and Comparative Law Quarterly 52.

Lemley M A, ‘Terms of Use’ (2006) 91 Minn L Rev 459.

Lenhoff A, ‘Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law’ (1962) 36 Tul L Rev <http://heinonline.org> accessed 21 February 2015.

Llewellyn K, ‘What Price Contract? An Essay in Persetive’ (1931) 40 (5) Yale Law Journal 704.

Llewellyn K, ‘On Warranty of Quality, and Society’ (1936) 36 (5) Colombia Law Review 699.

Llewellyn K, ‘Why a Commercial Code?’ (1951-1953) 22 Tenn L Rev 779.

Robert M Lloyd, ‘The “Circle of Assent” Doctrine: An Important Innovation in Contract Law’ (2005) 7 Transactions: Tenn J Bus L, 237.

Lobban M, ‘Contractual Fraud in Law and Equity c1750-c1850’ (1997) 17 (3) Oxford Journal of Legal Studies 441.

Lonegrass M T, ‘Finding Room for Fairness in Formalism-The Sliding Scale Approach to Unconscionability’ (2012) 44 (1) Loy U Chi LJ <http://heinonline.org> accessed 14 February 2014.

Lucas J R, ‘Justice’ (1972) 47 (181) Philosophy 229

Lucy W N R, ‘Contract as a Mechanism of Distributive Justice’, (1989) 9 (1) Oxford Journal of Legal Studies, 132.

Manwaring J A, ‘Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law’ (1993) 25 Ottawa L Rev 235.

Mason A, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) Law Quarterly Review 238 <login.westlaw.co.uk> accessed 8 Septemebr 2015.

Mason A F, ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000)116 LQR 66 <login.westlaw.co.uk> accessed 8 September 2015.

Dari-Mattiacci G and Deffains B, 'Uncertainty of Law and the Legal Process' (2007) 163 (4) Journal of Institutional and Theoretical Economics 627 <http://ssrn.com/paper=869368> accessed 4 April 2015.

Maxeiner J R, 'Standard-Terms Contracting in the Global Electronic Age: Euopean Alternatives, (2003) 28 Yale J Int'l L 109.

McFadden D, 'Rationality for Economists?' (1999) 19 J. Risk & Uncertainty <http://link.springer.com/chapter/10.1007/978-94-017-1406-8_4#page-1> accessed 26 June 2014.

McGuiness M G and Karr A J, 'California's Unique Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption under the Federal Arbitration Act' (2005) 1 J Disp Resol 61.

Mensch B, 'Freedom of Contract as Ideology The Rise and Fall of Freedom of Contract by P.S. Atiyah' (1981) 33 (4) Stanford Law Review <http://www.jstore.org/stable/1228540> accessed 5 August 2014.

Meyer A W, 'Contracts of Adhesion and the Doctrine of Fundamental Breach' (1964) 50(7) Virginia Law Review, 1178.

Meyerson M I, 'Efficient Consumer, The Efficient Consumer Form Contract: Law and Economics Meets the Real World' (1990) 24 Ga L Rev <http://heinonline.org> accessed 25 June 2014.

— —, 'The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts' (1993) 47 U Miami L Rev <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328395> accessed 25 June 2014.

Miller J M, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentina Examples to Explain the Transplant Process' (2003) 51 (4) The American Journal of Comparative Law <http://www.jstor.org/stable/3649131> accessed 11 January 2014

Montesquieu C, 'The Spirit of Laws' (1899) 2 Colonial Press < http://jb-hdnp.org/Sarver/AP_Government/Documents/Montesquieu,%20Spirit%20of%20the%20Laws%20excerpts.pdf> accessed 2 January 2014.

Morley P M, 'Commercial Decency and the Code - The Doctrine of Unconscionability Vindicated' (1968) 9 (4) Wm & Mary L Rev 1143.

Murray J E, 'Unconscionability: Unconscionability' (1969) 31 (1) University of Pittsburgh 1.

— —, 'Contract Theories and the Rise of Neoformalism' (2002) 71 (3) Fordham L Rev 896

Neal A C, Anderman S, Victorin A, 'Inequality of Bargaining Power Law and the Weaker Party' Hugh Beale (ed), (1986) 6 (1) Oxford University Press <http://www.jstor.org/stable/764470> accessed 8 June 2014.

Oakley R L, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated' (2005) 42 Hous L Rev 1041 <login.westlaw.co.uk> accessed 8 November 2016.

O'Gorman, D P, 'Contract Theory and Some Realism about Employee Covenant Not to Compete Cases' (2012) 65 (145) S M L Rev 145.

O'Mahony L F and Devenney J, 'Undue Influence, the Elderly and Equity Release Schemes' (2006) 5 (1) Elder L Rev <http://heinonline.org> accessed 23 Novemebr 2013.

— —, 'The Elderly, Their Homes and the unconscionable Bargain Doctrine' in Martin Dixon (ed) *Modern Studies in Property Law* (Bloomsbury Publishing 2009).

Ostas D T, 'Economics and the Law of Unconscionability' (1993) 27 (2) Association for Evolutionary Economics 647.

Patti S, 'interpretation of the General Clauses 'public Policy' and 'Good Faith' in European Contract Law' (2014) 22(5) European Review of Private Law https://www.kluwerlawonline.com accessed 4 Decemebr 2014.

Peters E A, 'Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two' (1963) 73 (10) Yale LJ <http://heinonline.org> accessed 14 January 2014.

Pettit M, Freedom, Freedom of Contract, and the 'Rise and Fall' (1999) 79 BUL Rev 263.

Phang A, 'contract Formation and Mistake in Cyberspace-The Singapore Experience' (2005) 17 (361) SAcLJ <http://heinonline.org> accessed 6 August 2013.

Pistorius T, 'Click-Wrap and Web-Wrap Agreemnts' (2004) 16 (568) Afr Mercantile LJ accessed 8 January 2014.

Ponte L M, 'Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer "Products"' (2011) 26 (119) Ohio St J on Disp Resol <http://heinonline.org> accessed 25 December 2013.

Posner E, 'Contract Law in the Welfare State: A Defence of the Unconscionability Doctrin, Usury Laws, and Related Limitations on the Freedom of the Contract' (1995) 24 Journal of Legal Studies 283.

Pound R, 'Liberty of Contract' (1909) 18 (7) The Yale Law Journal <http://www.jstore.org/stable/785551> accessed 7 March 2015.

— —, ‘The Theory of Judicial Decision I. The Material of Judical Decision’ (1923) 36 (6) Harvard Law Review 641.

Powell R, ‘Good Faith in Contracts’ (1956) 9 Current Legal Problems.

Prince H G, ‘Unconscionability in California: A Need for Restraint and Consistency’ (1994-1995) 46 Hastings LJ 459 <http://heinonline.org> accessed 22 July 2016.

Quraishi A, ‘From a Gasp to a Gamble: A Proposed Test for Unconscionability’ (1991) 25 (187) UCDavis L Rev <http://heinonline.org> accessed 3 January 2014.

Radin M J, ‘Commentary Boilerplate Today: The Rise of Modularity and the Waning of Consent’ (2005) 104 Mich L Rev 1223.

Rakoff T D, ‘Is “Freedom of Contract” Necessarily a Libertarian Freedom’ (2004) Wis L Rev 477.

Raz J, ‘Legal Principles and the Limits of Law’ (1972) 81 (5) The Yale Law Journal 823.

— —, Promises in Morality and Law’ (1982) 95 (4) Harvard Law Review <http://www.jstor.org/stable/1340782> accessed 6 July 2016.

Radin M J, ‘Commentary Boilerplate Today: The Rise of Modularity and the Waning of Consent’ (2005) 104 Mich L Rev <http://heinonline.org> accessed 25 May 2014.

Reiter B J, ‘The Control of Contract Power’ (1981) 1 (3) Oxford Journal Legal Studies, 347.

— —, ‘Good Faith in Contracts’ (1983) 17 (705) Val U Rev <http://heinonline.org> accessed 13 February 2015.

Reznikoff S, ‘The Unconscionable Controversy’ (1979) 17 American Business Law Journal, 61.

Robertson M, ‘Is Assent Still A Prerequisite for Contract Formation in Today’s E-Conomy’ (2003) 78 (265) Wash L Rev 265.

Roos P D, ‘The Doctrine of Unconscionability Alive And Well in California’ (1972-1973) 9 Cal W Rev 100.

Rosenfeld M, ‘Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory’ (1984) 70 Iowa L Rev 769.

Saintier S, ‘Good Faith as an Overriding Requirement in Commercial Agency Contracts: ‘Legal Irritant’ or Successful ‘Transformation’?’ (2014) 3 (3) ZVertriebsR,166.

— —, ‘The Elusive Notion of Good Faith in the Performance of a Contract, Why Still a *Bete Noire* for the Civil and Common Law’ (2017) J.B.L. 441, 450.

Sargent T N, ‘Unconscionability Redefined: California Imposes New Duties on Commercial Parties Using Form Contracts’ (1983) 35 Hastings LJ 161.

Scalia A, ‘ The Rule of Law as a Law of Rules’ (1989) 56 (4) The University of Chicago Law Review, 1175.

Scalise R, ‘Undue Influence and The Law of Wills: A Comparative Analysis’ (2008) 19 (41) Duke J. Comp. & Int'l L. <http://heinonline.org> accessed 1 November 1014.

Schoelleman J, ‘Reevaluation of the Decision Not to Adopt the Unconscionability Provision of the Uniform Commercial Code in California’ (1970) 7 San Diego L Rev <http://heinonline.org> accessed 6 July 2016.

Schwartz A, ‘A Reexamination of Non Substantive unconscionability’ (1977) 63 Virginia Law Review 1053.

Shahar O, B, ‘Fixing Unfair Contracts’ (2011) 63 (4) Stanford Law Review,869

Shiffrin S, ‘Paternalism, Unconscionability Doctrine, and Accommodation’ (2000) 29 (3) Philosophy of Law 205.

— —,‘The Divergence of Contract and Promise’ (2007) 120 (708) Harv L Rev <login.westlaw.co.uk> accessed 20 June 2016.

Siopis A, ‘Unconscionable Bargain and General Principle’ (1984) 100 Law Quarterly Review, 523.

Slawson D W, ‘ New Meaning of Contract: The Transformation of Contracts Law by Standard Forms’ (1984) 46 (21) U Pitt L Rev <http://heinonline.org> accessed 1 Febraury 2014.

Smith S, ‘In Defence of Substantive Fairness’ (1996) 112 Law Quarterly Review 138.

— —, ‘The Reasonable Expectations Of The Parties: An Unhelpful Concept’ (2010) Canadian Business Law Journal <http://ssrn.com/abstract=1349995Jana> accessed 16 May 2015.

Smithson S L, ‘A Delicate Balancing of Paternalism and Freedom of Contract: The Evolving Law of Unconscionability in Missuri’ (2013) 78 Mo. L. Rev. 321-349 <http://heinonline.org> accessed 14 March 2014.

Smlsalova J, ‘Shrink-Wrap Agreements and English Contract Law’ (2007) 8 (13) Common L Rev <http://heinonline.org> accessed 17 December 2013.

Snyderman M, 'What's So Good about Good Faith? The Good Faith Performance Obligation in Commercial Lending' (1988) 55 (4) University of Chicago Law Review, <http://www.jstor.org/stable/1599790> accessed 10 November 2015.

Spanogle J A, 'Analyzing Unconscionability Problems' (1969) 117 (7) University of Pennsylvania Law Review, 931.

Speidel R E, 'The New Spirit of Contract' (1982) 2 (193) JL & comparative, 193

— —, 'The "Duty" of Good Faith in Contract Performance and Enforcement' (1996) 46 (4) J Legal Educ, 537.

Sqires S, 'Some Contrat Issues arising from Online Business-Consumer Agreements' (2000) 5 (95) Deakin L Rev 95.

Stapleton J, 'Good Faith in Private Law' (1999) 52 (1) Current Legal Problems <http://clp.oxfordjournals.org/content/52/1/1.full.pdf> accessed 5 November 2015.

Steyn, ' The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?' (1991) 6 (131) Denning LJ <http://heinonline.org> accessed 13 Sebtember 2015.

Steyn J, 'Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 Law Quarterly Review 433 <http://login.westlaw.co.uk/maf/wluk/api/tocectory?sttype=stdtemplate&stnew=true> accessed 13 January 2015.

Stulz R M and Williamson R, 'Culture, Openness, and Finance' (2002) 70 (3) Journal of Financial Economics <http://www.sciencedirect.com/science/article/pii/S0304405X03001739> accessed 24 February 2014.

Summers R S, 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 (2) Virginia Law Review, 195

— —, 'The General Duty of Good Faith-Its Recognition and Conceptualization' (1982) 67 (810) Cornell L Rev, 810.

Sunstein C R, 'Problems with Rules' (1995) 83 (4) California Law Rev, 953.

Taisch F, 'Unconscionability in a Civil Law System: An Overview of Swiss Law' (1991) 14 (529) L.A. Int'l & Comp LJ <http://heinonline.org> accessed 14 January 2014.

Tan Z. X, 'Keeping the Faith with Good Faith? The Evolving Trajectory Post Yam Seng and Bhasin ' (2016) JBL 420, 427.

Tasker T and Pakcyk D, 'Cyber-Surfing on the High Sea of Legalese:Law and Technology of Internet Agreements' (2008) 18 Alb LJ Sci & Tech 79.

Teubner G, 'Legal Irritant: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61(1) The Modern Law Review, 11.

Thal S N, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 (1) Oxford Journal of Legal Studies 17.

Thomas C, 'What Role Should Substantive Fairness Have in the English Law of Contract? An Overview of the Law' (2010) 6 Cambridge Student L Rev 177.

Tiplady D, 'The Judicial Control of Contractual Unfairness' (1983) 46 (5) The Modern Law Review <http://www.jstor.org/stable/1095889> accessed 21 November 2014.

Trakman L E, 'The Boundaries of Contract Law in Cyberspace' (2009) International Business Law Journal 159.

Virgo G, 'Conscience or Unjust Enrichment?: The Emperor's Old Clothes: Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd' (Opinions on High 19 May 2014n) <http://blogs.unimelb.edu.au/opinionsonhigh/2014/05/19/virgo-hills-industries/> accessed 20 May 2014.

Waddams S M, 'Unconscionability in Contracts' (1976) 39 (4) The Modern Law Journal 396.

— —, 'Good Faith, Unconscionability and Reasonable Expectations.' (1995) 9 Journal of Contract Law 55

Waisman D, 'Preserving Substantive Unconscionability' (2014) 44 Sw L Rev 297 <intl.westlaw.com> accessed 8 November 2016.

Warkentine E R, 'Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts' (2007) 31 (469) Seattle U L Rev <http://heinonline.org> accessed 12 Decemebr 2013.

Warren E, 'Formal and Operative Rules Under Common Law and Code' (1983) 30 (898) UCLA L Rev <login.westlaw.co.uk> accessed 7 August 2016.

Watson A, 'Legal Transplants: An Approach to Comparative Law' (1975) 27 (4) Stanford Law Review <http://www.jstor.org/stable/1228215> accessed 9 January 2014.

— —, 'Comparative Law and Legal Change' (1978) 37 (2) The Cambridge Law Journal <http://www.jstor.org/stable/4506104> accessed 9 January 2014.

— —, ‘From Legal Transplants to Legal Formants’ (1995) 43 (3) The American Journal of Comparative Law <http://www.jstor.org/stable/840649> accessed 25 December 2013.

Wang W KS, ‘Reflections on Contract Law and Distributive Justice: A Reply to Kronman’ (1982) 34 Hastings Law Journal 513 <login.westlaw.co.uk> accessed 1 June 2016.

Wrigth R W, ‘Substantive Corrective Justice’ (1992) 77 Iowa L Rev 625.

NWhittaker S, ‘Good Faith Implied terms and commercial contracts’ (2013) LQR 129 <login.westlaw.co.uk> accessed 8 May 2014.

Wilhelmsson T, ‘Varieties of Welfarism in European Contract Law’ (2004) 10 (6) European Law Journal 713.

Wilson J, ‘The Institutional and Doctrinal Roles of “Conscience” in the Law of Contract’ (2005) 11 (1) Aukland U L Rev, 172.

Wilson N S, ‘Freedom of Contract and Adhesion Contracts’ (1965) 14 (1) International and Comparative Law Quarterly <http://journals.cambridge.org/abstract_S0020589300012768> accessed 24 March 2015.

Wilson R H, ‘Internet Hotel Reservations: Recent Changes and Trends in the Enforcement of Click Wrap and Browse Wrap “Terms and Conditions/Terms of Use”’ (2011) 52 (2) Cornell Hospitality Quarterly 190

Winn J K and Webber M, ‘The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants’ (2006) 62 (209) Bus. Law. <http://www.heinonline.org> accessed 1 June 2014.

Winter C S, ‘The Rap on Click-Wrap: How Procedural Unconscionability if Threatining the E-Commerce Marketplace’ (2008) 18 Widener LJ 249.

Wiston F, ‘Article Two- Sales’ (1951-1953) 22 (6) Tenn L Rev <http://www.heinonline.org> accessed 1 June 2014

Wishart M C, ‘The O’Brien Principle and Substantive Unfairness’ (1997) 56 (1) Cambridge Law Journal <http://www.heinonline.org> accessed 1 June 2016.

Wishart M C, ‘The Nature of Vitiating Factors in Contract Law’ in Gregory Klass, George Letsas, and Prince Saprai (ed), *Philosophical Foundations of Contract law* (Oxford Scholarship Online 2015).

Withford W C, ‘Contract Law and Control of Standardised Terms in Consumer Contracts: An American Report’ (1995) 3 European Review of Private Law 193.

Marotta-Wurgler F, ‘Does Disclosure Matter?’ (2010) New York University Law and Economics Working Papers Paper 242 available at http://lsr.nellco.org/nyu_lewp/242 accessed 24 May 2016

Xanthaki H, ‘Legal Transplants in Legislation: Defusing the Trap’ (2008) 57 (3) The International and Comparative Law Quarterly 659.

Yuval F, and Harel A "Social norms, self-interest and ambiguity of legal norms: An experimental analysis of the rule vs. standard dilemma." (2008) 4 (1) Review of Law & Economics 81.

Zeller B, ‘Good Faith - Is it a Contractual Obligation?’ (2003) 15 (2) Bond Law Review <http://epublications.bond.edu.au/blr.vol15/iss2/13 accessed 23 November 2015.

Zhuang S, ‘Legal Transplantation in the People’s Republic of China: A response to Alan Watson (2005) 7 EurJ L Reform 215.

Law Commission Reports

Commission of the European Communities, *First Annual Progress Report on European Contract Law and the Acquis Review* (Com(2005) 456 final).

Electronic Commerce: Formal Requirements in Commercial Transactions. Advice from the Law Commission (December 2011).

Ontario Law Reform Commission, Report on Sale of Goods 163 (1979).

State of New York Law Revision Commisson Report, *Hearings on the Uniform Commercial Code* (1954) 1.

The State Bar of California: *The Uniform Commercial Code, A Special Report by the California State Bar Committee on the Commercial Code* (37 J. St. B. of Cal. 117 1962).

Encyclopedia

Expert Series, California Affirmative Defense, (2d edn).

Witikin, Cal Proc., (5th edn, 2008).

Encyclopedia of Britannica (Encyclopedia Britannica, inc 2015). <https://www.britannica.com/topic/ijma>

Encyclopedia of Britannica (Encyclopedia Britannica, inc 2016). <https://www.britannica.com/topic/qiyas>

The Stanford Encyclopaedia of Philosophy <https://plato.stanford.edu.>