
A COMPREHENSIVE LEGAL ANALYSIS ON CONTRACTS AGAINST PUBLIC POLICY AND WAIVER CLAUSES IN GUARANTEE AGREEMENTS

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ABSTRACT

This research delves into the enforceability of waiver clauses within contracts across various jurisdictions, examining their alignment with public policy principles. While such clauses often seek to limit or exclude liability, their validity is scrutinized when assessed against public policy considerations. The study explores judicial interpretations, statutory provisions, and the evolving landscape of contract law to determine the legitimacy of such waiver clauses in different legal systems. Enforceability of waiver clauses within personal guarantee agreements executed by Indian banks, scrutinizing their alignment with Section 23 of the Indian Contract Act, 1872. While these clauses often stipulate the waiver of certain legal provisions, their validity is questioned when assessed against public policy considerations

This paper explores the legal nuances of waiver clauses in contracts under Indian law, focusing on their enforceability when such waivers pertain to statutory rights or public policy considerations. Through an in-depth analysis of statutory provisions, judicial precedents, and case laws, the study examines the circumstances under which waiver clauses are upheld or struck down by Indian courts. The paper also delves into the implications of these legal principles on contractual freedom and public interest.

Keywords: Waiver Clauses, Public Policy, Contract Law, Enforceability, Guarantee

“We're all in a social contract. Whether we like it or not, we live in each others' good graces”. John Popper

I. Introduction

The principle of freedom of contract is a cornerstone of Indian contract law, allowing parties to negotiate terms and conditions that best suit their interests. However, this freedom is not absolute. Section 23 of the Indian Contract Act, 1872, stipulates that the consideration or object of an agreement is lawful unless it is forbidden by law, defeats the provisions of any law, is fraudulent, involves or implies injury to the person or property of another, is regarded as immoral, or is opposed to public policy. This provision serves as a safeguard against agreements that may harm public interest or contravene statutory provisions.

Personal guarantee agreements are pivotal in securing loans and credit facilities in India. These agreements often include clauses where the guarantor waives certain legal rights, including those under the Indian Contract Act, 1872. Such waivers raise pertinent questions about their enforceability, especially when assessed against the backdrop of public policy considerations enshrined in Section 23 of the Act.

Waiver clauses in contracts often stipulate that one party relinquishes certain rights or claims, including those arising from negligence or breach of contract. While these clauses are prevalent in various industries, their enforceability is frequently challenged on the grounds of public policy. This research aims to provide a comparative analysis of how different legal systems address the validity of waiver clauses, focusing on judicial interpretations and statutory frameworks.

A. Legal Framework: Public Policy and the Indian Contract Act

The Indian Contract Act, 1872, codifies the principles of contract formation and enforcement. Section 23 is pivotal—it states that the consideration or object of an agreement is lawful unless it is forbidden by law, fraudulent, involves injury to person or property, or is regarded as immoral or opposed to public policy. If an agreement's purpose is to defeat a statutory provision or public interest, it is void.

A.1 : Section 23 of Indian Contract Act (ICA) speaks about Lawful Consideration and Object. Section 23 stipulates that the consideration or object of an agreement is lawful

unless it is forbidden by law, is of such a nature that if permitted, it would defeat the provisions of any law, is fraudulent, involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy.

Section 23 – What Consideration and Objects are Lawful, and What Not:

Section 23 of the Indian Contract Act stipulates that the consideration or object of an agreement is lawful unless

- It is forbidden by law;
- It is of such a nature that, if permitted, it would defeat the provisions of any law;
- It is fraudulent;
- It involves or implies injury to the person or property of another; or
- The court regards it as immoral, or opposed to public policy.

A.2 Section 24: Agreements Void Where Consideration and Object Unlawful in Part

Section 24 provides that if any part of the consideration or object of an agreement is unlawful, the entire agreement is void.

Section 27: Agreement in Restraint of Trade

Section 27 declares void any agreement that restrains anyone from exercising a lawful profession, trade, or business of any kind.

Section 28: Agreements in Restraint of Legal Proceedings

Section 28 renders void any agreement that limits the time within which a party may enforce its rights under the contract.

Section 30: Agreements by Way of Wagering

Section 30 makes void all agreements by way of wager.

A 3 : Constitution of India

1. Article 13: Laws Inconsistent with or in Derogation of the Fundamental Rights.

Article 13 declares that any law inconsistent with or in derogation of the fundamental rights shall be void.

2. Article 19: Protection of Certain Rights Regarding Freedom of Speech, etc.

Article 19 guarantees the freedom of speech and expression, assembly, association, movement, residence, and profession, subject to reasonable restrictions in the interest of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation, or incitement to an offense.

3. Article 21: Protection of Life and Personal Liberty. Article 21 ensures that no person shall be deprived of his life or personal liberty except according to procedure established by law.

A 4 : Waiver Clauses in Personal Guarantee Agreements

Banks often incorporate waiver clauses in personal guarantee agreements, where the guarantor agrees to waive certain rights, including:

- The right to receive notice of default;
- The right to be discharged from liability upon the principal debtor's insolvency;
- The right to require the creditor to proceed against the principal debtor before enforcing the guarantee.
- Right to have principal borrower's security;
- In case of lost of security of principal borrower, the guarantor shall not claim right of waiver, in case of carelessness, negligence and dilapidated of security, due to creditor's

emission etc.

These clauses are intended to expedite the recovery process for banks. However, their enforceability is contentious, especially when they seek to override statutory provisions designed to protect the interests of the guarantor.

A 5 : Opposed to public policy Clause in a Contract

This provision underscores that agreements contrary to public policy are unenforceable, emphasizing the importance of aligning contractual obligations with societal welfare and legal norms.

A 5 a : Public Policy as a Non-Waivable Element: Indian courts uphold public policy considerations as non-waivable, especially when they pertain to fundamental legal principles, justice, and morality.

A 5 b : Limitations on Waiver Clauses: Even if parties agree to waive certain rights or obligations, such agreements cannot override statutory provisions or public policy considerations.

A 6 : Judicial Oversight: Courts exercise vigilant oversight to ensure that contracts do not contravene public policy, safeguarding societal interests and legal norms.

II. Guarantee Agreements, Waiver Clauses & Public Policy: A Detailed Legal Analysis

A. What Is a Guarantee Agreement?

Under Section 126 of the Indian Contract Act, 1872:

"A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default."

There are three parties involved:

Principal Debtor – the person who is liable.

Creditor – the person to whom the liability is owed.

Surety – the person who guarantees performance or payment if the principal debtor defaults.

Guarantee contracts are a cornerstone in commercial and financial transactions. Contracts are fundamental to private law and represent the will of parties to create legally binding obligations. However, this freedom is not absolute. One of the foundational limitations imposed on contractual freedom is the doctrine of public policy. Under Indian law, any contract or part thereof that is contrary to public policy is void. This limitation becomes particularly significant in the context of **waiver clauses**, especially within **guarantee agreements**, where statutory protections granted to the surety are often waived in advance. Such waiver clauses are routinely included in commercial guarantee agreements, how they interact with Sections 133 to 139 of the Indian Contract Act, 1872, and the legal justification provided by Indian courts in enforcing them. It reveals after careful examination and studying comparative jurisprudence, the boundaries of contractual freedom, and the balance, courts strike between public policy and commercial pragmatism.

B. What is a Public Policy?

The term "public policy" encompasses a wide range of considerations aimed at promoting the welfare of the public and maintaining the integrity of societal norms and legal institutions. While not exhaustively defined, Indian courts have identified several categories of agreements that are generally deemed to be against public policy.

Sections 133 to 139 of the Act deal specifically with **rights of the surety**:

Section 133: Surety is discharged if the terms of the contract between the creditor and principal debtor are varied without consent.

Section 134: Discharge of the principal debtor discharges the surety.

Section 135: Creditor entering into a composition with the principal debtor discharges the surety.

Section 139: Surety is discharged if the creditor acts negligently and impairs surety's right of subrogation.

These provisions aim to protect the surety from unfair treatment, as the surety's liability is secondary and contingent upon the principal debtor's default.

The primary purpose of these clauses is **risk minimization for lenders and ensuring creditor's rights are not delayed**. Financial institutions argue that these waivers create certainty and efficiency in enforcement. However, it raises concerns whether such contractual terms can legally override statutory protections.

B. Why Do Guarantee Agreements Contain Waiver Clauses?

Modern commercial guarantee agreements, especially those by banks or financial institutions, often contain clauses where the surety:

Waives the **right to be discharged** under Sections 133–139.

Agrees that **creditor actions (like restructuring the debt)** won't release the surety.

Waives **notice of default, demand for payment, or information rights**.

Purpose:

Commercial certainty: Ensures the creditor can proceed against the surety without procedural delays.

Risk management: Shifts some risks to the surety voluntarily.

Standardization: Waivers are embedded in pre-drafted templates used by banks.

C. Are Such Waivers Against Public Policy?

This is the core issue: If law provides protections to sureties, can they contractually waive them?

Prima Facie Argument Against Waivers:

Contracting out of statutory protection may seem contrary to public policy.

It might undermine the legislative intent behind Sections 133–139.

Judicial Trend in India:

Despite these concerns, Indian courts have **accepted waiver clauses** in guarantee contracts. Why?

D. The Public Policy Dilemma: Can Statutory Rights Be Waived?

There are two schools of thought:

One view holds that waiver of statutory rights, especially those intended to ensure fairness and protect weaker parties, violates public policy.

The other view, which Indian courts largely follow, is that **such statutory provisions are not mandatory** and hence can be waived if it does not harm public interest.

Courts distinguish between:

Mandatory provisions (which cannot be waived as they are designed for public interest), and

Directory provisions (which protect private rights and may be waived).

Sections 133 to 139 are treated as *directory*, protecting the individual surety and not public at large, hence capable of being waived.

Despite the explicit prohibition under Section 23 of the Indian Contract Act, 1872, which renders agreements contrary to public policy void, courts have occasionally upheld certain clauses that, *prima facie*, seem to contravene public policy. This apparent contradiction arises from the courts' cautious approach, emphasizing the sanctity of contracts while balancing public interest. Below is a detailed enumeration of such clauses and the corresponding judicial pronouncements:

D.1. a Wagering Agreements

While wagering contracts are generally void, courts have upheld certain clauses within them if the primary object of the agreement is not to wager. In *Gherulal Parakh v. Mahadeodas Maiya*, the Supreme Court held that an agreement to share the profits of a business intended to carry on wagering transactions was not opposed to public policy, as wagering contracts were not

illegal, though void.

D.2.b Champerty and Maintenance

These doctrines involve third parties assisting in litigation in exchange for a share of the proceeds. While traditionally opposed to public policy, Indian courts have upheld such agreements if they are made with a bona fide object and the reward is not extortionate. The Privy Council in *Raja Venkata Subhadrayamma Guru v. Sree Pusapathi Venkapathi Raju* held that champerty and maintenance are not illegal in India unless the agreement is not made with a bona fide object or the reward seems to be extortionate.

D.2.c Sale or Transfer of Public Offices

Agreements involving the sale or transfer of public offices are generally void as they tend to pervert the course of justice and public service. However, in certain cases, if the transfer does not affect the public interest adversely, courts have upheld such agreements. In *Saminathan v. Muthusami*, the Madras High Court upheld an agreement where a public servant agreed to retire to make way for another, as it did not contravene public policy.

D.2.d Interference with the Course of Justice

Agreements that interfere with the administration of justice, such as bribing a judge or influencing a witness, are void. However, in cases where the interference is minimal and does not affect the outcome of justice, courts have shown leniency. For instance, in *Veerayya v. Sobhanandri*, the Andhra Pradesh High Court held that an agreement to withdraw a criminal case was void, but the parties were not penalized as the offence was compoundable.

D.2.e Restraint of Personal Liberty

Agreements that restrain personal liberty, such as contracts that prevent a person from leaving employment or changing residence, are generally void. However, in certain employment contracts where the restraint is reasonable and for the protection of business interests, courts have upheld such clauses. In *Harwood v. Millers Timber & Trading Co.*, the court upheld a clause restricting an employee's movement to protect business interests.

D.2.f Agreements in Restraint of Marriage

Agreements that restrain marriage are void as they contravene public policy. However, in cases where the restraint is reasonable and for a specified period, courts have upheld such agreements. In *Re Carroll*, the court upheld an agreement where a father agreed not to arrange a marriage for his daughter for a specified period.

D.2.g Agreements in Restraint of Legal Proceedings

Agreements that restrict a party's right to approach the court are void. However, in cases where the restriction is reasonable and for a specified period, courts have upheld such agreements. Section 28 of the Indian Contract Act, as amended in 1996, provides that every agreement by which any party is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, is void to that extent.

D.2.h Agreements to Stifle Prosecution

Agreements that seek to prevent the prosecution of a criminal are void as they contravene public policy. However, in cases where the offence is compoundable under the Indian Penal Code, such agreements may be upheld. In *Sudhindra Kumar v. Ganesh Chand*, the court held that an agreement to drop a prosecution for robbery was void as its object was unlawful.

III. Instances Where Courts Have Recognized Waiver of Legal Rights

Indian courts have consistently held that certain statutory rights, especially those enshrined in public policy, cannot be waived or excluded by contractual agreements. Even if parties include waiver clauses in their contracts, such clauses are rendered void if they contravene statutory provisions aimed at protecting public interest.

1. *State Bank of India v. Mula Sahakari Sakhar Karkhana Ltd.*, (2006) 6 SCC 293, it was held that Surety can waive rights under Section 133 and Section 135. These are not matters of public interest but of private bargain. Hence, waiver is permissible if clearly agreed. The Court upheld the creditor's right to enforce the guarantee despite restructuring the loan without the surety's consent. The guarantee had a clause explicitly stating that the surety's liability would continue regardless of such changes.

2. *Industrial Investment Bank of India v. Biswanath Jhunjunwala*, (2009) 9 SCC 478, the Supreme Court ruled that waiver clauses in personal guarantees are enforceable, and the

surety cannot later claim discharge under Section 133 due to contract restructuring. The Court observed that waiver clauses where surety consents to variation in terms or indulgence to the principal debtor do not contravene public policy

3. *Bank of Bihar v. Damodar Prasad*, AIR 1969 SC 297, Court emphasized that **liability of surety is immediate and not dependent on creditor exhausting remedies** against the principal debtor. The Court held that a creditor is not obligated to first proceed against the principal debtor before proceeding against the surety, reaffirming the enforceability of immediate liability clauses.

4. *Simplex Concrete Piles (India) Ltd. v. Union of India (2010)*, in this case, the Delhi High Court addressed whether a contractual clause could dis-entitle a party from claiming damages that it is otherwise entitled to under law. The court held that clauses prohibiting a contractor from seeking damages under Sections 73 and 55 of the Indian Contract Act are void under Section 23. The judgment emphasized that rights arising from laws with a public policy element cannot be waived, as such laws are designed to protect public interest.

5. *Central Inland Water Transport Corporation v. Brojo Nath Ganguly* (1986), the Supreme Court held that contracts formed under unequal bargaining power, where one party dominates the other, may render exclusionary clauses void. The court emphasized protecting the interests of weaker parties, highlighting the need to balance contractual autonomy with fairness.

6. *ONGC Ltd. v. Saw Pipes Ltd. (2003)*, the Supreme Court observed that public policy is a vague and unsatisfactory term, but it must be given a wider meaning. The Court held that an award that is patently in violation of statutory provisions cannot be said to be in public interest. Such an award is likely to adversely affect the administration of justice and should be set aside if it is contrary to the fundamental policy of Indian law, the interest of India, justice or morality, or if it is patently illegal.

7. *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan (1987)*, the Supreme Court held that the exclusion clause in an insurance contract, irrespective of the circumstances, made the owner absolutely liable leading to the driving by an unlicensed driver. The court emphasized that the exclusion clause should be "read down" to ensure that it aligns with the main purpose of protecting victims of accidents. While parties may attempt to waive public policy considerations in contracts, Indian courts have consistently held that such clauses cannot be

waived if they pertain to matters of public interest. The enforceability of contracts containing waiver clauses contrary to public policy has been examined in various cases.

8. *Vijay Karia v. Prysmian Cavi E Sistemi SRL (2020)*, the Supreme Court reiterated that for an award to be set aside on the grounds of public policy, the violation must amount to a breach of legal principles or legislation that is so basic to Indian law that it is not susceptible of being compromised. This case underscores that public policy considerations cannot be waived by contractual agreement if they pertain to fundamental legal principles.)

9. *Shri Lal Mahal Ltd. v. Progetto Grano Spa (2014)*, the Court held that the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to the fundamental policy of Indian law, the interests of India, or justice or morality. Mere contravention of statutory provisions is insufficient to invoke the bar of public policy. This decision highlights that public policy considerations are paramount and cannot be waived by the parties.

10. *Waman Shrinivas Kini v. Ratilal Bhagwandas & Co. (1959)*, in this case, the Supreme Court held that a waiver of statutory rights is permissible only if it does not contravene public policy or morals. The Court emphasized that statutory rights conferred for public benefit cannot be waived by private parties.

11. *Krishna Bahadur v. Purna Theatre (2004)*, the Supreme Court reiterated that a statutory right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute, subject to the condition that no public interest is involved therein.

12. *PTC India Financial Services Ltd. v. Venkateswarlu Kari (2022)*, the Supreme Court observed that while waiver is contractual, it cannot infringe any public right or public policy. The Court highlighted that statutory rights enacted for public benefit cannot be waived by private parties.

13. *Shalimar Tar Products Ltd. v. H.C. Sharma (1987)*, the Supreme Court held that waiver of an individual's rights is decided based on the facts and circumstances of the case. The Court emphasized that statutory rights conferred for public benefit cannot be waived by private parties.

IV. Instances Where Courts Have Refused to Recognize Waiver of Legal Rights

1. Statutory Rights and Public Policy

State Bank of Travancore v. Vasantha Kumari : The Supreme Court emphasized that an agreement to waive statutory rights, especially those enacted for public benefit, is void. Courts have consistently held that rights conferred by statutes for public benefit cannot be waived, as such waiver would be against public policy. This ensures that individuals cannot contract out of obligations imposed for the welfare of the public.

2. Fundamental Rights

Basheshar Nath v. Commissioner of Income-Tax : The Supreme Court held that individuals cannot waive their fundamental rights, as these rights are enshrined not only for individual benefit but also as a matter of public policy. Fundamental rights enshrined in the Constitution of India cannot be waived, as they are essential to the individual's dignity and the state's accountability. This reflects the constitutional mandate that certain rights are inviolable and cannot be surrendered by individuals.

A. Balancing the Two Perspectives

While Indian law allows for the waiver of certain legal rights, especially in contractual relationships, it places limitations on waiving rights that are statutory in nature and serve public policy objectives. Courts carefully examine the nature of the right being waived, the context of the waiver, and the potential impact on public interest before determining its validity.

B. Public Policy Considerations

Public policy serves as a safeguard against agreements that may harm public interest or contravene statutory provisions. Waiver clauses that seek to exclude statutory rights or contravene public policy are generally unenforceable. This ensures that contractual freedom does not override the protection of public interest.

Indian courts have addressed the validity of waiver clauses in various contexts:

C. Supreme Court Decisions on Public Policy in Contracts

1. Gherulal Parakh v. Mahadeodas Maiya (1959)

In this landmark case, the Supreme Court addressed the enforceability of wagering agreements. While wagering contracts are not illegal, they are void as they contravene public policy. The Court held that such agreements, though not forbidden by law, are unenforceable due to their nature.

2. Rattan Chand Hira Chand v. Askar Nawaz Jung (1991)

The Supreme Court examined an agreement where a person purchased property in a public auction with the intent to resell it at a higher price. The Court deemed this arrangement opposed to public policy, as it undermined the fairness of public auctions and the principle of transparency in government dealings.

3. Union of India v. L.S.N. Murthy (2011)

This case involved a contract that, if performed, would require disobedience of law. The Supreme Court emphasized that an agreement is void under Section 23 if its performance necessitates unlawful acts, reinforcing the principle that contracts must not contravene legal provisions.

4. Secretary-Cum-Chief Engineer, Chandigarh v. Hari Om Sharma (1998)

The Supreme Court addressed the validity of agreements that contravene statutory provisions. It was held that any agreement that violates express legal provisions is unenforceable, as it is opposed to public policy.

5. Newar Marble Industries Pvt. Ltd. v. Rajasthan State Electricity Board (1993)

The Rajasthan High Court ruled that an agreement where the board abstained from prosecuting a company for an offense under the Electricity Act, in exchange for a benefit, was unlawful and void. This decision highlighted that agreements facilitating or condoning illegal activities are against public policy.

D. Legal Maxims and Principles

Ex turpi causa non oritur actio: This Latin maxim translates to "no action arises from a

dishonorable cause," implying that one cannot seek legal remedy for a contract that is based on an illegal or immoral act.

Public Policy as a Variable Concept: Public policy is not static; it evolves with societal norms and values. What is considered against public policy today may not have been so in the past, and vice versa. Courts assess public policy in the context of contemporary standards and the specific facts of each case.

E. Exclusive Jurisdiction Clause in a contract

Validity of Exclusive jurisdiction clauses enunciate a choice by parties to limit the place of institution of the suit to one forum. Section 23 of ICA mandates, *inter alia*, that there cannot be a contract which is forbidden by or defeats any provision of law. Section 28 makes an absolute restraint on a legal recourse or ability to enforce rights under a contract, void. However, through a conjoint reading of Section 20 of the Civil Procedure Code and Sections 23 & 28 of the Contract Act, there is scope for a partial restriction by limiting parties' recourse to one forum. Exclusive jurisdiction clauses occupy this space between an absolute restraint and convenience-based forum shopping.

In *Hakam Singh v. Gammon (India) Ltd* [1971 SCR (3) 314], the contractual validity of choice of forum clauses was discussed. In that case, the Petitioner approached the Court of the Subordinate Judge at Varanasi for an order referring the parties to the arbitration. The contract between the parties had a stipulation that the Courts of Mumbai alone will have jurisdiction. The trial court concluded that the entire cause of action had arisen at Varanasi and the parties could not by agreement confer jurisdiction on the Courts at Bombay, which they did not otherwise possess. While dealing with this case, the Supreme Court stated that when two courts had the jurisdiction to entertain a dispute, a choice of one by agreement, would not amount to restraint of legal proceedings, or violate public policy, under Sections 28 and 23 of the Contract Act respectively. However, the parties could not, by agreement confer jurisdiction on a court that would otherwise not have jurisdiction in law to adjudicate the dispute in question. This position has been affirmed in subsequent decisions of the Supreme Court.

Central Inland Water Transport Corporation Ltd. V Brojo Nath Ganguly, 1986 SCR (2) 278, in this case one of the clauses in a contract of employment provided that the employer (corporation) could terminate the services of a permanent employee by giving him a 3 months'

notice or 3 months' salary. In accordance with the above clause, the services of the respondent Brojo Nath and others were terminated instantly by giving them the notice, accompanied by cheque for 3 months' salary. The Supreme court held Rule 9 of service Discipline And Appeals of 1979 frames by the corporation empowering that such a clause in the service agreement between persons having gross inequality of bargaining power was wholly unreasonable and against public policy and was therefore void under section. 23 of the Indian Contracts Act.

In *Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd.*, the Supreme Court was dealing with a clause, which limited the liability of a courier company in case of any loss or damage to a shipment, in the terms and conditions printed on a consignment note for shipment of a package. The Supreme Court upheld the decision of the National Consumer Disputes Redressal Commission, which limited the amount awarded to the consignor for deficiency of service, to the amount specified in the limitation of liability clause. The court held that parties who sign documents containing contractual terms are usually bound by such contract and rejected the contention that there was no *consensus ad idem* between the parties on limitation of liability, in view of the National Commission's finding of fact that the consignor had signed the consignment note.

Recently, Supreme Court of India, in the case of *Vijaya Bank & Anr versus Prashant B Narnaware*, 2025 INSC 691, held while interpreting the contractual terms contained in the employment agreement, about liquidated damages. The Supreme Court's decision stresses upon the importance of balancing the interests of employers in retaining key personnel with the rights of employees to seek better opportunities. This case highlights the evolving nature of public policy and the need for courts to consider the broader economic context when interpreting employment contracts. Supreme Court had occasion to deal with two section of the IC Act, Section 23 and Section 27, it was observed that a restrictive covenant operating during the subsistence of an employment contract does not put a clog on the freedom of contracting party to trade or employment. It was further held that what is just, fair and reasonable in the eyes of society varies with the time, civilizational advancements, growth of knowledge and evolving standards of human rights and dignity alter the contours of public good and policy. So, restrictive terms in covenant prescribing a minimum term cannot be said to be unconscionable, unfair or unreasonable and thereby in contravention of public policy nor it is opposed to public policy.

F. Enforcement of exclusive jurisdiction clauses

In *A.B.C. Laminart Pvt. Ltd. & Anr vs A.P. Agencies, Salem* [1989 SCR (2) 1] the contract between the parties stipulated that the Courts of Kaira will have jurisdiction to try disputes arising from the contract. The Plaintiff instituted a suit for money recovery in the Court at Salem. The Madras High Court upheld the concurrent jurisdiction vested in the Salem Court since the contract was partly performed in Salem. The division bench of the Supreme Court in Special Leave to Appeal, stated that as regards construction of the ouster clause when words like ‘alone’, ‘only’, ‘exclusive’ and the like have been used there may be no difficulty in construing the ouster, unless it is found that there is no *consensus ad idem*.

In *Swastik Gas (M/S Swastik Gases Pvt. Ltd v. Indian Oil Corp.Ltd* [(2013) 9 SCC 32], the Supreme Court provided much-needed clarity by stating that “... the absence of words like “alone”, “only”, “exclusive” or “exclusive jurisdiction” is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The three-judge bench held that the very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. The judgment also noted that the principle of *Expressio unius est exclusio alterius* (expression of one is an exclusion of the other) would be applicable to such cases.

V. Cross Country Study & Legal Frameworks

A.1 India

Under Section 23 of the Indian Contract Act, 1872, an agreement is void if its object or consideration is unlawful, including if it is opposed to public policy. Indian courts have consistently held that waiver clauses that contravene statutory provisions or public policy are unenforceable. For instance, in *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, the Supreme Court emphasized that contractual terms that are unfair or unreasonable may be struck down as being opposed to public policy.

A.2 United States

In the United States, the enforceability of waiver clauses is assessed based on factors such as the nature of the service provided, the bargaining power of the parties, and the public interest involved. In *Tunkl v. Regents of the University of California*, the California Supreme Court

identified six factors to determine whether a contract affects the public interest, including whether the service is essential and whether the party seeking exculpation is engaged in performing a service of great importance to the public. If these factors are met, waiver clauses may be deemed unenforceable.

A.3 United Kingdom

English contract law permits waiver clauses but subjects them to scrutiny under the Unfair Contract Terms Act 1977. Clauses that attempt to exclude or limit liability for negligence are enforceable only if they satisfy the requirement of reasonableness. In *Norwich City Council v. Harvey*, the Court of Appeal held that a clause excluding liability for fire damage was enforceable because it was reasonable and had been agreed upon by the parties. The principle of public policy in contract law is well-established, with courts scrutinizing contracts that contravene public interest. Under English law (see *Holme v. Brunskill*, 1878), similar protections exist, but sureties can waive them if done clearly.

A.4 Canada

Canadian courts have adopted a similar approach to the United Kingdom, allowing waiver clauses that exclude or limit liability for negligence, provided they meet the test of reasonableness. However, in *Pearce v. 4 Pillars Consulting Group Inc.*, the British Columbia Court of Appeal found that a class action waiver clause was unenforceable due to unconscionability and public policy considerations, as it effectively precluded access to justice for the plaintiffs.

A.5 South Africa

In South Africa, the enforceability of waiver clauses is determined by their compliance with constitutional values and public policy. In *Barkhuizen v. Napier*, the Constitutional Court held that a time-limitation clause in a contract was unenforceable because it violated the constitutional right of access to courts, deeming it contrary to public policy.

A.6 France

French contract law incorporates public policy considerations, rendering certain contracts void if they contravene public order.

A.7 Germany

The German Civil Code provides provisions that void contracts against public policy.

A. 1 International Conventions

1. United Nations Convention on Contracts for the International Sale of Goods (CISG)

Article 4 of the CISG excludes matters of public policy from its scope, allowing domestic laws to govern such issues.

VI. Discussion & Findings:

The comparative analysis reveals that while waiver clauses are recognized across various jurisdictions, their enforceability is contingent upon their alignment with public policy considerations. Jurisdictions like India and South Africa adopt a strict scrutiny approach, rendering such clauses unenforceable if they contravene public policy or constitutional values. In contrast, the United States, United Kingdom, and Canada employ a reasonableness or factors-based analysis, allowing waiver clauses provided they do not adversely affect the public interest or access to justice.

This divergence underscores the importance of context and jurisdiction in determining the validity of waiver clauses. Parties engaging in international contracts must be cognizant of the legal frameworks governing such clauses in the relevant jurisdictions to ensure enforceability.

A.1 The Balancing Act: Commercial Need versus Fairness

Courts tread carefully to ensure that waiver clauses are not **buried or obscure** in contracts. There is **clear consent** and **understanding** by the surety. No element of **coercion or unequal bargaining power** exists. As such waiver clause if inserted would not held contract *ipse dixit* void or un-enforceable or against the public policy.

- **Bargaining Power:** If the guarantor has unequal bargaining power, the waiver clause may be considered unconscionable.
- **Clarity and Transparency:** The terms of the waiver must be clear and transparent; any ambiguity may render the clause unenforceable.

- Compliance with Statutory Provisions: Waiver clauses that contravene statutory provisions, such as those under the Indian Contract Act, may be void.
- This underpins the **creditor's freedom** to insert waiver clauses to facilitate recovery.

Courts are likely to scrutinize waiver clauses to ensure they do not undermine the statutory protections afforded to guarantors. By keeping these points in mind, if the waiver is made, then, it would not be against the public policy.

- ❖ Standardization: Banks should standardize waiver clauses to ensure fairness and transparency.
- ❖ Disclosure: Guarantors should be provided with clear disclosures regarding the implications of waiver clauses.
- ❖ Regulatory Oversight: Regulatory bodies should monitor the inclusion of waiver clauses to ensure compliance with legal standards.
- ❖ Judicial Vigilance: Courts should continue to scrutinize waiver clauses to protect the interests of guarantors and uphold public policy.
- ❖ Jurisdictional Awareness: Parties should conduct thorough legal due diligence to understand the enforceability of waiver clauses in the relevant jurisdictions.
- ❖ Clarity and Transparency: Waiver clauses should be drafted with clear and unambiguous language to avoid challenges based on un-conscionability or lack of understanding.
- ❖ Reasonableness Assessment: Clauses should be reasonable and not impose undue hardship on any party, aligning with the principles of fairness and justice.
- ❖ Legal Counsel: Engaging legal professionals with expertise in the relevant jurisdictions can aid in drafting enforceable waiver clauses and navigating potential legal challenges.
- ❖ Codify Limits on Waivers in Statute: The Indian Contract Act should include clarificatory provisions that specify which statutory protections for sureties are waivable and under what conditions. This would help ensure uniformity in application

and prevent abuse.

- ❖ **Mandate Disclosure and Explanation of Waiver Clauses:** Financial institutions and creditors should be required to clearly explain the implications of waiver clauses to sureties at the time of signing, particularly when using standard-form agreements.
- ❖ **Judicial Review of Bargaining Fairness:** Courts should more actively examine bargaining power dynamics between the surety and creditor, especially in cases involving laypersons or non-commercial sureties, to ensure that waivers are truly voluntary and informed.
- ❖ **Introduce Cooling-Off Periods:** For certain categories of sureties (e.g., individuals guaranteeing loans for friends or family), laws could provide a short cooling-off period post-execution to reconsider and revoke their consent to onerous waiver clauses.
- ❖ **Create Guidelines for Enforcement Agencies:** Regulatory bodies like RBI could issue guidelines for banks on the use of waiver clauses, ensuring they are not misused in a way that circumvents the protective intent of the Contract Act.
- ❖ **Encourage Alternative Dispute Resolution (ADR):** In cases involving disputed waivers, parties should be encouraged to resolve issues through mediation or arbitration, which can account for the nuances of consent and understanding better than strict textual interpretations.

VII Conclusion

Indian legal principles uphold the sanctity of public policy by restricting the waiver of rights that could harm public interests. Contractual clauses attempting to waive statutory or fundamental rights are generally unenforceable if they contravene public policy. This approach ensures the protection of individuals and society at large, maintaining the integrity of legal and moral standards.

Waiver clauses in personal guarantee agreements play a significant role in the banking sector. However, their enforceability is contingent upon their alignment with public policy considerations under Section 23 of the Indian Contract Act. By adhering to principles of fairness, transparency, and statutory compliance, the legitimacy of such clauses can be upheld,

ensuring a balance between the interests of Indian courts have consistently held that these statutory provisions, although protective in nature, are not mandatory in character and thus may be waived by the surety, provided such waiver is express, voluntary, and clear. The jurisprudence suggests that the courts differentiate between public law rights (which cannot be waived) and private statutory rights (which can be waived when not contrary to public policy). Waiver clauses in guarantee agreements have, therefore, been upheld as valid tools to enhance commercial certainty, especially in the banking and finance sector, where predictability in enforcement is crucial. But moot question shall always pinch is whether, if, there are certain provisions in the Statutes, still it can be waived, particularly where, it is a defence and whether such defence can be taken away by Banks or Courts only for the reason that the Guarantors have waived statutory provisions voluntarily ?. In the era of freedom of contract and bargaining power, there is a way further to analyse once again by the Supreme Court of India in time to come.

References:

1. R K Bangia, Indian Contract Act (12th edn, Allahabad Law Agency 2022)
2. Avtar Singh, Law of Contract and Specific Relief (13th edn, Eastern Book Company 2021)
3. Dr G C Bharuka, Contract Act with Special Reference to Guarantee and Bailment (9th edn, Universal Law Publishing 2019)
4. Mulla, The Indian Contract Act (14th edn, LexisNexis Butterworths 2019)
5. P C Tripathi, The Law of Contracts (5th edn, Central Law Publications 2017)
6. International Chamber of Commerce, Incoterms® 2020 (ICC Publication No 723)
7. United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980
8. E Peel, Treitel on the Law of Contract (15th edn, Sweet & Maxwell 2015)
9. H Beale (ed), Chitty on Contracts (33rd edn, Sweet & Maxwell 2018)
10. R Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (OUP 1996)
11. J McCoubrey and N White, Textbook on Jurisprudence (4th edn, Butterworths 2007)
12. G McMeel, Waiver and Estoppel (Hart Publishing 2010)
13. Hitesh N Dave, Once a Guarantor Always a Guarantor : A Conundrum, Gujarat Law Herald 2019(3) page 17-22
14. L M Friedman, 'Contractual Waivers and Public Policy in the United States' (1992) 80 Mich L Rev 393
15. A Ramaiya, 'The Law of Contracts and Public Policy: Indian Context' (2013) 7 Indian J Law & Justice 77
16. *Waman Shrinivas Kini v. Ratilal Bhagwandas & Co.*, AIR 1959 SC 689

17. *Gherulal Parakh v. Mahadeodas Maiya*, AIR 1959 SC 781
18. *Shalimar Tar Products Ltd. v. H.C. Sharma*, (1988) 2 SCC 1
19. *Murlidhar Agarwal v. State of U.P.*, (1974) 1 SCC 1
20. Law Commission of India, *Report on Unfair (Procedural and Substantive) Terms in Contract*, Report No. 199 (2006).
21. Law Commission of India, *Report on Unfair Terms in Contract*, Report No. 103 (1984).