DEFAULT, MANDATORY AND ALTERING RULES IN CONTRACT LAW: NEED FOR A SYSTEMATIC APPROACH IN INDIA

A Thesis Submitted

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS

FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY
IN
LAW

By

S BADRINATH
REGISTRATION NO.: 20GSOL3010015

Supervisor

PROF. (DR.) SEEMA YADAV
FORMER PROFESSOR, DEPARTMENT OF LAW

GALGOTIAS UNIVERSITY
UTTAR PRADESH
MARCH 2024

Approval Sheet

This thesis entitled "**Default, Mandatory and Altering Rules in Contract Law: Need for a Systematic Approach in India**" by **S Badrinath** is approved for the degree of **Doctor of Philosophy in Law.**

Examiners

_____

_____

Supervisor (s)

_____

_____

_____

Chairman

_____

Date:_____

Place:_____

CANDIDATE'S DECLARATION

I hereby certify that the work which is being presented in the thesis, entitled "**Default, Mandatory and Altering Rules in Contract Law: Need for a Systematic Approach in India**" in fulfilment of the requirements for the award of the degree of **Doctor of Philosophy in Law** and submitted in Galgotias University, Greater Noida is an authentic record of my own work carried out during a period from July 2020 to March 2024 under the supervision of Dr Seema Yadav, Former Professor of Law.

The matter embodied in this thesis has not been submitted by me for the award of any other degree of this or any other University/Institute.

S Badrinath
20GSOL3010015

This is to certify that the above statement made by the candidate is correct to the best of our knowledge.

(Prof. (Dr) Seema Yadav)
Supervisor
Department of Law

The Ph.D. Viva-Voice examination of **S. Badrinath**, Research Scholar, has been held on _____.

Sign. of Supervisor(s) Sign. of External Examiner

Statement of Thesis Preparation

1. Thesis title: **Default, Mandatory and Altering Rules In Contract Law: Need for a Systematic Approach in India**

2. Degree for which the thesis is submitted: **Doctor of Philosophy in Law**

3. Thesis Guide was referred to for preparing the thesis.

4. Specifications regarding thesis format have been closely followed.

5. The contents of the thesis have been organized based on the guidelines.

6. The thesis has been prepared without resorting to plagiarism.

7. All sources used have been cited appropriately.

8. The thesis has not been submitted elsewhere for a degree.

(Signature of the student)

Name: S Badrinath

Registration No.: 20GSOL3010015

Abstract

The view that contract law can be looked at as default, mandatory and altering rules (**Default Rules Doctrine**) has been in vogue for more than three decades. The evolution of contract law in the West can be seen in three stages from the perspective of the Default Rules Doctrine. In the first stage, the question was whether a rule should be mandatory or not. Contract law scholars (and practitioners) engaged in a discussion as to whether a particular rule should be designed as a mandatory rule or freedom should be given to parties to contract around it. At the cost of reductionism and generalisation, if a period could be pointed out, contract law scholars engaged in this debate up to 1989. The inflection point was the paper penned by Ian Ayres and Robert Gertner and published in 1989 in the Yale Law Journal.

Thereafter, contract theory was occupied with the question that if a rule should not be mandatory how should it be designed? Several hundreds of articles were written on how default rules should be designed. The third stage, being the current one, is concerned with how contract parties should contract around the default rule. This stage was concerned with the question as to the design of altering rules. The inflection point was Ian Ayres' paper "Regulating Opt-Out; An Economic Theory of Altering Rules" published in 2012.

This trifurcation has immense practical significance is clear in the amount of literature it has produced in these thirty five years and the way statutes have been drafted in the recent past.

Unfortunately, the Default Rules Doctrine has not permeated contract law in India, either in policy or judicial discourse or in legal education. In fact, the term "default rule" has been used for the first time, and that too in the passing recently, in Dyna Technologies v. Crompton Greaves, 2019 SCC OnLine SC 1656. The impact of failure to view contract law in terms of the Default Rules Doctrine has made Indian lawyers (judges, counsels, law academicians and law students) view contract law as a black-letter legal instrument and without the sophisticated understanding of contract law and the legal system that the Default Rules Doctrine offers. To the extent the theory is used, it is employed by academicians in an *ad hoc* manner. Therefore, there is a lack of systematic analysis of contract law through the lens of the Default Rules Doctrine. Empirical evidence suggests that legal educational institutions to not teach default rules systematically and lawyers, law academicians and law students in India are not aware of the Default Rules Doctrine.

The failure to appreciate this view of contract law has resulted in a not-so-sophisticated view of the field of law that could be classified as contract law. Another problem is the lack of certainty in contract law. Some of the typical examples include the law regarding time being the essence in construction contracts, the relevance of time-as-contractual-essence for determination of liquidated damages, disability of unregistered partnerships vis-à-vis arbitrations, and the law regarding enforceability of standstill agreements. Using these examples various insights in the Default Rules Doctrine were highlighted.

The larger point is that asking the questions whether a rule was a default or a mandatory rule and if, it was a default rule, what are the conditions for contracting around the default, provide considerable insight on the nature of the rule, and failure to ask those questions could lead to misunderstanding of the real purport of the rule.

The absence of a systematic use and analysis of Default Rules Doctrine in India and the adverse consequences thereof can be looked at two ways: one approach is to look at the negative consequences of the lack of integration of the Default Rules Doctrine in India and the other approach is to look, given the absence of the theory, at the potential of the theory in contributing to developing the Indian legal system. The aforesaid four examples looked at it from the negative perspective. From a positive angle, there are several benefits that could be reaped by the legal system.

Key areas where the theory could contribute to the legal industry were also noted, such as:

- Default Rules Doctrine provides insights on when and how parties could validly contract around a particular rule and this skill is important both for transactional and dispute resolution lawyers.
- The theory enables a finer understanding of various rules in contract law.
- It creates a duty on courts to guide future contracting parties as to how to contract around a default rule.
- Faulty design of rules could be identified through the theory to reorient such rules towards better effectiveness and efficiency.

- The role of academia becomes critical in analysing various contract law rules and critique the laws, whether legislature or judge made, and recommend remedial measures. This role of academia is considerably furthered through the use of the theory.
- The theory also helps law teachers focus not only on the ratio decidendi of a particular decision but also on facts, which are crucial for understanding various contract law doctrines and for law practice.
- By reorienting the focus to facts, the theory enables law students gain practical understanding on the contractual clauses in dispute in a decision and helps them better understand the practicalities of drafting contracts.

The entire legal system stands to benefit by the systematic use of the Default Rules Doctrine. An empirical study conducted points out at the lack of awareness of the Default Rules Doctrine and that the theory is not taught either in undergraduate or postgraduate law courses in most law schools in India. This needs to change. Further, most respondents were of the view that if Default Rules Doctrine is employed, the legal system would stand to benefit. This is applicable in several spheres of the legal industry- be it law-making, legal education, transactional lawyering, or adjudication.

All these aspects led to the conclusion that effective utilisation of the Default Rules Doctrine in law practice and legal education would considerably improve clarity and certainty in Indian contract law.

Acknowledgements

A PhD is never the work of a single person. It is the combined effort of the supervisor, the university and various persons who guide the researcher to the proper path. In undertaking this work, I have received constant support, guidance and encouragement from Dr Seema Yadav, my supervisor. Many thanks to her for her support.

I am thankful to the VC, the Administration, Dr. Prusty, Dean (Research), Dr Amrita Tyagi, and the PhD Office of the Galgotias University. The Department of Law of Galgotias University and the faculty members therein have constantly supported me right from the course work till the submission of the thesis. Special thanks to Dr Naresh Kumar Vats, Dean & Professor of Law. Many thanks for the faculty members of the university including, in no particular order, Dr Sandhya Kumari, Prof. (Dr.) Namita Singh Malik, Dr Vikram Singh Jaswal, Prof. PP Mitra, Dr Shweta Thakur, Dr Azim Pathan, Dr. Mritunjay Kumar and others. I also thank my colleagues in various PhD batches for various discussions regarding the course. Special thanks to various faculty members and external faculty who had provided their inputs on various occasions during the course of the PhD work.

There are several people who have helped me in this research. These include Prof. (Retd.) Dr. P. Ravilochanan, who guided me primarily on research methodology and other aspects of the thesis, Prof. Ian Ayres, who had been kind enough to email me whenever I wrote to him guiding me on the Default Rules Doctrine, and on whose work this thesis is based, Prof. Eyal Zamir, who, generously, replied to my queries, Dr. Lovely Dasgupta, who has guided and encouraged me to write on contract law on various occasions, including on the Default Rules Doctrine and on whose writing on the theory in India that this work builds on, and Prof. Nilima Bhadbhade, who has guided me on contract law, in general, and on various types of default rules, in particular. Prof. Bhadbhade had been kind in answering my doubts and is an immense source of inspiration not only to me but to lakhs of law students in India. Thanks to Ms. Jasmine Joseph for everything.

I thank my mother, Mrs. Bhanu Srinivasan, for proof-reading the draft. I thank my father, Mr. Srinivasan Seshadri, for being an example of how one should lead a life- duty-conscious and ever-caring. I thank my brother, Hariprasad Srinivasan, for showing the way. Undertaking a

PhD is arduous and would not have been possible without support from family. My sincere thanks to my wife, Ms. Hamsini Ravilochanan, for allowing me to pursue my passion, and to my son, Prahlad, for sacrificing his dad time- the most important thing I had to sacrifice for this PhD.

Thanks to the Directorate General of Hydrocarbons and Bharat Petroleum Corporation Limited, especially the Legal and the HR Departments, who have encouraged me in this endeavour. When I applied for this programme, Mr. Inamul Islam, my boss in the DGH Legal Department, and my senior colleague, Mr. Kaushik Rajkhowa, encouraged me. Special thanks Ms. Neelam from the HR Department of DGH who had got the clearances in record time, and so did Mr. Biju George and Ms. Sujatha Nair of BPCL's HR Department. I take this occasion to thank by bosses and colleagues in the Legal Department of DGH, BPCL, BHEL and GSPC, including Mr. Sandeep Dave, Mr. Mohammed Yousuff, Mr. J. Ravichandan, Mr. Avnit Singh Arora, Mr. Sudhakar Reddy, Mr. A. Venkatesan, and Mr. Amit Jindal for their guidance, support and encouragement.

My friends, Mr. MLS Kaarmukilan, Mr. Puneet Vyas, Ms. Madhavi Nalluri and Ms. Smitha Poovani, have always been great sounding board for my ideas and constantly encouraged me throughout my professional and personal life. Thanks to my Mangalore and Ranipet friends for all the support.

Special thanks to my colleagues at DGH Legal Department who have been of great support and encouragement in my endeavour. Thanks to my teachers, library staff and fellow students at NUJS, Kolkata and SDM Law College, where I did my LLM and BA (Law), LLB, respectively.

- S. Badrinath

Table of Contents

List of Cases

- *A* -

- B -

45. BVM Finance Private Limited vs. Vistra ITCL (India) Ltd. and Ors. (27.10.2020 - BOMHC) : MANU/MH/1720/2020

- *C* -

46. C. Haridasan v. Anappath Parakkattu Vasudeva Kurup, MANU/SC/0031/2023
47. C and C Constructions Ltd. vs. Ircon International Ltd. (01.03.2021 - DELHC) : MANU/DE/0400/2021;
48. Carlill v. Carbolic Smoke Ball Co., [1892] EWCA Civ 1 (CA)
49. Central Bank v. Multi Block Private Ltd. and Ors. MANU/MH/0015/1997
50. Ch. Ramalinga Reddy v. Superintending Engineer, MANU/SC/1814/1994
51. Chand Rani v. Kamal Rani, MANU/SC/0285/1993
52. Charles Rickards Ltd. v. Oppenheim [1950] 1 KB 616.
53. Chetanram Ramgopal v. Chief Engineer, PWD, Rajasthan, MANU/RH/0267/1999;
54. Chintpurni Medical College and Hospital v. State of Punjab, MANU/SC/0679/2018
55. Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates (P) Ltd., (2011) 9 SCC 147
56. Citi Bank v. Standard Chartered Bank (2004) 1 SCC 12;
57. Citibank N.A. v. Juggilal Kamlapat Jute Mills Co. Ltd., MANU/DE/0004/1982
58. City of San Antonio v. Hotels.com, L. P., 209 L. Ed. 2d 712 (U.S. May 27, 2021)
59. City of Burlington v. Indem. Ins. Co. of N. Am., 332 F.3d 38, 2003 U.S. App. LEXIS 11482 (2d Cir. Vt. June 9, 2003);
60. Concord Real Estate CDO 2006-1 v. Bank of Am. N.A., 996 A.2d 324, 2010 Del. Ch. LEXIS 113, 2010 WL 1948225 (Del. Ch. May 14, 2010)
61. Co-operative Hindusthan Bank Ltd. v. Surendra Nath, MANU/WB/0173/1931
62. Construction Design Services v. Delhi Development Authority, MANU/SC/0099/2015.
63. Corporation Bank v Mohandas Baliga MANU/KA/0296/1992 : ILR 1993 Kar 201.
64. Cowan v Foreman and Ors, [2019] EWCA Civ 1336

- *D* -

65. Crescent Pak Soap and Oil Mills, Karachi v. Pakistan, LEX/HWPK/0081/1964
66. D. Wren International Ltd. v. EIL, MANU/WB/0053/1996
67. Datar Switchgear v. Data Finance Ltd MANU/SC/0651/2000
68. Deccan Paper Mills v. Regency Mahavir Properties, MANU/SC/0599/2020
69. DeFelice v. Emp't Sec. Dep't, 187 Wn. App. 779, 351 P.3d 197, 2015 Wash. App. LEXIS 1078 (Wash. Ct. App. May 26, 2015)
70. Desh Raj v. Rohtash Sinha, AIR 2023 SC 163
71. Devender Kumar v. Parsvnath Realcon Pvt. Ltd., MANU/RR/0012/2020.
72. Dharam Deo Pandey vs. Ramanuj Pandey, MANU/BH/0201/1937
73. Dickerson v. Rogers, 4 Humph 179 (1843).
74. Dignam-Thomas and Anor v McCourt and Anor [2023] EWHC 546 (Fam)
75. Dost Mohammad and Ors. vs. (Firm) Jai Ram Damodar MANU/PE/0049/1935;
76. Drax Holdings Ltd., Re [2003] EWHC 2743 (Ch).
77. Duncan v. TheraTx, Inc., 775 A.2d 1019, 2001 Del. LEXIS 243 (Del. June 1, 2001)
78. Dyna Technologies v. Cromption Greaves 2019 SCC OnLine SC 1656

- *E* -

79. East India Company v Oditchurn Paul, [1849] UKPC 21
80. Energy Watchdog v. Central Electricity Regulatory Commission (2017) 14 SCC 80 : MANU/SC/0408/2017
81. Export Credit Guarantee Corpn of India Ltd. v. Garg Sons International, MANU/SC/0039/2013;

- *F* -

82. Fateh Chand v. Balkishan Das, MANU/SC/0258/1963
83. Firm Ashok Traders and Anr. v. Gurumukh Das Saluja AIR 2004 SC 1433, 2004(1) Arb. LR 141 (SC)
84. Flanagan v Liontrust Investment Partners LLP and others, [2015] EWHC 2171
85. Food Corporation of India Vs. Sreekanth Transport (1999) 4 SCC 491

- *G* -

86. G.T. Girish vs. Y. Subba Raju (D) by L.Rs and Ors. (18.01.2022 - SC) : MANU/SC/0058/2022
87. Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri MANU/MH/0039/1942
88. Geo Miller and Co. Pvt. Ltd. vs. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd., MANU/SC/1198/2019
89. Gherulal Parakh v. Mahadeodas Maiya, MANU/SC/0024/1959
90. Girolametti v. Michael Horton Assocs., 332 Conn. 67, 208 A.3d 1223, 2019 Conn. LEXIS 172 (Conn. June 25, 2019).
91. Golden Edge Engineering Private Limited v. Bharat Heavy Electricals Limited, MANU/WB/0558/2020
92. Globalia Business Travel SAU (formerly Travel Plan SAU) of Spain v Fulton Shipping Inc of Panama, [2017] UKSC 43
93. Gopinath Motilal v. Ramdas MANU/WB/0171/1935
94. Gouri Dutt v, Bandhu Pandey, AIR 1929 All 394;
95. Granville Technology Group Ltd and Ors v. LG Display Co Ltd, [2023] EWHC 2418 (Comm)
96. Gujarat Bottling Co. Ltd. v. Coca Cola Company, MANU/SC/0472/1995

- *H* -

97. H.B. Basavaraj v. Canara Bank, MANU/SC/1785/2009
98. H.M. Kamaluddin Ansari and Co. v. Union of India, MANU/SC/0002/1983
99. H.P. Power Corporation Limited v. Hindustan Construction Company Limited, MANU/HP/1945/2023
100. HSIDC v. Shushil Kumar Rout, MANU/DE/0925/2019.
101. Hadley v. Baxendale 9 Ex. 341, 156 Eng. Rep. 145 (1854)
102. Haji Adam Sait Dharmasthapanam v. Hameed (1985) KLT 169;
103. Hari Ram Nagar v. Delhi Development Authority, MANU/DE/5785/2019
104. Hari Shankar Singhania v. Gaur Hari Singhania, MANU/SC/1686/2006

105. Harvey ex rel. Gladden v. Cumberland Trust and Inv. Co., 532 S.W.3d 243, 2017 Tenn. LEXIS 701, 2017 WL 4700834 (Tenn. October 20, 2017)
106. Haryana State Industrial Development Corporation Ltd. v. Shushil Kumar Rout, MANU/DE/0925/2019: (26.02.2019 - DELHC).
107. Haryana Telecom Ltd. v. Union of India, MANU/DE/8645/2006;
108. Heaton-Sides v. Snipes, 233 N.C. App. 1, 755 S.E.2d 648, 2014 N.C. App. LEXIS 262, 2014 WL 1016051 (N.C. Ct. App. March 18, 2014)
109. Heerachand v. Saraswathy Ammal (2000) 3 CTC 694;
110. Himachal Pradesh Cooperative Group Housing Society v. Umesh Goel MANU/DE/8959/2007
111. Hind Construction Contractors v. State of Maharashtra, (1979) 2 SCC 70
112. Hindustan Corporation (Hyderabad) Pvt. Ltd. v. United India Fire and General Insurance Co. Ltd., Hyderabad, AIR 1997 AP 347: MANU/AP/0051/1997
113. Hungerford Investment Trust Ltd. (in vol. Liquidation) v. Haridas Mundhra, MANU/SC/0684/1972

- I -

114. In Re: Antonius Raab and Ors. (24.11.1948 - BOMHC) : MANU/MH/0048/1950
115. In re McKinney, 67 A.3d 824, 2013 Pa. Super. LEXIS 736, 2013 PA Super 123, 2013 WL 2180015 (Pa. Super. Ct. May 21, 2013)
116. Indeen Bio Power Limited v. EFS Facilities Service (India) Pvt. Ltd., MANU/DE/2364/2019
117. India Tourism Development Corp. Ltd. v. Bougainvillea Multipex and Entertainment Centre Pvt. Ltd., Delhi High Court: O.M.P. (COMM.) 402/2018: 01.04.2022
118. Indian Bank Ltd. v. Anomula Seshagiri Rao and Sons Co., MANU/AP/0089/1971
119. Indian Oil Corporation v. Lloyds Steel Industries Ltd., MANU/DE/8665/2007
120. Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum, Rajgurunagar, MANU/SC/0127/2022
121. Industrial Development Bank of Pakistan vs. Hyderabad Beverage Company Private Limited, LEX/SCPK/0258/2014

122. Innodata India Pvt. Ltd. v. Commissioner of Central Tax, GST and Central Excise, MANU/CN/0001/2024
123. International Design and Engineering Solutions Pvt. Ltd. vs. MGI (India) Pvt. Ltd. (13.08.2019 - DELHC) : MANU/DE/2714/2019
124. IREO Grace Realtech Pvt. Ltd. v. Abhishek Khanna 2021 SCC OnLine SC 14

- J -

125. Jagdish Singh Garcha v State of Haryana MANU/PH/2338/2018;
126. Jagjiwandas v King Hamilton Co., AIR 1931 Bom 337;
127. Jatindra Chandra v. Rangpur Tobacco Co. Ltd., MANU/WB/0081/1924
128. Jawaharlal v. Mathura Prasad, (1934) I.L.R. 57 All. 108 (FB)
129. Jayamurugan Granite Exports vs. SQNY Granites, 2015-4-L.W. 385 (Madras High Court).
130. Johnson v. Lewis, 645 F. Supp. 2d 578, 2009 U.S. Dist. LEXIS 69377 (N.D. Miss. July 20, 2009)
131. Johnson v. Merchant, 628 F. Supp. 2d 695, 2009 U.S. Dist. LEXIS 52573 (N.D. Miss. June 22, 2009)

- K -

132. K.K. Krishnan Kutty v. Green Tree Homes and Ventures Pvt. Ltd., MANU/TN/4722/2019: (12.06.2019 - MADHC).
133. K.R. Chitguppi and Co. v. Vinayak Kashinath Khadilkar, AIR 1921 Bom 164: MANU/MH/0014/1920
134. K.S. Satyanarayana V. V.R. Narayana Rao, MANU/SC/0422/1999 : (1999) 6 SCC 104: AIR 1999 SC 2544;
135. K.V.S. Sheik v. The B.I.S.N. Co., (1908) 18 MLJ 497: MANU/TN/0073/1908
136. K/S Victoria Street v House of Fraser (Stores Management) Ltd, [2011] EWCA Civ 904; [2012] Ch 497;
137. Katta Sujatha Reddy v. Siddamsetty Infra Projects Pvt. Ltd., MANU/SC/1046/2022
138. Kailash Nath Associates v. Delhi Development Authority, MANU/SC/0019/2015

139. Kedarnath Gangagopal Misra v. Sitaram Narayan Moharil (02.02.1968 - BOMHC) : MANU/MH/0084/1969
140. Kerala SEB v. Kurien Kalathil (2018) 4 SCC 793.
141. Keshavlal v Pratap, AIR 1932 Bom 168;
142. Kajima Construction Europe (UK) Ltd and Anor v Children's Ark Partnership Ltd., [2023] EWCA Civ 292
143. Krishna Bahadur v. Purna Theatre and Ors., MANU/SC/0667/2004
144. Krishan Lal v State of J and K MANU/SC/0728/1994;
145. Kunhan Mayan v. The Bank of Madras (25.10.1895 - MADHC) : MANU/TN/0132/1895
146. Kuppusami Naidu vs. Smith and Company, MANU/TN/0125/1895

- L -

147. Lachoo Mal v. Radhey Shyam, MANU/SC/0715/1971.
148. Lallan Prasad vs. Rahmat Ali and Ors., MANU/SC/0070/1966
149. Lamprell v. Billericay Union, (1849) 154 ER 850: [1849] 3 Ex 283.
150. Leela Hotels Ltd. vs. Housing and Urban Development Corporation Ltd., MANU/SC/1335/2011
151. Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960)
152. Lloyds Steel Industries Ltd. v. Indian Oil Corporation Ltd., MANU/DE/0417/1999
153. Low v Body Corporate 384911 (2011) 12 NZCPR 209;

- M -

154. MBL Infrastructures Limited vs. Delhi Metro Rail Corporation, MANU/DE/8454/2023
155. M. Lachia Setty and Sons Ltd. and Ors. vs. Coffee Board, Bangalore (09.10.1980 - SC) : MANU/SC/0095/1980
156. M. Venkataramanaiah v. Margadarsi Chit Fund Limited, MANU/AP/0935/2008
157. M.S.A. Subramania Mudaliar Firm v. The East Asiatic Co. Ltd. MANU/TN/0103/1936

158. Madden Phillips Const. v. GGAT Development, 315 S.W.3d 800, 818 (Tenn. Ct. App. 2009).
159. Maharashtra State Electricity Board v. Sterilite Industries (India), MANU/SC/0627/2001
160. Mahendra v. Gurdeyal, 1950 SCC OnLine Pat 85 : ILR (1951) 30 Pat 109 : AIR 1951 Pat 196
161. Mahendrakumar Chandulal v. Central Bank of India, (1984) 1 GLR 237: MANU/GJ/0121/1983
162. Mahua Khair v. Ameria Begum Ali Ispahani, LEX/BDAD/0088/2012;
163. Man Kaur (Dead) by Lrs. v. Hartar Singh Sangha MANU/SC/0789/2010
164. Manik Chand v. Ramachandra, MANU/SC/0097/1980
165. Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee and Ors. (02.05.1963 - SC) : MANU/SC/0259/1963
166. Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 2021 Del. LEXIS 286 (Del. September 13, 2021);
167. Marx v. Morris, 2019 WI 34, 386 Wis. 2d 122, 925 N.W.2d 112, 2019 Wisc. LEXIS 129, 2019 WL 1442285 (Wis. April 2, 2019);
168. Mary Jane Cowan v. Martin John Foreman and Ors, [2019] EWHC 349 (Fam)
169. Mas Developers Pvt. Ltd. v. Magus Consortium Orchid Avenue (P) Ltd. (07.02.2023 - DELHC) : MANU/DE/1157/2023;
170. Mathai v. Joseph Mary, MANU/SC/0473/2014
171. Mathoora Kanto Shaw vs. IGSNL, MANU/WB/0209/1883.
172. Mcdermott International Inc. v. Burn Standard Co Ltd., (2006) 11 SCC 181
173. Md. Sultan v. Firm of Rampratap Kannyalal, MANU/AP/0090/1964
174. Md. Wasim and Another v. Bengal Refrigeration and Company, Order dt. 30.09.2022 in A.P. No. 27 of 2022 (Calcutta High Court)
175. Meghraj Sampatlall v. Raghunath and Son MANU/WB/0076/1955
176. Mittal Pigments Pvt. Ltd. v. Gail Gas Limited (01.02.2023 - DELHC) : MANU/DE/1000/2023.
177. Mohd. Khan v. Mst. Shahmali, AIR 1972 JandK 8
178. Mohori Bibee v. Dharmodas Ghose, MANU/PR/0049/1903
179. Motilalal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh, AIR 1979 SC 621: MANU/SC/0336/1978

180. Moulin Global Eyecare Trading Ltd (In Liq) v. Commissioner of Inland Revenue [2012] 3 HKC 272;
181. Muhammad Khalilur Rahman Khan v. Mohammad Muzammilullah Khan AIR 1933 All 468
182. Muhammad Muin-Ud-Din v. Musammat Jamal Fatima, (1921) ILR 43 All 650;
183. Mulamchand V. State of M.P. (MANU/SC/0009/1968 : AIR 1968 SC 1218.
184. Muniya Konan v. Perumal MANU/TN/0001/1911.
185. Muppudathi Pillai v. Krishnaswami Pillai, MANU/TN/0455/1959

- N -

186. NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd., Civil Appeal Nos. 3802-3803/2020 dt. 25.04.2023 (Five Judge Bench)
187. Naihati Jute Mills Ltd. v. Hyaliram Jagannath. MANU/SC/0348/1967 : 1968 (1) SCR 821
188. Nalini Singh Associates vs. Prime Time - IP Media Services Ltd. MANU/DE/2496/2008
189. Nanak Resorts, Inc. v. Haskins Gas Serv. (In re Rome Family Corp.), 407 B.R. 65, 2009 Bankr. LEXIS 1787, 51 Bankr. Ct. Dec. 251, 69 U.C.C. Rep. Serv. 2d (Callaghan) 436 (Bankr. D. Vt. June 24, 2009);
190. Narayan Prasad Lohia v. Nikunj Kumar Lohia (2002) 3 SCC 57
191. Naresh Chandra Guha v. Ram Chandra Samanta, MANU/WB/0144/1951
192. Nath Bros v. Best Roadways Ltd. MANU/SC/0200/2000
193. NHAI v. Consulting Engineering Group Ltd., MANU/DE/2962/2023
194. National Highway Authority of India v. Ganga Enterprises, MANU/SC/0665/2003;
195. National Highways Authority of India v. Progressive Constructions Ltd., MANU/DE/1310/2019;
196. NHAI v. Trichy Thanjavur Expressway Ltd., MANU/DE/5469/2023
197. National Insurance Company Limited v. Digital World, MANU/DE/1149/2022
198. NTPC. v. Ashok Kumar, MANU/SC/0143/2015;
199. NTPC v. The Singer Company and Ors. (07.05.1992 - SC) : MANU/SC/0146/1993
200. New Enter. Assocs. 14 v. Rich, 295 A.3d 520, 2023 Del. Ch. LEXIS 102, 2023 WL 3195927 (Del. Ch. May 2, 2023)

201. Neyveli Lignite Corporation, Neyveli v. Vinay Engineering and Ors., MANU/TN/0067/1992
202. Niranjan Shankar Golikari v. The Century Spinning and Mfg. Co. Ltd., MANU/SC/0364/1967
203. Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd, MANU/UKWA/0014/1984: [1984] Q.B. 644
204. Noveletsky v. Metro. Life Ins. Co., 49 F. Supp. 3d 123, 2014 U.S. Dist. LEXIS 134460 (D. Me. September 24, 2014);
205. NTPC Limited v. Sri Avantika Contractors (I) Limited, (08.06.2020 - DELHC) : MANU/DE/1237/2020;
206. Nune Sivayya and Ors. vs. Maddu Ranganayakulu and Ors. (12.02.1935 - PRIVY COUNCIL) : MANU/PR/0021/1935
207. Nutan Kumar v. II Additional District Judge, Banda, AIR 1994 All 298

- O -

208. ONGC v. Afcons Gunanusa JV, MANU/SC/1075/2022
209. Oil and Natural Gas Corporation Ltd. v. Interocean Shipping (India) Pvt. Ltd., 2017(5) Bom CR 8: 2017(5) Arb LR 402 (Bom).
210. Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Pvt. Ltd., MANU/SC/0828/2010;
211. Orissa Industrial Infrastructure Development Corporation v. MESCO Kalinga Steel Ltd. (14.02.2017 - SC) : MANU/SC/0154/2017
212. Orissa Industrial Infrastructure Development Corporation v. MESCO Kalinga Steel Ltd. (14.02.2017 - SC) : MANU/SC/0154/2017

- P -

213. PGG Wrightson Real Estate Limited v Routhan, [2023] NZCA 123
214. Padmanabha Kakkothaya v. Keshava Derinjithaya, MANU/TN/0030/1951
215. Pagoudis v. Keidl, 2023 WI 27, 406 Wis. 2d 542, 988 N.W.2d 606, 2023 Wisc. LEXIS 27, 2023 WL 2763202 (Wis. April 4, 2023);

216. Panipat Food Limited v. Union of India, MANU/DE/0555/1995 : 1995 (60) DLT 258.
217. Peoples Bank v. F. F. Campbell and Co., Ltd. AIR 1939 Lah 398
218. Persimmon Homes Ltd v Ove Arup and Partners Ltd, [2017] EWCA Civ 373;
219. Polyplas v. McNeil and NRM, Final Award dt. 02.05.2023 in ICC Case No. 27178/PAR
220. Pondicherry University v. B.E. Billimoria, MANU/DE/1099/2020;
221. Popular Shoe Mart v. K. Srinivasa Rao, MANU/AP/0433/1989
222. Power Rental Op. Co. Australia, LLC v Forge Group Power Pty Ltd (in liq) [2017] NSWCA 8.
223. Pratapsing v. Keshavlal, 39 CWN 440.
224. Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Assoc. (In re Premier Entm't Biloxi LLC), 445 B.R. 582, 2010 Bankr. LEXIS 2994 (Bankr. S.D. Miss. September 3, 2010);
225. Price v Spoor, [2021] HCA 20.
226. Promotha v. Prodyumno, AIR 1921 Cal 416
227. PTC India Financial Services Limited vs. Venkateswarlu Kari, (12.05.2022 - SC) : MANU/SC/0629/2022
228. Punj Llyod Ltd. v. Petronet MHB Ltd, (2006) 2 SCC 638
229. Pure Pharma Limited v. Union of India MANU/DE/0949/2008.

- R -

230. Radha Charan Saha and Ors. vs. Matilal Saha and Ors. (15.01.1937 - CALHC) : MANU/WB/0427/1937
231. Radmacher (formerly Granatino) v Granatino (Rev 4), [2010] UKSC 427
232. Raigad Concrete Industries v ICICI Bank, 2009 SCC OnLine Bom 727
233. Rail Land Development Authority v. Yantti Buildcon 2018(3) Arb LR 356 (Del.)
234. Rajendra Kumar Verma v. State of Madhya Pradesh, MANU/MP/0038/1972.
235. Rajesh R. Nair v. Meera Babu, 2013 (1) KLT 899
236. Rajshree Sugars and Chemicals Limited v. AXIS Bank Limited, MANU/TN/0893/2008
237. Ram Babu Saksena v. Rex (11.11.1949 - ALLHC) : MANU/UP/0131/1950

238. Ram Bahadur Thakur and Company v. Devi dayal (Sales) Ltd., MANU/MH/0048/1954
239. Ramdas Topandas and Son v. Kodanmal Phagunmal, MANU/SN/0069/1932
240. Ramdeyal Prasad v. Sayed Hasan, MANU/BH/0102/1943
241. Ram Lal Harnam Dass v. Bal Krishen, MANU/PH/0069/1957.
242. Ram Prasad v. Kamta Prasad, 1935 SCC OnLine All 210: AIR 1935 All 89;
243. Ram Tuhul Singh v. Biseswar Lall Sahoo, MANU/PR/0009/1875
244. Ramnath International Construction Pvt. Ltd. v. Union of India, MANU/SC/8802/2006
245. Randall v. Lady of Am. Franchise Corp., 532 F. Supp. 2d 1071, 2007 U.S. Dist. LEXIS 53606 (D. Minn. July 24, 2007);
246. Rare Asset Reconstruction Limited v. Sarga Hotel Private Limited, MANU/NC/5155/2023
247. Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, AIR 2012 SC 2829;
248. Razia Begum v. Sahebzadi Anwar Begum, 1959 SCR 1111;
249. Re Lehman Brothers International (Europe) (No 2), [2011] 2 BCLC 184
250. Rigall Arteria v Bank Handlowy (C-64/21), [2023] 2 C.M.L.R. 12
251. Robinson v. Tripco Inv., Inc., 2000 UT App 200, 21 P.3d 219, 2000 Utah App. LEXIS 62, 398 Utah Adv. Rep. 26 (Utah Ct. App. June 29, 2000);
252. Roshan Real Estate Pvt. Ltd. v. Union of India (22.02.2023 - DELHC): MANU/DE/1434/2023;
253. Rungarazu Sathrurazu v. Maddura Basappa, MANU/TN/0014/1913;

- *S* -

254. S Brahmanand v. KR Muthugopal (2005) 12 SCC 764;
255. S. Summan Singh v. National City Bank of New York, Bombay AIR 1952 PandH 172: MANU/PH/0066/1952
256. Sajimon v. Kerala State Road Transport Corporation, MANU/KE/5929/2019
257. Sandhya Chatterjee v. Salil Chandra Chatterjee, MANU/WB/0057/1980
258. Sandoz Limited v. Federation of Pakistan, LEX/SCPK/0713/1995
259. Saradhakar Naik and Ors. v. The King (09.09.1948 - ORIHC) : MANU/OR/0012/1950

260. Saradamani Kandappan v. S. Rajalakshmi, MANU/SC/0717/2011
261. Satyabrata Ghose v. Mugneeram Bangur and Co. MANU/SC/0131/1953 : 1954 SCR 310
262. Saurav Jyoti Baruah vs. Oil and Natural Gas Corporation Ltd., MANU/GH/0555/2021
263. Selvido v. Gillespie (In re Gillespie), 2012 Bankr. LEXIS 1261, 2012 WL 1021417 (Bankr. W.D.N.C. March 26, 2012)
264. Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnerships Ltd and Ors [2023] EWHC 644 (TCC)
265. Shibho Mal v. Lachman Das, MANU/UP/0045/1901
266. Shiromani Sugar Mills Ltd. vs. Debi Prasad (20.02.1950 - ALLHC) : MANU/UP/0207/1950
267. Shreeram Finance Corpn. v. Yasin Khan, MANU/SC/0341/1989
268. Simplex Concrete Piles (India) Ltd. vs. Union of India MANU/DE/4538/2010
269. Sitaram Agrawal v. Union of India, MANU/BH/0350/1995;
270. Sita Ram Gupta vs. Punjab National Bank and Ors., MANU/SC/7385/2008
271. Snyder v. Lovercheck, 992 P.2d 1079, 1999 Wyo. LEXIS 188 (Wyo. December 13, 1999)
272. Sound Techniques, Inc. v. Hoffman, 50 Mass. App. Ct. 425, 737 N.E.2d 920, 2000 Mass. App. LEXIS 922 (Mass. App. Ct. November 3, 2000);
273. Southern Railway v. Santhosh Babu, 2022 SCC OnLine Ker 189 : (2022) 1 Arb LR 514
274. SPH v SA (Forum and Marital Agreements) [2014] HKFLR 286.
275. Spyglass Media Grp., LLC v. Bruce Cohen Prods. (In re Weinstein Co. Holdings, LLC), 997 F.3d 497, 2021 U.S. App. LEXIS 15185, 2021 WL 2023058 (3d Cir. Del. May 21, 2021).
276. Star India v Kaleidoscope 2015(5) Arb LR 282 (Bom).
277. State Bank of India v. Jayanthi (23.02.2011 - MADHC) : MANU/TN/2511/2011
278. State of Haryana v. Malik Traders, MANU/SC/0945/2011;
279. State of Karnataka v. Shree Rameshwara Rice Mills [1987] 2 SCR 398
280. State of West Bengal v. BK Mondal, AIR 1962 SC 779.
281. Steel Authority of India Limited v. HTC Engineering (1958) Private Limited, MANU/WB/2408/2023;

282. Steel Authority of India Limited v. J.C. Budharaja, MANU/SC/0542/1999
283. Stellar Information Technology Private Ltd. v. Rakesh Kumar, MANU/DE/2238/2016
284. Stengart v. Loving Care Agency, Inc., 408 N.J. Super. 54, 973 A.2d 390, 2009 N.J. Super. LEXIS 143, 29 I.E.R. Cas. (BNA) 588, 106 Fair Empl. Prac. Cas. (BNA) 1177, 158 Lab. Cas. (CCH) P60,829 (App.Div. June 26, 2009)
285. Suleman Bhanji v. Emandi Pydiraju, MANU/MP/0270/1960
286. Surendra Nath De and Ors. vs. Monohar De and Ors. (30.07.1934 - CALHC) : MANU/WB/0099/1934
287. Sushma Shivkumar Daga v. Madhurkumar Ramkrishnaji Bajaj, MANU/SC/1344/2023

- *T* -

288. T. Raju Setty v. Bank of Baroda, MANU/KA/0013/1992
289. T.K. Viswambaran vs. State of Kerala and Ors. (18.08.2015 - KERHC) : MANU/KE/1650/2015
290. Taj Mahal Hotel v. United India Insurance Co. Ltd., (2020) 2 SCC 224
291. Tapanga Light Foundry v. SBI, Khurda, MANU/OR/0047/1987
292. Tapas Kanti Mandal v. Cosmo Films Ltd., Writ Petition No. 2875/2018, Bombay High Court, dt. 16.08.2018, available at https://indiankanoon.org/doc/141232238/
293. Tata AIG General Insurance Company Limited vs. Manhattan Exports (24.04.2019 - BOMHC) : MANU/MH/0977/2019
294. Tehilram V. D'Mello, MANU/MH/0058/1916
295. Thakorlal V. Patel v. Syed Badruddin, MANU/GJ/0238/1992
296. The All India Tea and Trading Company Limited vs. The Loobah Company Limited MANU/WB/0758/2021
297. The Bank of Bengal v. M. Pogose (14.09.1877 - CALHC) : MANU/WB/0055/1877
298. The Chancellor Masters and Scholars of the University of Oxford v. Orient Longman Private Limited, MANU/DE/2021/2002
299. The Chief Executive Officer, Kolkata Metropolitan Development Authority v. Pragati 47 Development Limited, MANU/WB/2639/2019;
300. The Official Assignee v. Madholal Sindhu, MANU/MH/0052/1946

301. The Oxford Architects Partnership v. The Cheltenham Ladies College, [2006] EWHC 3156 (TCC).
302. The State Bank of India v Vivek Garg MANU/SI/0037/2010;
303. Tilley v. Thomas (1867) L.R. 3 Ch. 61
304. Tourism Development Corporation Limited v. Bougainvillea Multiplex Entertainment Centre Pvt. Ltd., MANU/DE/2063/2022 (DB)
305. Tourism Development Corporation Limited v. Bougainvillea Multiplex Entertainment Centre Pvt. Ltd., Special Leave to Appeal (C) No.13630/2022, Order dt. 16.08.2022, Supreme Court of India, https://main.sci.gov.in/supremecourt/2022/21170/21170_2022_3_5_37306_Order_16-Aug-2022.pdf
306. Trading Corporation of Pakistan (Pvt.) Ltd. v. Punjab Trading Agency, LEX/SKPK/0209/2016
307. Transocean Drilling UK Ltd v Providence Resources PLC, [2016] EWCA Civ 372; [2016] 2 Lloyd's LR 51
308. Triple Point Technology, Inc v PTT Public Company Ltd [2021] UKSC 29
309. Tsakiroglou and Co. Ltd. v. Noblee Thorl GmbH, 1961 (2) All ER 179
310. Tulsa Kunwar v. Jageshwar Prasad, (1906) 28 All 563: MANU/UP/0117/1906

- U -

311. Umesh Goel v Himachal Pradesh Co-operative Group Housing 2016(4) Arb LR 96 (SC): MANU/DE/8959/2007 Himachal Pradesh Cooperative Group Housing Society v. Umesh Goel,
312. UOI v. Pearl Hosiery Mills, MANU/PH/0085/1961
313. Union of India v. Raman Iron Foundry, MANU/SC/0005/1974;
314. Union of India (UOI) v. Gujrat Co-Operative Grain Growers Federation Ltd., (07.12.2009 - DELHC): MANU/DE/4669/2009;
315. Union of India v. Godfrey Philips India Ltd., MANU/SC/0036/1986
316. Union of India v. L.S.N. Murthy and Ors. (23.11.2011 - SC) : MANU/SC/1377/2011
317. Union of India v. Steel Stock Holders Syndicate, Poona, MANU/SC/0059/1976.

- V -

318. V. Subramaniam vs. Rajesh Raghuvandra Rao, MANU/SC/0417/2009
319. Vikraman Nair v Aishwarya, 2018 (4) KLJ 528;
320. Vimal Chandra Grover v. Bank of India, MANU/SC/0316/2000
321. Virendra Singh. v. Uttar Pradesh, MANU/SC/0025/1954
322. Vishwa Nath Sood v. Union of India MANU/SC/0646/1989

- *W* -

323. Webb v. Hughes, [1870] L.R. 10 Eq. 281.
324. Welspun Specialty Solutions Limited v. Oil and Natural Gas Corporation Ltd., Judgment in Civil Appeal Nos. 2826-2827 of 2016 dated 13.11.2021: (2022) 2 SCC 382.
325. William v. Carwardine, 4 B and A 621
326. Williams v. City of Cleveland, 848 F. Supp. 2d 646, 2012 U.S. Dist. LEXIS 8307, 2012 WL 245228 (N.D. Miss. January 25, 2012);
327. Williams v. Linnitt, 1 ALL E.R. 278 (Eng. 1951)
328. Wipro Limited v. Beckman Coulter International S.A.: MANU/DE/2671/2006
329. World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd. (24.01.2014 - SC) : MANU/SC/0054/2014
330. World Vision of New Zealand Trust Board v Seal (2003) 5 NZCPR 618

- *X* -

331. xxx v. yyy, Order dt. 03.02.2023 in RPFC No. 327/2022, Kerala High Court.

- *Y* -

332. Yedidag v. Roswell Clinic Corp., 2015-NMSC-012, 346 P.3d 1136, 2015 N.M. LEXIS 51, 39 I.E.R. Cas. (BNA) 1356 (N.M. February 19, 2015);

- *Z* -

333. Zillon Infraprojects Pvt. Ltd. v. Bharat Heavy Electricals Limited, MANU/WB/0742/2023

List of Statutes and Notifications

1. The Andhra Pradesh Shop and Establishments Act, 1988
2. The Arbitration Act, 1940
3. The Arbitration and Conciliation Act, 1996
4. The Carriers Act, 1865
5. The Code of Civil Procedure, 1908
6. The Code of Criminal Procedure, 1973
7. The Code of Wages, 2019
8. The Companies Act, 1956
9. The Companies Act, 2013
10. The Constitution of India, 1950
11. The Delhi Shop and Establishments Act, 1954
12. The Electricity Act, 2003
13. The Employee's Compensation Act, 1923
14. The Finance Act, 2023
15. The Goa Shop and Establishments Act, 1973
16. The Indian Contract Act, 1872

17. The Indian Railway Act, 1879

18. The Income Tax Act, 1961

19. The Insurance Act, 1938

20. The Limitation Act, 1963

21. The Limited Liability Partnership Act, 2008

22. The Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981

23. The Minimum Wages Act, 1948

24. The Ministry of Finance: Department of Expenditure, Office Memorandum: Re-classification/ Upgradation of Cities/ Towns on the basis of Census-2011,No. 2/5/2014-E(II)B dt. 21.07.2015, https://doe.gov.in/sites/default/files/21-07-2015.pdf

25. The Partnership Act, 1932

26. The Payment of Wages Act, 1936

27. The PNGRB (Access Code for City or Local Natural Gas Distribution Networks) Regulations, 2011

28. The Rights of Persons with Disabilities Act, 2016

29. The Sale of Goods Act, 1930

30. The Securities Contracts (Regulation) Act, 1956

31. The Specific Relief Act, 1963

32. The Tamil Nadu Manual Workers (Regulation of Employment and Conditions of Work) Act, 1982

33. The Telangana Shop and Establishments Act, 1988

34. The Transfer of Property Act, 1882

List of Tables

List of Figures

List of Abbreviations

AR	Altering Rules
Arbitration Act	The Arbitration and Conciliation Act, 1996
CERC	Central Electricity Regulatory Commission
Contract Act	The Indian Contract Act, 1872
CPC	The Code of Civil Procedure, 1908
DR	Default Rules
DRD	Default Rules Doctrine
EAA	The (English) Arbitration Act, 1996
ECJ	The European Court of Justice
EOT	Extension of Time
EU	The European Union
FOB	Free on Board
GUVNL	Gujarat Urja Vikas Nigam Limited
HPCGHS	Himachal Pradesh Cooperative Group Housing Society Ltd.
ICC	International Chamber of Commerce
ICC Rules	Arbitration Rules of the International Chamber of Commerce
INCOTERMS	International Commercial Terms
LD	Liquidated Damages
LIBOR	London Inter Bank Offered Rate
LLP	Limited Liability Partnership
LLP Act	The Limited Liability Partnership Act, 2008
MR	Mandatory Rules
NKC	National Knowledge Commission
NLSIU	National Law School of India University
NLU	National Law University
ONGC	Oil and Natural Gas Corporation Limited
Partnership Act	The Indian Partnership Act, 1932
PG	Postgraduate

PNGRB	The Petroleum and Natural Gas Regulatory Board
S.	Section
Sale of Goods Act	The Sale of Goods Act, 1930
SIAC	Singapore International Arbitration Centre
Specific Relief Act	The Specific Relief Act, 1963
The Specific Relief Amendment Act	the Specific Relief (Amendment) Act, 2018
UK	The United Kingdom
UNCITRAL	The United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985
UG	Undergraduate
USA	The United States of America
VCLT	The Vienna Convention on the Law of Treaties

CHAPTER 1: INTRODUCTION

The view that contract law can be looked at in terms of default, mandatory and altering rules ("Default Rules Doctrine") has been in vogue at least for more than three decades. That this trifurcation (default, mandatory and altering rules) has immense practical significance is clear in the amount of literature it has produced in the last thirty five years or so.

Unfortunately, the Default Rules Doctrine has not permeated contract law in India, either in policy or judicial discourse or in legal education. In fact, the term "default rule" has been used for the first time only in 2019.[1] The impact of failure to view contract law in terms of the Default Rules Doctrine ("DRD") has made Indian lawyers (judges, counsels, law academicians and law students) view contract law as a black-letter legal instrument and without the sophisticated understanding of the legal system, generally, and contract law, in particular, that the DRD offers.

This thesis aims at highlighting the problems that exist owing to this failure. It goes a step further and examines the utility of the DRD in Indian legal discourse for advancing a deeper appreciation of contract law and its possible reform.

1.1. Default Rules Doctrine: Meaning

The conception of rules of contract law as the triumvirate- default, mandatory and altering rules- and various insights relating to the said conception, including design, factors for designing the rules, the sub-types and the choice of one sub-type over other, the role of various governmental organs vis-à-vis the said conceptions, and other aspects are collective regarded under the topic, Default Rules Doctrine ("DRD", for short).

[1] Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., MANU/SC/1765/2019 ("Dyna v Crompton", for brevity).

The term "doctrine" refers to "*a principle or position or body of principles in a branch of knowledge or system of belief*."[2] The Default Rules Doctrine as used in the present context refers to a body of principles and ideas which are connected to the default, mandatory and altering rules and their interplay.

But what are default rules? Many rules are applicable in a contract relationship even if parties do not specifically agree on a particular aspect or a thing. If parties address the situation in their agreement, the rules of contract law would not govern. Such rules are known as default rules (Srinivasan and Yadav, 2022) and apply to contracts which are silent about a particular thing or an issue. To illustrate, sub-section (3) of Section 31, Arbitration Act requires the arbitrator to state the rationale of their decision in the award, "unless parties have agreed otherwise". This means that even if parties do not specifically agree that the arbitral tribunal shall provide reasons in their arbitral award, by operation of the default rule in Section 31(3), it is compulsory for the tribunal to provide reasons. But if parties agree in their arbitration agreement that no reasons are required to be provided, the tribunal need not provide reasons because Section 31(3) allows such an agreement.[3]

Taking into consideration the nature of default rules, they have been classified in many ways, including as majoritarian, sticky and penalty defaults (Ayres and Gertner, 1989). There have been several debates on the optimal design of default rules. Numerous theories have been offered as regards design and setting of the same. Some of the main objectives for designing default rules are to lessen the transaction costs of parties (Michaelsen and Sunstein: 2023), addressing information asymmetry, error reduction, and so on (Ayres, 2012).

The concept of default rules are not free from criticisms (Posner, 2006; Maskin 2006; Schwartz and Scott, 2003; Scott, 2000). From an institutional point of view, one school of thought considers that the purpose of contract law is predominantly to supply default

[2] https://www.merriam-webster.com/dictionary/doctrine (accessed 28.12.2023).
[3] See, Section 31(3)(a), Arbitration Act.

rules for the parties, apart from defining promises that are legally enforceable and to lay down conditions for free consent by parties for contracting (Ayres and Gertner, 1992; Barnett, 1992; Craswell, 1989). Another school of thought questions this perspective. It argues that contract law does not perform such a function as envisaged by the default rule project considering that parties inevitably choose to opt out of default rules or standards, which only increase the contracting cost, if left unattended by the parties (Schwartz and Scott, 2016). On the other hand, proponents of this perspective contend that common law has been an effective vehicle in creation of default rules. The default rule project has been called a quixotic quest and it has been argued that there are hardly any default rules but only vague standards (Schwartz and Scott, 2003). It has also been argued that Default Rules Doctrine is impractical owing to reasons of institutional incompetence (Scott, 2000).

Mandatory rules are also called by various names including “immutable rules” and “imperative rules”. Mandatory rules are binding on the parties, which they cannot derogate from. They constrain the freedom of parties to contract. Mandatory rules have been classified into procedural mandatory rules and substantive mandatory rules (Zamir and Ayres,2020).

In designing mandatory rules, a singular approach where one-size-fits-for-all is not the correct approach and the manner of design of mandatory rules would depend on the situation (Ben-Shahar and Porat, 2019). Mandatory rules addressing internalities use different methods as opposed to those addressing externalities (Zamir and Ayres,2020, 289-290). Several choices or factors are available in the manner of design of mandatory rules. The choice of the instrument, whether statute, delegated legislation, etc. is one of the factors. There are various other approaches and dimensions to the concept of mandatory rules (Zamir and Ayres,2020, 307-308).

The concept of altering rules is of recent vintage. Altering rules refer to rules that prescribe the manner in which parties could alter the default rules. Altering rules perform certain important functions in the legal system. For instance, they minimise the

transaction costs, address concerns regarding information asymmetry like default rules, reduce errors and oversight while entering into agreements and may also be designed to further policy purposes. The prominent of these functions is error reduction, which is achieved through mechanisms such as requiring the agreement to be in writing, prerequisite of express agreement and requirement of consideration.

Formally, they have been classified as thought requiring, clarity-requiring, altering rules enhancing manifestation of assent, train and testing altering rules, password altering, and altering rules with element of reversibility (Ayres, 2012, 2069- 2070).

Various types of altering rules are justifiable on different grounds, one of the prominent ones being reducing errors, either by parties or by courts. By insisting on the "necessary and sufficient conditions" for altering a default rule, they provide more clarity in contracts and thereby provide more contracting clarity (Ayres, 2012, 2069- 2070).

Altering rules can be drafted to have a party disclose information just like information forcing default rules. Known as altering penalties, these will pave for better information disclosure from a party, which will be useful for other parties to the contract or even the courts (Ayres, 2012, 2096- 2097).

1.2. Literature Review on Default Rules Doctrine in India

This literature survey is structured as follows: it firstly covers the core literature on the Default Rules Doctrine and the second part deals with the literature on Default Rules Doctrine in India.

1.2.1. Historical, Conceptual and Philosophical Perspectives

This portion of the literature survey briefly encapsulates the major literature on the Default Rules Doctrine in general through a historical, conceptual and philosophical lens.

1.2.1.1. Filling Gaps in Incomplete Contracts

The history of a systematic analysis of the Default Rules Doctrine began with the paper titled "**Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules**" authored by **Ian Ayres and Robert Gertner** and published in the Yale Law Journal in 1989. It considered default rules as a distinct idea and discussed various types of such rules is the work. Academic writings till then recognised that parties did not negotiate a complete contract and left gaps in their contracts because agreeing to extra terms meant parties incurred costs, which exceeded the benefit derived therefrom. Accordingly, the then existing literature argued courts should fill those gaps with contractual terms that parties would have chosen.

Ayres and Gertner in the paper argued that incompleteness existed also because of asymmetric information- one party had more information than the other, withheld information and did not choose to contract around a default that is inefficient (Ayres and Gertner, 1989, 127). This phenomenon is strategic incompleteness. Once this is recognised, lawmakers can design default rules so as to force information out of the party withholding information. Such rules are known as penalty default rules or information forcing default rules. While designing such a rule, law-makers (and even courts when coming up with judge-made law) should consider the benefits that may be derived from the revealed information and the costs of contracting around the default rule. Law-makers should also be conscious of whether a party such require private information after expending its resources. Penalty defaults would work where private information is acquired without expending such resources (Ayres and Gertner, 1989, 127).

While designing the rules, lawmakers and courts (while making judge-made laws) should be conscious of the process of contracting and the equilibrium that the parties have attained in their contract (Ayres and Gertner, 1989, 127). The larger point that Ayres and Gertner made is that lawmakers should design default rules after

understanding why contracting parties enter into incomplete contracts. Ayres and Gertner also argued that contract law teachers should teach students of the law the distinction between default and mandatory rules (Ayres and Gertner, 1989, 127). They also argued that the knowledge of whether a rule is a default or not and how to contract around it was essential for effective advocacy (Ayres and Gertner, 1989, 127).

1.2.1.2. Optimal Tailoring of Contractual Rules

In 1993, **Ian Ayres** came up with a paper titled "**Preliminary Thoughts on Optimal Tailoring of Contractual Rules**". Earlier, Ayres and Gertner (1989) explicated the theory of default rules and analysed variants of default rules including majoritarian and penalty defaults. Another classification of default rules dealt with by them was tailored and untailored rules. In this paper published in 1993, Ayres laid down a theory of how to optimally tailor default rules to specific contexts (Ayres, 1993, 1).

In the paper, Ayres recognised that law often combined rules with standards and that such a method was the effective way to deal with when designing default rules. In order for parties to contract around defaults, Ayres argued that law should clearly provide for the "magic words" through which rules can be contracted around, and the consequences of when parties do not comply with such "magic words" (Ayres, 1993, 18). These magic words came to be known later as altering rules.

Given the complexities in the choice of rules versus standards when it comes to default rules, Ayres stated that it would be extremely difficult to come up with a general theory on optimal tailoring of default rules (Ayres, 1993, 18).

1.2.1.3. Default Rules Symposium in 2006

The Florida State University of Law Review published in its third issue of 2006 the proceedings of a symposium conducted on Default Rules Doctrine. The symposium

contained several significant papers on the Default Rules Doctrine. Out of the several papers published, a few merits specific mention.

Eric Maskin's "**Default Rules in Private and Public Law: An Exchange on Penalty Default Rules: on the Rationale for Penalty Default Rules**" (Maskin, 2006) was one of such papers. The paper argued that Ayres and Gertner's model of penalty default rules was flawed as it is possible that a party could reveal socially valuable information absent a non-penalty default rule.

The second paper published in the said issue was titled "**Default Rules in Private and Public Law: An Exchange on Penalty Default Rules: There Are No Penalty Default Rules in Contract Law**" (Posner, 2006). The paper argued that penalty default rules did not exist and the examples cited as such were in reality interpretative presumption or rules of contract formation. Consequently, the paper argued, there was no reason to abandon or deviate from the concept of majoritarian default rules.

In the same symposium issue, **Ian Ayres** responded both the Maskin and Posner in the paper titled "**Ya-Huh: There Are and Should Be Penalty Defaults**" (Ayres, 2006). Ayres argued that Posner's restrictive reading of penalty default rules was not warranted when considering whether law-makers should deploy penalty defaults or not. Fine doctrinal distinctions may not be helpful, argued Ayres, when law-makers could tap the information forcing nature of default rules. Ayres also stated that useful information need not be produced only to the other party but also to subsequent courts or third parties. Ayres cited the example of the rule of *contra proferentem* and various other examples in support of the argument regarding existence of penalty defaults.

In criticising Maskin, Ayres stated that Maskin's analysis was contrary to existing literature on the subject and that it ignored various informational effects produced by penalty defaults. At the same time, Ayres acknowledged that in examining the efficiency of default rules, it important to understand the type of transactional costs.

Another paper in the symposium that made an important contribution to the Default Rules Doctrine is the paper of **Omri Ben-Shahar** and **John A. E. Pottow** titled "**On the Stickiness of Default Rules**" (2006). The paper recognised that it was once thought that default rules should enable the least transaction costs for the parties to contract around and that if the costs of contracting around are high, they might be 'stuck' with the default. It argued that parties tend to 'stick' to default rules not only because drafting a contra provision might be costly but for other reasons (Ben-Shahar and Pottow, 2006, 651). Interestingly, the paper demonstrated that drastic changes in legal interpretation did not produce a change in contracting behaviour (Ben-Shahar and Pottow, 2006, 654).

1.2.1.4. Economic Theory of Altering Rules

In 2012, **Ian Ayres** published another paper in the Yale Law Journal titled "**Regulating Opt-Out: An Economic Theory of Altering Rules**". This paper was the first systematic exposition of altering rules, although the idea of altering rules was discussed much earlier (Ayres, 2012, 2036).[4] The paper is titled "Regulating Opt-Out" because it deals with regulation of opting out of the default rule. It discussed the meaning of altering rules and various types of altering rules such as necessary altering rules, sufficient altering rules, altering standards, court-created standards, statutory altering rules, *ex ante* and *ex post* altering rules, hermeneutic and juristic altering rules.

The paper provided an important insight into the history of contract law theory in the USA. It stated that scholars till 1989 were concerned about the question as to whether a rule should be a mandatory rule or not (Ayres, 2012, 2034). In the second stage (roughly, between 1989 and 2012), scholars dealt with issues relating to design of default rules (Ayres, 2012, 2034- 2035). The third stage, Ayres predicted, was about how law should facilitate the manner of contracting around a default rule (Ayres, 2012, 2034- 2035).

[4] When Ian Ayres published the 2012 paper, there were at least 19 papers published in law reviews which employed the terms "altering rules" and "ayres" together (Ayres, 2012, 2036, note 8).

The paper also discussed how altering rules are designed to avoid errors through various types of altering rules. The paper also brought out the concept of altering penalties and systematically analysed it.

The leitmotif of the paper was that law could provide modes of displacement of default rules by laying down "necessary and sufficient conditions", which could change contractual behaviour without restricting contracting freedom of the parties (Ayres, 2012, 2114).

Further Ayres argued that in situations where there were heightened concerns of paternalism, instead of deploying mandatory rules, lawmakers could create sticky defaults by using impeding altering rules so as to discourage parties from deploying the default (Ayres, 2012, 2114). These are valuable tools, according to Ayres, in order to achieve policy outcomes. Ayres stated that designing altering rules should be in sync with designing default rules (Ayres, 2012, 2114).

Reckoning these aspects, Ayres argued that in order for a law student to practice as a successful lawyer, be it as a transactional lawyer/ litigator/ judge, the law student should be able to identify the response of the law to attempts at opting out of a particular rule (Ayres, 2012, 2115).

The larger point that Ayres was making is that recognition of altering rules as a distinct conceptual category had immense usefulness not only for a descriptive analysis or legislative design but also for a normative examination as to whether imposition of a particular type of altering rule was justifiable (Ayres, 2012, 2116).

1.2.1.5. Mandatory Rules Typology

After innumerable papers on default rules and some on altering rules, legal academia came a full circle by dealing with mandatory rules. In the paper titled "**A Theory of Mandatory Rules: Typology, Policy, and Design**" **Eyal Zamir** (featuring **Ian Ayres**), the authors argued that with the effectiveness of nudges in serious doubt, it was

time to examine in depth the concept of mandatory rules. The paper recognised that while several papers were written on default rules in the last two decades, not much attention was paid to mandatory rules (Zamir and Ayres, 2020, 286).

The paper made a broad distinction between substantive and procedural mandatory rules. It also dealt with the broad themes of objectives of making certain rules mandatory, consideration for designing mandatory rules and normative justifications for interfering with the freedom of contract. The main idea behind the paper is that it was important to study mandatory rules for the purpose of reassessment and improvement (Zamir and Ayres, 2020, 287).

Some of the questions discussed in the paper were: whether mandatory rules were to be laid down by the law-makers, judiciary or other agencies; whether mandatory rules should be designed as rules or standards; whether they should be general or personalised/ tailored; whether they should prohibit deviation or should allow deviation by one party or otherwise; what should the consequence of deviation from the mandatory rule be; whether law should substitute arrangements after declaring deviations to be invalid? (Zamir and Ayres, 2020, 288- 289).

The paper concluded by arguing that mandatory rules were underutilized as a policy measure (Zamir and Ayres, 2020, 339) and that detailed experimental and empirical analyses were to be carried out on the subject, including on the public opinion on the use of mandatory rules, as opposed to nudges, default rules and other alternatives (Zamir and Ayres, 2020, 340).

1.2.1.6. Theoretical Foundations of Default Rules

Eyal Zamir's paper titled "**Default Rules: Theoretical Foundations**", published as a book chapter (Zamir, 2022), provided a descriptive analysis of the theoretical foundations of the concept of default rules. The paper is a notable contribution because it summarised the theoretical aspects relating to default rules.

Zamir noted the distinction between statutory law and common law insofar as default rules were concerned: when it came to common law, judges relied on "implied terms" and interpretation but the effect thereof was to fill gaps in incomplete contracts (Zamir, 2022, 2). Zamir argued that there was no difference between the process of interpretation and gap filling (Zamir, 2022, 2).

Zamir also noted that there was no precise distinction between default rules and mandatory rules in that owing to the operation of doctrines such as unconscionability, unenforceability. etc., default rules could be quasi-mandatory as well (Zamir, 2022, 2-3). Likewise, if mandatory rules were formulated in a vague manner, led leads to the possibility of their effect resembling default rules rather than mandatory rules (Zamir, 2022, 3).

Zamir also underscored the possibility of mandatory rules representing the actual expectation of the parties as opposed to provisions in standard form agreements (Zamir, 2022, 4).

Zamir analysed the evolution of contract law theory ("contract theory", for short) in USA and attempted to place the Default Rules Doctrine in that analysis (Zamir, 2022). He highlighted that the promise theory and other traditional theories concerning contract theory were unable to fully explain the gap filling function of contract law (Zamir, 2022, 5). However, he acknowledged that economic theories highlighted the important role of gap filling in reducing transaction costs (Zamir, 2022, 6). He inferred that default rules should be designed in the way that parties would have chosen had there been no transactional costs (Zamir, 2022, 6). How to do this is the question: one way to do so would be to conduct a costly empirical analysis; alternatively, the legislature could rely on the economic assumption of rationality and design default rules accordingly to maximise their surplus (Zamir, 2022, 7).

Zamir acknowledged the existence of literature which recognised that there would be a minority set of persons to whom the default rule applicable did not make them better off: they would either contract around the default or leave it as it is, depending upon the cost of contracting around or leaving it as it is (Zamir, 2022, 7-8). If that default rule maximised the aggregate benefits for the majority as compared to the minority, such a rule was regarded as efficient (Zamir, 2022, 8).

Now, coming back to the question of people contracting around inefficient defaults, there could be situations where a default rule is expensive to contract around, known as sticky defaults (Zamir, 2022, 9).

Zamir also noted how default rules served another function: elicit information from parties (Zamir, 2022, 8). Zamir took note of how the criticisms against penalty default rules noted that even majoritarian rules could elicit information and of the validity of Ayres' counter-argument that default rules could address informational issues (Zamir, 2022, 8).

Zamir concluded the paper with two ideas for the future of default rules: the first was to find a way to integrate various theories of contract law in the context of default rules, and the second was to explore the theoretical insights through empirical findings (Zamir, 2022, 16-17).

1.2.2. Default Rules Doctrine in India

Scholarly writings in India on the DRD are scarce (see, for instance, Varottil, 2009, 14; Srinivasan, 2010; Dasgupta, 2010; Varottil, 2011, 144; Kamlanaath and Peddeda, 2012, 686; Guha and Kannan, 2017, 14; Garg and Hablani, 2018; Gautam, 2018; Sukul and Bansal, 2021, 276-279).

One of the earliest references to the theory was in an article titled "**A Cautionary Tale on the Transplant Effect on Indian Corporate Governance**" by **Umakanth Varottil**

(2009) where there were references made to default rules and mandatory rules but there was no substantial discussion on the theory (Srinivasan and Yadav, 2022). While discussing difference models of corporate governance, Varottil made note of the outsider model of corporate governance, which is characterised by a greater emphasis on default rules as compared to mandatory rules (Varottil, 2009, 14). In a footnote, Varottil also took note of the concept of information forcing rules, which, according to him, were default rules that compelled parties with superior information to divulge information to the other parties so as to eliminate or minimise issues relating to information asymmetry (Varottil, 2009, 14).[5] This was in the context of the legal regime on capital markets being in the nature of information forcing rules. This analysis by Varottil was descriptive in nature.

There have been a few works citing or mentioning default rules (Varottil, 2009, 14; Srinivasan, 2010; Dasgupta, 2010; Varottil, 2011, 144; Kamlanaath and Peddeda, 2012, 686; Guha and Kannan, 2017, 14; Garg and Hablani, 2018; Gautam, 2018; Sukul and Bansal, 2021, 276-279) but not in terms of substantial analyses or a critique of the existing contract law doctrines, except for three works, one, by the Government[6], two, by **Lovely Dasgupta** (Dasgupta, 2010) and three, by **Sukriti Jha** and **Saara Mehta** (2018). Jha and Mehta (2018) took up the rule of *contra proferentem* and argued that it was a penalty default rule.

The classical Indian commentary on the Contract Act, "**Pollock and Mulla's Indian Contract Act, 1872**" (Vardhan, 2018), does not list out "default rules" in the index (Srinivasan and Yadav, 2022, 205). Other prominent commentaries in India on contract law also do not devote a section on default rules nor discuss it (Moitra, 2023; Markanda, 2013; Setalvad, 2015; Bangia, 2021;Kapoor, 2021). Books in India dealing with economic analysis of law do not address the Default Rules Doctrine (Gopalakrishnan, 2016; Nagar *et al*, 2017; Nagar and Thakker, 2022). This is not surprising considering

[5] Foot note 55 in Varottil (2009).
[6] Economic Survey of India (2018-19), Chapters 1 and 2 (2019), https://www.indiabudget.gov.in/budget2019-20/economicsurvey/doc/vol1chapter/echap01_vol1.pdf (accessed 21.12.2022).

that the main contract law statute in operation, the Indian Contract Act, 1872 ("Contract Act" or "1872 Act") predates the concept by at least a century.

Even with the existing, *albeit*, minimal academic literature on the subject in India, there are some fundamental problems. Some academic writings designate rules relating to default by a debtor as a "default rule" (Jha and Mehta, 2018, 77; Gautam, 2018; Sukul and Bansal, 2021, 276-279) that is a rule to connote the failure to pay by a debtor. This is a problem of nomenclature and since the Default Rules Doctrine has specific connotation of the terms default rules, altering rules and mandatory rules, using the same name to denote another thing would be to create unnecessary confusion. Similar lack of clarity in usage has been observed in other jurisdictions as well (Ayres and Fox, 2019, 290).

For the first time in 2019, the concept of default rules was used explicitly and in terms of the Default Rules Doctrine in the case of Dyna Technologies v. Crompton Greaves[7] decided by the Supreme Court of India (Srinivasan and Yadav, 2022). Prior to the decision, there has been sporadic references to default rules in various academic writings in India. The DRD was taught as a part of a course on drafting contracts (Srinivasan and Yadav, 2022). But for these references, there has not been a substantial discussion on the doctrine in Indian legal literature.

1.3. Statement of the Problem

As previously noted, from a normative perspective, while adjudicating the effect of altering rules, judges may decide that the contractual terms agreed between the parties did not have the effect of altering the default which both parties or one of them intended, in which case, the Default Rules Doctrine mandates that judges are to state the contracting practices are to be changed so that future parties could produce the intended effect (Ayres, 2012, 2054).

[7] MANU/SC/1765/2019

This idea is fundamental to the evolution of contract law and contracting practices by the parties (Ayres, 2012, 2054). In ideal circumstances, lawyers are those who are supposed to go through judgments and advise clients to alter contracting language appropriately. As would be dealt with in the later portions of this thesis, this is an ideal scenario and lawyers are prone to adopt the shortcut of standard form contracts without tracking judgments and their effect on those standard form contracts. Another problem with the ideal situation is that in many jurisdictions such as India, where many agreements are signed without legal vetting/ advice. Therefore, the duty of courts to provide directions to future contracting parties is more significant. This will have a considerable effect on increasing contracting certainty.

The failure to appreciate this view of contract law has resulted in a not-so-sophisticated view of contract law. Another problem is the lack of certainty in contract law. A typical example is the issue regarding time being the essence of contracts.

Courts in India have adopted an ad hoc manner of decision-making when it comes to contract law: what is mandatory and what is not in contract law is a question of fundamental importance. Parties need to know when whether a rule in contract law can be altered and if so how. The default rule doctrine, through altering rules, calls for courts to provide guidance to parties as to how to alter a default rule in case of lack of clarity (Ayres, 2012, 2054).

In the absence of subsumption of the Default Rules Doctrine in Indian legal discourse, courts hardly pay attention to this function of clarifying contract law to facilitate contracting behaviour. The contracting behaviour post the Supreme Court's judgment in Hind Construction v. Maharashtra[8] ("*Hind Construction* case") shows that parties continue to go by the text of Section 55 without looking at the above decision and those decisions that followed it. Even in 2020, after more than forty years, the arguments that were made in *Hind Construction* that the contract provided that time was of the essence

[8] (1979) 2 SCC 70

is continued to be argued, notwithstanding the decision on the Supreme Court in *Hind Construction*.

Indian contract law has been enacted about one and a half century ago. Much of the filling of gaps in contract law and its amplification has been owing either to judge-made law or special statutes giving a perspective to judge-made law on possible approaches in decision-making. Since Indian contract law relies more on judge-made law, it is important that default, mandatory and altering rules devised by courts consider policy considerations in framing those rules.

The argument is not that there is no default, mandatory, or altering rule in India. Contract law is replete with these rules. However, a systematic approach to the same is lacking. Hence, the argument made above that there is an *ad hoc* approach to the rules of contract law and that there is a need for a systematic approach to the use of the Default Rules Doctrine in legal education and in law practice, be it transactional lawyering or in dispute resolution.

The title calls for a systematic approach in India. Generally, a systematic approach is a process-based approach. A systematic approach in this context is one where the organs of the Government, lawyers, teachers and law students are attuned to a Default Rule Doctrine centric approach and include it in their process of operation. This entails, among other things, the following:

- Various subjects of contract law are to be taught in law schools by including the Default Rules Doctrine.
- Transactional lawyers and in-house counsels are conscious about the Default Rules Doctrine, including about the relevant rules of contract law could be contracted around, those that cannot be contracted around, and the manner of valid contracting around of default rules, while drafting agreements;
- Advocates present their cases by construing contract law provisions keeping in mind various aspects of the Default Rules Doctrine,

- Legislators design various contract law rules keeping a sense of the Default Rules Doctrine, and consciously drafting it in a way keeping in mind various ideas of the doctrine, and
- Adjudicators, including judges and arbitrators, construing contract law provisions, with the clear understanding of the rule, its objective and on whether the rule is a default, mandatory or altering rule, and using other insights of the DRD.

1.4. Objectives of Research

To explore this gap in literature, this research work is undertaken with the following objectives of:

- **Research Objective 1**: To analyse the role of the legislature with respect to default, mandatory and altering rules and discussing various policy debates relating to such rules.
- **Research Objective 2:** To identify the potential of default, mandatory and altering rules in adjudication of disputes relating to contract law and in law reform.
- **Research Objective 3:** To contextualise default, mandatory and altering rules in terms of Indian law and classify the statutory provisions in the Indian Contract Act, 1872 and the Specific Relief Act, 1963[9] into default, mandatory and altering rules.
- **Research Objective 4:** To examine the problems owing to the absence of a systematic analysis of the Default Rules Doctrine through decided cases.

As regards the first objective, while the role of judiciary as regards Default Rules Doctrine can be explored, it cannot be seen in isolation: the role of legislature in designing rules taking into consideration the insights of the Default Rules Doctrine is

[9] Hereafter "1963 Act" or "Specific Relief Act".

also relevant. Further, given that substantial amount of legislating at the lower level is undertaken by the executive arm of the Government through delegated legislation, various insights of Default Rules Doctrine which apply to the legislature apply equally to the executive and is therefore not separately dealt with.[10]

1.5. Hypothesis

In view of the above stated background, the following hypothesis is framed:

Failure to adopt a default, mandatory and altering rules centric approach to contract law in India hinders proper understanding of rules of contract law. Further, this doctrine is neglected in legal education in India.

1.6. Research Questions

In the context of the aforesaid issues, objectives and the below-mentioned scope, this thesis would address the below research questions:

1. What are the aims and objectives of the legislature as regards framing default, mandatory and altering rules and what are the various policy debates relating thereto?
2. What is the potential of the Default Rules Doctrine in relation to adjudication of contractual disputes and law reform?
3. How has the Indian legal system dealt with the Default Rules Doctrine?
4. What are the default, mandatory and altering rules in the Contract Act and the Specific Relief Act in India?
5. What are the adverse consequences of a lack of a systematic approach in India on the Default Rules Doctrine?

[10] The role of executive in contractual relationships between two parties is primarily a matter for the legislature and the courts, with limited role played by executive (except in government contracts).

This study, in sum, explores the justification and possible roadmap for including the Default Rules Doctrine in the Indian legal system.

1.7. Research Methodology, Design and Sources

This portion of the work discusses the methodology of research, the research design and the sources employed in undertaking the research. This research employs the doctrinal method in achieving its objectives and pursuing the research questions stated above. The same is elaborated below. The research also employs empirical work for the purposes provided below.

1.7.1. Doctrinal Legal Research and Justification for Adopting it

To elaborate on the doctrinal part of the methodology, there are four primary components to this research. The first component focusses on theoretical aspects of contract law, viz., contract incompleteness, and the Default Rules Doctrine. Although the Default Rules Doctrine is virtually alien to Indian law, it is incorrect to suggest that the idea of default rules does not exist in Indian law. As has been recognised in various judgments for more than a century, Indian law has maintained a distinction between "imperative" and "non-imperative" provisions, the Contract Act (Srinivasan and Yadav, 2022, 206).

It has been recognised in Indian law that whenever the Contract Act permitted parties to contract around a rule, the relevant provision stated so explicitly. But there are provisions which are default rules although not so expressly stated by the relevant rule. Therefore, the second component of the doctrinal research is to employ case law research and explore how the courts in India have dealt with the Default Rules Doctrine and the extent to which the said theory has permeated the Indian legal system. The term "legal system" is broadly used to cover the entire legal industry, including the three organs of the Government- law-making, law-implementing and law-interpreting organs, the legal profession (whether transactional, in-house or practising lawyers), the

legal education industry, those dealing with dispute resolution modes such as arbitration, conciliation, mediation, etc. and others dealing with the legal system.

The third component of this research is to critically evaluate the results of the lack of discourse in Indian contract law on DRD. It may be noted that DRD is not simply about contracting around of provisions but also entails several aspects such as the design of default, mandatory and altering rules, justifications for design of a provision as a mandatory, default or altering rule, manner of altering a default rule, and the duties of the organs of the government vis-à-vis the said rules, etc.

This also includes a critical evaluation of various contract law provisions, including those outside General Contract Law such as the law relating to guarantees, partnership, etc. Here, the term "contract law" is to be broadly understood as not only including laws that are traditionally regarded as contract law but also those laws which permit private parties to order markedly their relations (Ayres, 2006, 592).

The fourth component of the research is to contextualise the Default Rules Doctrine in India by taking up the following approaches. First, to examine how Default Rules Doctrine can be applied in the classroom in teaching contract law. Second, to show the practicality of the theory, by classifying the Contract Act and the Specific Relief Act into default rules, mandatory rules and altering rules. This would entail not only a descriptive/ interpretative approach to the Contract Act but also extensive case-law survey.

1.7.2. Use of Quantitative/ Empirical Methods

To elaborate on the empirical part of the methodology in the present work, it employs quantitative/ empirical methods for specific purposes, which are listed below:

- To explore if the Default Rules Doctrine is taught in law schools and if there is a basic awareness among lawyers and law students about the Default Rules Doctrine.

- To obtain the views of lawyers and law students in India about the usefulness of Default Rules Doctrine in understanding laws, making laws, drafting of agreements, advocacy and adjudication.

Earlier, this chapter noted the five research questions that is sought to be explored. The second research question is: What is the potential of the Default Rules Doctrine in adjudication of contractual disputes and law reform? Exploring the potential of the Default Rules Doctrine is undertaken in the present work from a doctrinal perspective in Chapters 2 and 6 of the present work. Chapter 6 discusses four areas where Default Rules Doctrine provides a more nuanced perspective on the state of the law as compared to what currently exists.

Analysing the potential of the Default Rules Doctrine in adjudication and law reform from an empirical perspective may require a separate study. However, it would be interesting to find out the whether the law schools in India have integrated the Default Rules Doctrine in legal education and the views of lawyers and law students on the potential of the Default Rules Doctrine in Indian legal discourse. A negative view may either convey a lack of understanding of the theory or point out that in their view the theory would not be useful to the legal system.

If the response to this question is in the affirmative, assuming awareness about the theory, would convey a significant aspect requiring reforms: despite the usefulness of the theory to lawyers/ law students in India, the theory is neither taught in the classroom nor in legal discourse, thereby leading to the conclusion that the theory should be taught in undergraduate and postgraduate courses in law and should also be used in various facets of law in India, including law-making, drafting agreements and in adjudication.

The third research question was: How has the Indian legal system dealt with the Default Rules Doctrine? Chapter 4 analyses the primary and secondary legal literature to answer this question. In addition, it would also be useful to explore if the Default Rules Doctrine is taught by law schools in the undergraduate or postgraduate law courses in

India. This would throw further light on the how the Indian legal system has dealt with the theory.

The question as to whether the Default Rules Doctrine is taught at the undergraduate or the postgraduate levels would be a relevant indicator as to the prevalence of the theory and its awareness in India. It is also the springboard to analyse why the Default Rules Doctrine is not prevalent in India, if the theory is not taught in Indian law schools.

The following table depicts the relation between the aims of undertaking the aforesaid empirical exercise and the research questions framed for the present work:

Table 1 Research Questions and Empirical Analysis

Research Questions for the PhD Work	**Empirical Analysis further to Research Questions**
2. What is the potential of the Default Rules Doctrine in adjudication of contractual disputes and law reform?	Views about the usefulness of Default Rules Doctrine in understanding laws, law-making, drafting of agreements, advocacy and adjudication.
3. How has the Indian legal system dealt with the Default Rules Doctrine?	Level of awareness of the basics of the Default Rules Doctrine, including whether the doctrine is taught in law schools in India

For both these purposes, it was felt that the appropriate method would be to through an empirical study and obtain the responses through a structured and closed set of questions. At the core of an empirical study of this nature is the questionnaire (Krosnick and Presser, 2010, 263) and the results of the study depend on the structuring of the questionnaire (Krosnick and Presser, 2010, 263). The questionnaire is reproduced in Appendix 1 hereto.

A structured questionnaire is designed in advance and is intended to meet the objectives of the empirical study/ survey (Afolayan and Oniyinde, 2019, 56). Closed questions

have been used with responses already given and the respondents were asked to choose one of the options given. Closed questions are relatively easier to process, especially using computers, and draw conclusions from (Afolayan and Oniyinde, 2019, 57). The questionnaire was framed in such a way that it was not too tedious or technical, and the number of questions were sufficient for the objectives, without making the survey burdensome for the respondents. The results of the empirical work are at Chapter 7.

In addition, this research also uses empirical data for the following purposes:

- The use of the Default Rules Doctrine in judgments in jurisdictions such as Australia, New Zealand, USA, UK, Singapore, Hong Kong, etc;
- Papers in law reviews/ law journals in USA pertaining to "Default Rules"

Future work in this area would require elaborate empirical/ quantitative methods in relevant contexts. At the same time, the present work employs data as noted above.

1.7.3. Research Design for Empirical Research

The research methodology is primarily doctrinal in nature. It relies on primary and secondary materials noted above. Additionally, it also generates primary data using questionnaire for the purposes of examining if there was at least a basic awareness among lawyers and law students about the Default Rules Doctrine, to examine if the Default Rules Doctrine is taught in law schools in India and also for obtaining the views of lawyers and law students in India about the usefulness of Default Rules Doctrine in understanding laws, law-making, drafting of agreements, advocacy and adjudication, and for exploring if the Default Rules Doctrine is taught by law schools in India.

1.7.3.1. Design of Empirical Survey

Design of a questionnaire is both an art as well as a science (Krosnick and Presser, 2010, 299). For the present purposes, the questionnaire was designed keeping in view

the eight points mentioned by Krosnick and Presser as reflecting conventional wisdom in the design of optimal design of questions in a questionnaire (Krosnick and Presser, 2010, 264). These include using simple words with simple syntax, avoiding jargons, framing specific questions, having exhaustive options, and so on (Krosnick and Presser, 2010, 264).

For this purpose, data was obtained through questionnaire. The questionnaire consisted of 26 questions divided into five sections: in the first section, consent of the participants for the use of the data and their personal details such as name, email addresses, gender, educational qualifications, experience, etc. were collected.

The second section titled "Awareness of Default Rules Doctrine" collected data on the knowledge of the Default Rules Doctrine. The third section ("Learning About the Default Rules Doctrine") related to whether the Default Rules Doctrine was taught in a systematic manner in the law school. The fourth section, meant for law teachers, collected data on whether and how the Default Rules Doctrine was taught in law colleges in India. The fifth section titled "Usefulness of the Default Rules Doctrine" collected data on the usefulness of the Default Rules Doctrine.

Researchers have found a drop in response rates to surveys (Keeter, 2018, 19). Given the decline in response rates, it is important to cover a cross-section of respondents- in this case, lawyers and law students- in order to ensure that the survey is balanced and not skewed towards one or few sub-professions in law, thereby avoiding coverage error. This type of error occurs where the sample is not represented by every unit of the population (Tourangeau, 2018, 46). Hence, the questionnaire captured various sub-professions in law. A detailed description of the questions of the questionnaire is at Chapter 7 of this thesis.

1.7.3.2. Methodology of Empirical Survey

The questionnaire designed was entered into in Google Forms and the link to the questionnaire was circulated with various lawyers, law academicians and law students. In addition, the questionnaire was also circulated in social media sites such as LinkedIN, through lawyers and law students' groups. As such, the questionnaire was circulated at least among three thousand respondents across India who have studied in various law schools across India. Additionally, emails were also sent to lawyers, law teachers and law students, with requests to pass on the questionnaire to various lawyer, student and law teacher groups. The respondents were not confined to a particular sub-profession or restricted to only a few colleges. Given the wide circulation/ distribution of the questionnaire, the author had no control over the type of respondents- they were therefore random.

A total of responses from present or past law students of about 90 to 100 different law schools in India were considered as adequate for the purposes of meeting out the aforesaid objectives in this PhD thesis. There are about 1890 law colleges approved by the Bar Council of India.[11] Accordingly, the questionnaire was kept open for responses from 11.09.2023.

1.7.4. Primary and Secondary Sources and Legal Databases

This research work includes references to primary legal research materials such as statutes, rules, regulations, delegated legislation and case laws. In addition, the work copiously refers to secondary legal research materials such as books, commentaries, research papers and newspaper reports. While there is substantial reference to secondary materials, the focus is on the primary sources of law, viz., legislation, judgments, rules, etc. In doing so, this work analyses the primary sources such as statues, judgments and delegated legislations in reaching the conclusions.

[11] https://www.barcouncilofindia.org/info/recognised-universities-colleges (accessed 05.09.2023).

Several legal databases such as Manupatra, SCCOnline and Indian Kanoon, which contain the reported decisions of various courts in India, and databases such as Westlaw, Global Arbitration Review, JSTOR, KLUWER Arbitration, and LexisNexis which has law review articles and cases decided by foreign courts, have been used. Open source databases such as Legal Information Institute, Social Science Research Network, etc. have also been relied on. The law school library of Galgotias University as well as libraries in New Delhi such as the library of the Indian Law Institute were also used for the purpose of research. The place where substantial portion of the research was carried out was the Galgotias University, and the place of work of the researcher, that is, the Directorate General of Hydrocarbons, Noida.

To sum up on the research methodology, this research employs induction as the method in that it develops the theory regarding the utility of the Default Rules Doctrine, the absence of the Default Rules Doctrine and its adverse effects, and the usefulness of the Default Rules Doctrine for India. For the purposes of drawing conclusions from the empirical study, this research employs deduction as the research method.

1.8. Scheme of Chapters

This thesis is structured in the following manner:

Table 2 Chapterisation

Chapter	Chapter Title
1	Introduction
2	Default Rules Doctrine in Contract Law: An Overview
3	Default Rules Doctrine: International Perspectives
4	Default Rules Doctrine in India: A Jurisprudential Study
5	Default Rules Doctrine: Classification of General Contract Law into Default, Mandatory & Altering Rules
6	Default Rules Doctrine in India: Absence of a Systematic Approach in India

7	Default Rules Doctrine in India: Empirical Perspectives
8	Conclusion and Suggestions

The first chapter, titled "**Introduction**", provides an overview of the research problem, provides a historical, conceptual and philosophical overview of the topic and lays down the methodology and the framework of research, including the research design for doctrinal and empirical research. The introductory chapter also deals with the significance, utility, scope and limitations of research.

The second chapter titled "**Default Rules Doctrine in Contract Law: An Overview**" deals with the concepts of default, mandatory and altering rules and illustrates these concepts with Indian examples. Chapter 2 also examines the role of legislature in designing default, mandatory and altering rules, the importance of the Default Rules Doctrine for legal academia, contracting practices, and various policy debates relating to these rules. It explores the potential of the Default Rules Doctrine in legal education, law making and adjudication. This chapter focusses mainly on legal education but the doctrine has many important insights for law-making as well.

The third chapter, titled "**Default Rules Doctrine: International Perspectives**" discusses the Default Rules Doctrine in the international perspectives on the subject. It examines the applicability of the doctrine in the international legal sphere through the decisions of international tribunals, and then examines certain jurisdictions such as the EU, the USA and the UK where the Default Rules Doctrine has been used extensively. It also examines if the doctrine finds its space in international legal instruments on contract law such as the Convention on International Sale of Goods, UNIDROIT's Principles on International Commercial Contract, etc.

The fourth chapter titled "**Default Rules Doctrine in India: A Jurisprudential Study**" explores if Default Rules Doctrine exists in India. It conducts a jurisprudential analysis of the dichotomy of immutable rules and mutable rules as it exists in India.

Chapter 5 titled "**Default Rules Doctrine: Classification of General Contract Law into Default, Mandatory & Altering Rules**" examines if the rules of the Contract Act and the Specific Relief Act could be classified into default, mandatory and altering rules, given their lack of recognition in judicial decisions in India. It surveys the law on Contract Act and the Specific Relief Act and identifies various default, mandatory and altering rules in the Contract Act and the Specific Relief Act. This analysis leads to various insights on those rules and illustrates the usefulness of the said doctrine in better understanding contract law.

Chapter 6 titled "**Default Rules Doctrine: Absence of a Systematic Approach in India**" examines how the lack of discourse of the theory in Indian contract law contributes to fuzziness in Indian law. The leitmotif of this chapter is that Indian contract law would be better off with the theory becoming a part of the jurisprudence, both in the academia and law practice. The argument is that the theory could better contribute to clarity in law. To demonstrate this, Chapter 6 picks up four aspects in contract law, which could be better off by applying insights from the Default Rules Doctrine- time as essence in construction contracts, interface between determination of time as essence and liquidated damages clause, enforceability of claims in arbitration by unregistered partnerships against third parties and enforceability of standstill agreements.

These four areas illustrate the potential of the Default Rules Doctrine in better understanding and critiquing the contract law.

Chapter 7 titled "**Default Rules Doctrine in India: Empirical Perspectives**" presents and analyses empirical data relating to the survey undertaken as a part of this research. Chapter 7 examines the awareness of the Default Rules Doctrine in India through the data collected about whether law colleges in India teach default rules doctrine and the desirability of using Default Rules Doctrine in law-making, transactional lawyering, adjudication, advocacy and legal education. The population considered is the law colleges in India recognised by the Bar Council of India.

Chapter 8 titled "**Conclusion and Suggestions**" concludes by summarising the usefulness of the theory in better understanding and critiquing contract law and the application of the theory in legal education, law practice and adjudication. It also provides certain recommendations on how well the theory could be integrated into Indian law and effectively utilised and identifies areas of potential research on the DRD.

1.9 Significance and Utility of the Research

The research has significance for law practice, adjudication and legal education in India. Recognition and the effective use of the Default Rules Doctrine would contribute to better understanding of contract law and would make the Indian legal system better off.

Any competent transactional lawyer needs to know whether a rule can be contracted around or applies mandatorily and the way to alter a default rule (through the altering rule)(Ayres, 2012, 2042; Ayres and Gertner, 1989, 130). Hence an understanding of these aspects would be better served through the Default Rules Doctrine not only from the position of legal education but from the standpoint of the practice of law, both in transactions and in dispute resolution.

In addition, the research work explores the potential of the theory in leading to clarity and certainty in contract law. In order for the theory to be applied, it also needs to be integrated into legal education. This research work also explicates methods to do so.

Also, for the first time, empirical data is collected and presented in India on the Default Rules Doctrine. Hitherto, no empirical research has been done on the same in India.

1.10. Scope and Limitations of Research

The DRD is immensely rich, with various insights, in multiple fields, such as corporate law (Manns and Robertson, 2020; Chase, 2020; Listokin, 2010; Listokin 2009; McDonnell, 2007, Millon, 1998), arbitration (Weidemaier , 2010; Ware, 1999), family law (Ellickson, 2011; Ribstein, 2011), etc. and there is copious literature on designing default, mandatory and altering rules. Therefore, it would not be possible to explore all the avenues of the Default Rules Doctrine.

1.10.1. Scope

The present work provides an overview of the Default Rules Doctrine but is not intended to be a comprehensive exercise laying down the fundamentals of various facets of the Default Rules Doctrine. It discusses the concept of contractual incompleteness, the difference between contingent and obligational incompleteness and reasons for incompleteness in contracts. This provides a framework to the concept of default rules, which fills gaps in incomplete contracts.

Considering the nascent literature on the Default Rules Doctrine in India, it is important to explore how the theory can aid in a nuanced appreciation of Indian law and also to examine how the theory would aid in law reform. Hence, the scope of this research is limited to the four objectives identified above.

In addition, although the scope of this thesis is restricted to attempting at classification of the rules in the 1872 Act and the 1963 Act. A similar exercise could be carried out in other fields of contract law such as insurance law, partnership, etc.

The concept of default rules is dealt with from the perspective of Indian law. The types, justifications and the normative debates surrounding various types of such rules have also been dealt with. It also discusses the importance of default rules in the legal system. It briefly provides an overview of the recent development in the Default Rules Doctrine

in terms of personalisation of default rules. This research discusses the same concepts as regards mandatory and altering rules as well. It also deals with the blurring lines in the Default Rules Doctrine and explores the question as to whether there are rules other than the trio of rules.

The chief issue that this research concerns is that the Default Rules Doctrine based approach is lacking in India. But its prevalence in other jurisdictions where the theory is discussed extensively in academia has also been discussed in this thesis.

Since the work critically evaluates the position of Default Rules Doctrine in India, it provides an overview of contract law in India. The work explores whether Indian law harnesses the potential of the Default Rules Doctrine to the fullest potential. Indian law is not only restricted to the legislature and the courts but the entire legal industry in India, including the academia. The work examines four areas in contract law where Default Rules Doctrine would have either contributed to a difference in law or better understanding of law or critical evaluation of the law. The work also empirically explores the utility of the Default Rules Doctrine by collecting the responses on the doctrine to law-making, adjudication, transactional lawyering, advocacy and legal education.

The work also examines the potential of the doctrine in bridging the gap between taught law and law in practice. It also discusses how law-making, contracting practices and adjudication in India would be better-off with effective utilisation of the Default Rules Doctrine. It also explores the 1872 Act and the 1963 Act to identify default, mandatory and altering rules in it.

1.10.2. Limitations

Considering the constraints of space and time, the present work does not discuss in detail the doctrine's multifarious perspectives on design of default, mandatory and altering rules. Optimal design of default rules is heavily dependent on how parties could

effectively alter the default, through altering rules (Ayres, 2012, 2043). The Default Rules Doctrine is therefore nascent when it comes to comprehensively laying down the framework for designing default and altering rules (Ayres, 2012, 2043). The scope of this research is limited to the four objectives identified earlier in this introductory chapter.

A caveat regarding the third objective, that is, contextualising these concepts by classifying the statutory provisions in contract law, is to be noted, at the outset: this research takes up the 1872 Act and the 1963 Act and undertakes the exercise of classification in Chapter 5 hereto. But it does not attempt a comprehensive exercise of classifying of contract law for two reasons.

- First, the purpose of undertaking a classification of the statutory provisions into one of the three types of rules is for the purpose of contextualising these concepts in terms of Indian law. Towards that aim, the exercise of classification is undertaken.

- Second, Special contract law statutes such as insurance law, sale of goods law, partnership law, etc. can be classified based on whether the rules contained therein are mandatory, altering or default rules. Further classification can be made by identifying the sub-type of the default, mandatory or altering rules.

Another important and a potential area for research is a normative evaluation of the manner in which a particular default, mandatory or altering rule ought to be structured and a comparison of the same with how such a rule has been drafted. These areas are ripe for inter-disciplinary research.

This thesis does not seek to classify the entire legal norms in the 1872 Act and the 1963 Act. As would be seen in Chapter 5, it takes up the explicit rules and examines them in order to classify them. The classificatory exercise is independent of explanation of the Default Rules Doctrine in various contract law related statutes. Throughout this thesis, examples are provided on various facets of this theory by picking up various laws, there

are various other laws that come under the rubric (special) of contract law such as insurance law, carriage law, partnership law, sale of goods law, etc., but are not dealt with in terms of classifying the rules into one of the three types.

All the same, this research work identifies potential areas for further research in the application of the Default Rules Doctrine in India.

Also, Chapter 2 discusses the use of the Default Rules Doctrine in addressing the between legal education and law practice (Srinivasan and Yadav, 2022). But the theory cannot be a panacea for this fundamental problem. These aspects are addressed in greater detail in the concluding Chapter of this research work.

After classifying a contract law rule as a default, mandatory or altering rule, further classification can be made by identifying the sub-type of the default, mandatory or altering rules. These aspects are not covered here.

The normative evaluation of the manner in which a particular default, mandatory or altering rule ought to be structured and a comparison of the same with how such a rule has been drafted is an important and a potential area for future research. These areas have immense scope for inter-disciplinary research too.

The first and the second research objectives relate to the legislative and judicial functions vis-à-vis the Default Rules Doctrine and pertain to framing and construing default, mandatory and altering rules. In the government, the role of the executive is to implement the laws, while that of the legislature is to frame laws. Apart from interpreting laws, judiciary also makes laws, albeit in a limited way. The Default Rules Doctrine has focussed substantially on the legislature and the judiciary. This research does not seek to explore the role of the executive in implementing contract law, which regulates the affairs of two parties. The role of the executive in such issues could be considered sparse, except, perhaps, in regulatory environments and where government contracts are involved.

Earlier, this chapter noted the empirical research component of this PhD thesis. The leitmotif of the present PhD Work is, broadly, to analyse whether Default Rules Doctrine is employed in India or not, and if the answer to the question is in the negative, how would the Indian legal system stand to benefit by employing the theory, whether in legal education or in law practice. Therefore, the focus is on the doctrinal aspect of the Default Rules Doctrine. However, in order to provide a comprehensive perspective, an empirical study of a relatively finite magnitude has been undertaken in the present study. The focus has been to obtain responses from present and former law students of law schools on various facets of the Default Rules Doctrine, including their understanding, on whether the same was taught, and their perceived utility. Further, it is possible that a student might have studied ten years back when the Default Rules Doctrine might not have been taught in an institution while, say, in the last five years, it might have been taught. A future study could conduct empirical study state-wise or even university-wise on the said subject-matter and from various batches of students, so as to cover a substantial number of law schools in India.

The work does not analyse the "why" question, that is, why the theory is not prevalent in India as it is beyond the scope of the present work. Comprehensive empirical work would be required to analyse the "why" question.

Another limitation regarding the present empirical endeavour is: there is enormous potential for non-doctrinal research on the aforesaid research questions. Even in the present, *albeit* limited empirical exercise, law colleges have been the focus of empirical study based on the responses of the respondents. It is possible that while one or a few batches might have been taught the Default Rules Doctrine while other batches might not have been so taught. Further, it is possible that teaching the doctrine might have been a contribution of a specific law teacher who could have moved to another law college and as such the former law college could have stopped teaching the Default Rules Doctrine. Thus, one can obtain and study the curriculum of these law schools/ colleges see if and the extent to which law schools/ colleges teach the Default Rules

Doctrine. This would not be an easy exercise considering that law colleges could be secretive about sharing their syllabus or reading materials.

Further, experimental research can be undertaken to see if awareness of the Default Rules Doctrine, especially skills regarding whether a rule or a set of rules could be contracted around or not, could lead to better drafting of contracts. Spatial and temporal constraints militate against undertaking such research for the present work.

Another limitation is regarding the level of awareness. One of the objectives of this study is to explore if there is awareness among lawyers and law students about the Default Rules Doctrine. The level of awareness varies. Some may be familiar with the Default Rules Doctrine while some may know only its basics. Some lawyers/ law students may not even have heard about it. While attempts have been made in the questionnaire to capture various levels of awareness of the doctrine, future empirical research could cover these facets in greater detail.

CHAPTER 2: DEFAULT RULES DOCTRINE IN CONTRACT LAW: AN OVERVIEW

2.1. Introduction

This chapter surveys writings on the topic of default, mandatory and altering rules. Gaps in contracts are filled through what is known as default rules, which apply to contracts in default, that is, in the absence of an agreement on that aspect. As such, parties can validly contract around these rules or modify them to the extent permitted. The gaps in contract are explained through the concept of contractual incompleteness. This provides a foundation to discuss the concept of default rules. This chapter goes on to recognise that while most contracts are obligationally incomplete, contract law protects contracts by filling gaps in such incomplete contracts, except where the incompleteness goes beyond the prescribed threshold. Default rules can be explicit or implicit. Based on their design, they could be majoritarian, sticky or penalty default rules. This section also discusses the normative justifications for default, mandatory and altering rules and other related aspects.

The next section of chapter 2 discusses the mandatory rules, which are rules that operate compulsorily on the parties, with no option of modifying them to suit their transaction. Mandatory rules are of several types such as substantive and procedural mandatory rules. This section discusses the objectives, justification and the design of mandatory rules. The next section deals with altering rules, which are the rules that provide the framework on how to alter a default rule. This section also deals with the types of altering rules. The fourth section puts forth the point that the trifurcation of contract law rules into default, mandatory and altering rules is not water-tight and there are blurred lines between them. It cites the example of sticky default rules which are regarded as quasi-mandatory rules. Chapter 2 explores the possibility of rules other than the triumvirate.

It then analyses the interface of the Default Rules Doctrine vis-à-vis legal education, contracting practices, designing contract law rules and adjudication.

2.2. Default Rules

Law tends to shun incompleteness in contracts and even declares as invalid agreements that are grossly incomplete. Section 29, Indian Contract Act, 1872 invalidates agreements in which the meaning is uncertain or incapable of being made certain (Srinivasan and Yadav, 2022, 201). At the same time, contract law allows parties to strike incomplete bargains where the incompleteness threshold is below what is specified in contract law. How then do incomplete contracts survive Section 29? It is by virtue of default rules.

2.2.1. Meaning of Default Rules

Default rules have been called by various names in the 1980s such as backstop, gap-filling, off-the-rack, presumptive, opt-out, pre-formulated, pre-set, enabling fallback, background, standard-form and suppletory rules. In the civil law tradition default rules are known as suppletive rules (Goldford, 2022, 8). But over the years, academia favoured the use of the term “default rules” (Ayres and Gertner, 1989, 91).

As addressed earlier, the Default Rules Doctrine emerged in the late 1980s and gained popularity on the publication of “Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules” by Ian Ayres and Robert Gertner in the Yale Law Journal (Ayres and Gertner, 1989). Since then, innumerable papers were written on the Default Rules Doctrine. The theory has also been used in several judicial decisions in prominent

commercial law jurisdictions such as UK[12], USA[13], Australia[14], New Zealand[15], Hong Kong[16], etc.

Default rules fill the gaps left by incomplete contracts (Ayres and Gertner, 1989, 1). This usage is similar to the usage in computers where there is a default option, that is, "*an option that is selected automatically unless an alternative is specified*."[17] To illustrate, an agreement provides that the seller has to supply 100 tons of rice to buyer at Rs. 1000 per ton but the parties do not agree the date by or within which performance has to take place, Section 46, Contract Act is a default rule: it provides that where the "*promisor is to perform his promise without application by the promisee*" and where no time is agreed upon (specified), such promise is to "*be performed within a reasonable time*". Here, the agreement does not become void for uncertainty as the gap in the agreement is filled by the law.

Take the case of Section 56 of the Indian Contract Act, 1872[18], which deals with force majeure circumstances. A force majeure clause is standard in commercial contracts. One would hardly find commercial contracts without this clause. Nevertheless, Section 56, which codifies the law on impossibility of performance, operates to fill an unlikely gap in a contract which does not contain the said clause.[19] Hence, Section 56 is a default rule, that is, a rule that operates sans an agreement.

---

[12] See, for instance, Flanagan v Liontrust Investment Partners LLP and others, [2015] EWHC 2171 (Ch); Re Lehman Brothers International (Europe) (No 2), [2011] 2 BCLC 184; Globalia Business Travel SAU (formerly Travel Plan SAU) of Spain v Fulton Shipping Inc of Panama, [2017] UKSC 43.

[13] See, for example, City of San Antonio v. Hotels.com, L. P., 209 L. Ed. 2d 712 (U.S. May 27, 2021); Girolametti v. Michael Horton Associates. Inc., 332 Conn. 67, 208 A.3d 1223, 2019 Conn. LEXIS 172 (Conn. June 25, 2019).

[14] See, for instance, Australian Medic-Care Co. Ltd. (a company Inc in Hong Kong) v Hamilton Pharmaceutical Pty Ltd., [2009] FCA 1220; Power Rental Op. Co. Australia, LLC v Forge Group Power Pty Ltd (in liq), [2017] NSWCA 8.

[15] See, for example, Low v Body Corporate 384911 (2011) 12 NZCPR 209; World Vision of New Zealand Trust Board v Seal, (2003) 5 NZCPR 618.

[16] See, for instance, Moulin Global Eyecare Trading Ltd (In Liq) v. Commissioner of Inland Revenue [2012] 3 HKC 272; SPH v SA (Forum and Marital Agreements) [2014] HKFLR 286.

[17] https://www.thefreedictionary.com/default+option (accessed 09.06.2021).

[18] Available at https://archive.org/details/IndianContractAct1872 (accessed 09.05.2023).

[19] Energy Watchdog v. Central Electricity Regulatory Commission (11.04.2017 - SC) : MANU/SC/0408/2017.

Interestingly, courts have held that parties could agree as to when an act could be treated as impossible.[20] For instance, in Energy Watchdog v. Central Electricity Regulatory Commission, the force majeure clause enumerated circumstances which would not be force majeure for the purposes of the agreement. The argument was that rise in price of coal was a force majeure event. The court rejected this contention and held that since the contract excluded such an event from force majeure, the same was binding.[21]

This gap filling function of default rules necessarily entails that where there is a contractual provision, the default rule that governs the subject dealt with by the contractual provision either ceases to operate or other consequences follow. Again, taking the case of Section 56, where there is a contractual provision on force majeure, Section 56 does not operate but Section 32 applies.[22] Another example is Section 64A, Sale of Goods Act, which fixes the burden on the buyer to bear liability for taxes on sale of goods (Srinivasan and Yadav, 2022). It also provides that parties can agree otherwise, that is, parties can agree that the seller, rather than the buyer, would bear the burden of increased taxes or even that the parties would bear the burden equally between them. Majority of contract law rules are in the nature of default rules (Goetz and Scott, 1983, 971; Burton, 2016, 1063).

Note that "default rules" may also mean rules that apply absent action or specific order from a court of law. To illustrate, Section 31(7)(b) of the Arbitration Act states: "*A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.*"[23] This rule provides for the "default" interest rate when the arbitral award does not deal with interest post-award. In Ashany v. Eco-Bat Technologies Ltd.[24], the English Court of Appeal regarded a rule in English Law fastening the liability for costs of legal proceedings on the claimant who discontinues such proceedings against a defendant as a "default rule"

[20] MANU/SC/0408/2017, Para 45;
[21] *Ibid.*
[22] *Ibid.*.
[23] https://shorturl.at/bizO4 (accessed 22.01.2024).
[24] [2018] EWCA Civ 1066

because the rule stated the position of law subject to the order of the court which decided otherwise.[25] This is not the meaning of default rules as dealt with in the context of contract law.

The term "default rules" as used in contract law refers to rules which apply absent agreement between the parties dealing with a specific situation. The difference is in case of a rule applying in absence of a court / tribunal order, discretion vests with the judge/ arbitrator while in case of a rule applying in absence of an agreement, the discretion to contract around the default position vests with the parties.

Likewise, rules of pleadings and proof may also provide for a default rule, which could be displaced by one party. To illustrate, in Granville Technology Group Ltd v. LG Display Co Ltd[26], the English Commercial Court called a rule which provides for applicability of English domestic law if neither party contends foreign law to apply as a default rule[27] and held that such a default could be displaced[28] if a party contends otherwise.[29] This is not the sense in which the term "default rules" is dealt with in this work, where the contract around is through consensual act of contracting parties. It is possible that in default rules, as used broadly by English court, principles could be the same as default rules as is used in this work. In a recent paper, Gregory Klass defines the term "default rule" broadly to mean a rule that "specifies the legal state of affairs" in the absence of the concerned person's "act or expression to the contrary" (Klass, 2023, 7). This could include an act by a judge or a contracting party or even a third party. Nevertheless, this is restricted to default rules that are capable of contracting around by consensus between parties. Even so, such broad usage is not the subject of this research.

[25] [2018] EWCA Civ 1066, Para 15.
[26] [2023] EWHC 2418 (Comm)
[27] *Ibid*, Para 11.
[28] *Ibid*.
[29] *Ibid*

2.2.2. Contract Incompleteness

The underlying theme in the above discussion on default rules was contractual incompleteness. It is important to explore the concept of contractual incompleteness in order to examine further aspects of default rules.

The concept of incomplete contracts came up as an important issue in economics in the last several decades (Tirole, 1999, 741). The idea has been regarded as a key to understanding several economic issues. This was picked up by law and economic scholars and formed the fulcrum of the paper of Ian Ayres and Robert Gertner on the role of default rules in filling gaps in incomplete contracts and the concept of penalty default rules (Hviid, 1996). The concept continued to be used extensively in economics while it took a new turn in law in providing a theoretical basis for default rules (Ayres and Gertner, 1989).

2.2.2.1. Contractual Incompleteness- Origins and Meaning

Contractual incompleteness as a concept was initially employed concerning the economic analysis of the nature of the firm (Grossman and Hart, 1986). Subsequently, it was used in the sub-field in law known as “law and economics” (Srinivasan and Yadav, 2022). The term “contractual incompleteness” has been used in multiple contexts in contract law: this makes defining the term a difficult exercise (Srinivasan and Yadav, 2022, 201).

Instead of describing the concept's contours, it would be helpful to begin with a simple statement of its meaning: contractual incompleteness means that the contract, although enforceable in law, is not sufficient to cover all possible circumstances or situations that parties could encounter during the currency of the contract.

To put it in converse, parties specify their rights and obligations in a complete contract to address all future contingencies (Baker and Krawiec, 2006, 726). Since parties cover

every contingency, they do not have the need to renegotiate the contract or breach it (Baker and Krawiec, 2006, 726).

On the other hand, if there is an incomplete contract, as new information becomes available or unforeseen events take place, they, or at least one of them, feel the need to renegotiate the contract, breach it or initiate litigations relating to the contract (Baker and Krawiec, 2006, 726).

To illustrate (Schwartz, 1998, 277), assume an entity manufacturing mobile phones agrees on 1 April to sell 10 units of the phone at Rs. 1,000/- per unit to a dealer by 1 June. On 1 June, it is possible that the demand for mobile phones may be high, low or the same as on the date of agreement to purchase (1 April). If the demand is high on 1 June, the dealer may sell the phones to his customer for, say, Rs. 1,200 per unit. If the demand is the same, he might sell it at Rs. 1,050/- per unit. But if the demand is low, he might sell it for Rs. 1,000/- or even lesser. However, the price at which the manufacturer sells the phones to the dealer may might not have considered the one or few or all of the said future states, that is, high, same and low demand states. If the agreement between the manufacturer and the seller does not take into consideration all future contingencies, it is an incomplete contract.

An agreement could be incomplete even if a contractual party has more information than the other party/ parties in relation to the agreement. To illustrate (Schwartz, 1998, 277), consider a dealer of a washing machine. The dealer knows that washing machines of a particular model become defective after intensive use of about seven months, a month beyond the warranty period of six months. But buyers do not know about this problem. So, a buyer who is a regular user of the washing machine might most likely encounter the defect in about seven months whereas a buyer who does not regularly use the device might encounter the defect much later. The seller hides this information since he would get to earn on repairs. This agreement is also incomplete because had this information been available to the buyer, an intensive buyer would have purchased an extended warranty or would have paid lesser price for the product. Since the agreement

does not cover the contingency of product malfunction within six months, it is incomplete.

2.2.2.2 Possibility of Complete Contracts

It is possible to posit the following question: if there are incomplete contracts, shouldn't there be contracts that are complete? (Crasswell, 2005, 152) In other words, if incomplete contracts are contracts with gaps, shouldn't there be agreements without such gaps?

The short answer is no. Literature in economics and law and economics literature assume that contracts are incomplete (Crasswell, 2005, 153). In short, the basis for this assumption is that parties would be unable to negotiate all possible circumstances in their agreement (Crasswell, 2005, 154). A related ground is that it would be too expensive for the parties to do so.

Theoretically, it may be possible to draft an agreement that is complete, from a legal perspective (Baker and Krawiec, 2006, 726; Ben-Shahar, 2004, 399) by an agreement to allocate unforeseen risks in a general manner. For instance, nothing stops the parties from agreeing that a typical force majeure clause would apply in case of an unforeseen situation arising inhibiting a party from performing the contract or which has material adverse effect on performance of the contract (Triantis, 1992). Parties could even agree that they would negotiate in good faith to address situations not covered by the terms of the agreement.

So, it is possible to draft agreements that are obligationally complete. It is another thing that parties may not wish to expend their resources towards drafting a perfect agreement covering all possible situations. This is fairly normal. Parties might also leave it to the law to take care of a situation where they have reached a deadlock during negotiations. Again, this is usual in contract negotiations. For instance, if parties are not in a position

to reach a consensus on the choice of court clause, they may leave it to the applicable law (i.e., the CPC, in India) to take care of the situation.

One of the parties who provides its standard form agreement to the other party to the transaction might deliberately exclude from the agreement certain rights to be provide to the other party. In many agreements, the employer or the client might exclude the contractor's right to terminate the agreement for convenience.[30] This might be deliberate and a contractor with lesser bargaining power may agree to such a clause. The one with more bargaining power might negotiate a clause for terminating the agreement at its convenience empowering the contractor to terminate the agreement for convenience.

Understanding why a contract is incomplete throws considerable light on various issues relating to contract law. The literature in economics goes much beyond the concept of incompleteness and addresses possible solutions to address problems emanating out of incomplete contracts (Crasswell, 2005, 155). Analysis of these aspects is not within the scope of this research. But what is relevant here is the importance and usefulness of this notion in better understanding contract law and the Default Rules Doctrine.

2.2.2.3. Obligational Completeness and Contingent Completeness

To explain incompleteness, it would be useful to describe and distinguish between obligational incompleteness and contingent incompleteness (Ayres and Gertner, 1992; Bag, 2018)).[31] Obligational incompleteness refers to a situation where parties do not fully specify in their agreement all rights and obligations applicable to them (Ayres and Gertner, 1992, 730). For example, if the parties do not mention the delivery date in their contract, such a contract is regarded as a contract that is incomplete obligationally. On

[30] See, for instance, AAI v. Dilbagh Singh, MANU/DE/0053/1997; See also, FIDIC RED BOOK: CONDITIONS OF CONTRACT FOR CONSTRUCTION (2017)(which empowers the employer to terminate the agreement for convenience under Clause 15.5 but does not empower the contractor to do so).

[31] Sugata Bag (2018) discusses the difference between incomplete contracts from an economic and legal perspectives of contractual incompleteness.

the other hand, if the contract does not fully specify parties' rights and duties in all future states, such a contract is held to be contingently incomplete (Ayres and Gertner, 1992, 730).

Recollect the previous example (Schwartz, 1998, 277) where the manufacturer of mobile phone agrees, on 1 April to sell 10 units of the phone at Rs. 1,000/- per unit to a dealer by 1 June. We saw that since the price at which the manufacturer sells the phones to the dealer might not have considered the one or few or all of the said future states, including the high, same and low demand states. Since the agreement specified price, quantity and the date of delivery, it was obligationally complete but since it did not reckon all future contingencies, it was contingently incomplete.

A contingently complete contract addresses all contingencies such that neither party can improve its value out of the contract to the disadvantage of the other party (Coleman *et al*, 1989, 640); Kostritsky, 2004, 334). Such a contract is efficient. Since a contingently complete contract is in equilibrium, neither party has any incentive to breach the terms of the contract (Coleman *et al*, 1989, 640; Kostritsky, 2004, 334). Consequently, there is no need for judicial intervention (Coleman *et al*, 1989, 640; Kostritsky, 2004, 334).

Thus, contingently incomplete contracts are those contracts in which parties would envision the multifarious states of the world that could materialise in future and provide for tailored conditions of contract to address all the states of the world Kostritsky, 2004, 334). Such a complete contract details the obligations of the parties in each possible state of the world (Scott and Triantis, 2005, 188). This would enable parties to make specific investment or compel exchange only in states which would maximise the shared value to both parties under the contract (i.e., surplus) (Scott and Triantis, 2005, 188, 189).

Unfortunately, parties cannot predict, *ex ante*, these uncertain future events (Scott, 2003, 1641-1642). One reason for this unpredictability is the innate inability to predict

the future (Scott and Triantis, 2005, 188). To provide an example of an extreme case, during the currency of an agreement for supply of sand, due to environmental reasons, there might be a ban on mining of sand. Small changes such as change in the timings for sand mining, or establishment of a new road that would cut short the time for bringing the sand would affect the cost-benefit assumptions made at the inception of the contract.

So, various future events that may alter the cost-benefit assumptions they made at the time of contracting cannot be predicted. Further, if all such scenarios or the effects of such scenarios are to be provided for in the contract, there can be no end to the length of the terms of the contract.

Theoretically, an obligationally incomplete contract is not contingently complete because it, in any case, does not fully specify the rights and obligations of the parties in any future contingency. For instance, in the above example, if the contract does not provide for price, Section 9(2), Sale of Goods Act, 1930 ("Sale of Goods Act") states that reasonable price is payable.[32] But what is reasonable price would depend on the then prevailing situation and how courts could view such an agreement or ascertain the price. This is a matter which parties cannot predict. Therefore, obligationally incomplete contracts are contingently incomplete.

2.2.2.4. Reasons for Incompleteness of Contracts

We have seen the reasons for contingently incomplete contracts: the innate inability of human beings to predict the future, and the practical impossibility of addressing all possible future contingencies at the time of negotiation (Scott, 2003, 1642).

[32] See, Law Commission of India, Thirteenth Report (Indian Contract Act, 1872) 2 (1958), www.lawcommissionofindia.nic.in (accessed 09.05.2023). See, however, Bhupendra Singh Bhatia v. State of M.P. (06.12.2006 - SC) : MANU/SC/5396/2006, Para 10, holding in the context of a government contract that parties to the sale of a commodity had to know the sale price before or at the time of sale (Sapre, 2021, 93-96)

There are various reasons[33] for obligationally incomplete contracts (Ayres and Gertner, 1989, 92). One, contractual negotiations are a costly and time-consuming process. If parties sit together to thrash out all the issues or situations that they could think of and draft them in contract language and agree upon the same, considerable time and efforts would have to be expended (Ayres and Gertner, 1989, 92-93). Parties may sometimes be unable, even after spending considerable time and costs to resolve differences and arrive at a consensus (Hwang, 2022, 670-671). Further, the costs that could be incurred from drafting and negotiating a complete agreement could outweigh the benefits (Hwang, 2022, 670; Ben-Shahar, 2004, 397). If parties could focus on the main terms of concern and leave it to law to take care of the remaining terms through filling gaps, there are more chances of striking an effective bargain that is beneficial for both parties (Ayres and Gertner, 1989, 92-93). In other words, parties could harness the gap filling function of contract law and reduce the transaction costs (Michaelsen and Sunstein, 2023, 1; Ben-Shahar, 2004, Ayres and Gertner, 1989). Parties typically achieve this in the following manner:

- Parties decide to negotiate on terms they consider to be important or relevant;
- They leave the remaining to be taken care of by default rules.
- Of the terms they consider important, they may alter existing default rules or might reiterate them in their agreement.
- They may reiterate an existing default rule in their agreement, either because they are not really sure of the operation of the default rule or for reasons of certainty.

Two, sometimes contracts that may seem to be obligationally complete may sometimes become problematic owing to unexpected events (Scott, 2003). It could be difficult to foresee such an event. The recent issue relating to the retirement of LIBOR[34] presents an apt example (Srinivasan and Yadav, 2022, 201-202). LIBOR used to be the standard interest rate index in commercial/ financial contracts and at least US$ 300 trillion was

[33] Reasons for contingently incomplete contracts apply equally to obligationally incomplete contracts.
[34] London Interbank Offered Rate (LIBOR)

indexed to LIBOR (Kiff, 2012). Given its commonality, contracting parties would never have expected LIBOR to be retired.[35] How could courts deal with contracts referencing LIBOR in the absence of LIBOR in reality? One solution is for law to treat the choice of LIBOR as void and apply the default rate of interest provided by the applicable law. Another solution is party driven: they could fill this gap in their contract owing to supervening events by agreeing to index their contracts to another index.

Three, contractual bargains could be struck under the shadow of information asymmetry (Bag, 2018). It is possible that one of the parties may have information about the contract that the other party does not, although it may be relevant for that other party's interests in the contract. The washing machine example earlier in this chapter was an illustration of information asymmetry between the parties. It was also seen that the consequence of asymmetry of information was that the contract was incomplete.

Sometimes, one party to a contract could strategically withhold information in order to take gain more value in the transaction. This happens typically in a scenario where one of the parties to the transaction has access to more information than the other- in a situation where information asymmetry prevails (Ayres and Gertner, 1989). An asymmetrical access to information *per se* may not be problematic. But when there is imbalance in information access, it could result in inefficiency or, worse, even market failure (Ayres and Gertner, 1989).

The withholding of information makes the contract contingently incomplete because it does not allow the parties to negotiate a contract and derive value in respect of the imbalance in informational access (Schwartz, 1992, 273).

Four, parties may simply have missed a relevant term of the contract owing to oversight (Scott, 2003, 1642-1643; Stipanowich, 2001, 834; Hill, 2001, 80; Coates IV, 2001).

[35] For further information on the cessation of LIBOR, see, https://www.theice.com/iba/libor (accessed 06.05.2023). Also see, Srinivasan and Yadav (2022).

Parties might have forgotten to negotiating a clause that would have otherwise found its place commonly in similar contracts. Contract negotiations do not take place in vacuum but under constraints of time. Therefore, parties omitting to negotiate a contract by inadvertence or mistake is not rare. To illustrate, parties might have forgotten to mention the place of arbitration in their arbitration clause (Srinivasan and Yadav, 2022, 202).

Another important reason for contract incompleteness can be attributed to sticky drafting practices. (Nyarko, 2021, 7; Coates IV, 2001, 1377-1383; Romano and Sanga, 2017, 50-76; Klein *et al*, 1993, 687, 696). Transactional lawyers across law firms use the same or similar templates for drafting their agreements (Nyarko, 2021, 2-6). This means that if the original template was incomplete as to certain aspects, the same is carried over whenever that template is being used (Nyarko, 2021, 6). Note that this is different from mere omission of a common contractual term by inadvertence but it is the general lack of due diligence in using the templates. In an empirical study, it was observed that transactional lawyers rely on template precedents rather than on the legal system's default rules to draft agreements (Manns and Anderson, 2020, 1256-1257).

A further reason why contracts could be incomplete is because a contract each entity to a contract would bring its collaborative intent, that is, an intent which is based on a consensus building process within such entity (Hwang, 2022, 663). Such contracts may not be rational, complete or is subject to careful consideration (Hwang, 2022, 663), even if sophisticated parties advised by sophisticated counsel are involved (Hwang, 2022, 666). This problem gets accentuated by modular contract negotiation- different parts of the contract are negotiated by different kinds of specialists (Hwang, 2022, 666-667).

Obligationally incomplete contracts can also be explained in relational contracts. Contracts are not merely discrete transactions but create relationships between the parties. Illustrations of relational contracts are joint venture agreements, franchise

agreements, oil and gas joint operating agreements, etc.[36] Relational contracts are typically long term contracts where parties invest substantial resources and performance of various obligations over the term of the contract have to be made with cooperation, mutual trust and confidence with a specific goal or sets of goals that parties wish to achieve (Collins, 2021; Macneil, 1978).

Given the long duration of relationship contracts, it is virtually impossible to foresee all contingencies (Goetz and Scott, 1981, 1091; Hadfield, 1990). Not just that: since co-operation is the bedrock of the relationship, parties do not negotiate in length over all foreseeable contingencies and situations. Therefore, relational contracts are considered "incomplete by design" (Collins, 2021). The mutual expectation of co-operation is an important tool to resolve the incompleteness.

In the ultimate analysis, the inherent indeterminacy of text also contributes to incompleteness. The court or the arbitral tribunal is unable to apply the text to a fact situation due to textual indeterminacy is also, in a way, incompleteness (Choi, 2022, 48-49).

2.2.2.5. Law's Response to Contractual Incompleteness

Law shuns contractual incompleteness. It even considers a grossly incomplete as void in terms of Section 29, Contract Act (Lau, 1994). Section 29 declares uncertain agreements as void (Srinivasan and Yadav, 2022, 202; Lau, 1994). All the same, contract law permits incomplete bargains where the incompleteness threshold is below what is prohibited by it. It is paradoxical that contract law allows incompleteness on the one hand but outrightly rejects incompleteness on the other (Baker and Krawiec, 2006, 726).

So long as an agreement meets the certainty threshold, they are regarded as obligationally complete by courts/ tribunals (Ayres and Gertner, 1992, 731; Baker and

[36] Yam Seng Pte Ltd v International Trade Corp Ltd., [2013] EWHC 111 (QB), Para 142.

Krawiec, 2006, 726, note 16). It is possible that some of such agreements could be void but they are considered to be obligationally complete. If the agreement does not cover certain situations expressly, default rules could take care of such situations or courts.[37] A typical example is the provision in contract law relating to damages. Parties need not and do not always agree on the quantum of damages at the time of contracting (liquidated damages). In those situations, the quantum is determined *ex post* through the statutory provision on damages.[38]

Further, in contracts such as relational contracts, parties have their own mechanisms to address incompleteness. Such mechanisms include amicable negotiations, mediation, conciliation, valuation by third party, etc.

Another strategy is for courts to ask the parties to renegotiate their bargain in the light of the uncertain future circumstance that has occurred. If the renegotiations fail, the court or the arbitral tribunal may thereafter decide on how to proceed to address that circumstance.

Courts (including arbitral tribunals) also use devices such as implied terms to read in terms into an agreement that does not expressly deal with a particular situation, especially in those situations where courts regard the incompleteness as regards relatively less important terms (Ben-Shahar, 2004).

In addition to law, parties tend to use standard form agreements to reduce the possibility of oversight in drafting obligationally incomplete contracts.

2.2.2.6. Contractual Incompleteness and Indian Contract Law

At times, law looks down upon incomplete agreements to the extent of holding them as unenforceable due to uncertainty. Section 29, the Contract Act declares agreements

[37] "Courts" here would mean any authority exercising judicial or quasi-judicial powers in construing an agreement. Such an authority could be a statutory tribunal or even an arbitral tribunal.
[38] Section 73, the Contract Act.

whose meaning is uncertain or which is not capable of being made certain as void. The illustrations provided in the Contract Act to section 29 deal with uncertainties as to subject matter and price. They are incomplete in that parties have failed to specify the subject matter or the price completely.

The idea that incompleteness in law is context specific is clearly illustrated by Illustrations (a) and (c) to Section 29, the Contract Act. An agreement stating that the seller would sell "hundred tons of oil" to buyer would be uncertain depending upon the context. If the seller is a dealer of, say, coconut oil, an agreement for the sale of "hundred tons of oil" at a price is capable of being made certain and is therefore enforceable.[39] But, where the seller sells various types of oil, an agreement for sale of "hundred tons of oil" at a price is unenforceable.[40] Similarly, the context rendered an otherwise uncertain (incomplete) agreement providing for sale of all his grains in his Ramnagar granary enforceable.[41]

As regards agreements that are uncertain owing to defects in price specification, if the agreement provides for some minimum standard of price, it is enforced. For instance, if the price is to be fixed by another person, there is a method of determination of price and the agreement is, therefore, enforceable.[42] But if there is uncertainty as regards price, such agreement is void.[43]

[39] Illustration (c) to Section 29.
[40] Illustration (a) to Section 29.
[41] Illustration (d) to Section 29.
[42] Illustration (e) to Section 29. See also, Bai Mangu v Bai Viji, AIR 1967 Guj 81: (1965) 6 GLR 915.
[43] See, Illustration (f) to Section 29, which provides for sale of a horse "*for rupees five hundred or rupees one thousand*".

2.2.3. Explicit and Implicit Default Rules

Default rules can be easily identified by the use of the phrases such as "subject to contract to the contrary"[44], "unless otherwise agreed"[45], "unless agreed otherwise"[46], "in the absence of a contract"[47], "in the absence of a special contract"[48], "in the absence of any special contract"[49], "in the absence of a contract to the contrary"[50], or their variants.[51] Default rules are found not only in statutes but also in delegated legislation[52] and common law.[53] The examples cited above are instances where default rules can be identified by explicit language used in the section itself.

But what about cases where the provision is not explicit? Even if certain provisions do not explicitly use the aforesaid terms or their variants, a rule could still considered be a default rule.[54] Such determination would be predominantly by courts, and at times, the common practice that stakeholders such as contracting parties and the officials follow might be to treat those rules as default rules.

The example cited above regarding Section 10(1) of the Arbitration Act regarding even number of arbitrators is a default rule although the rule expressly seems to suggest

---

[44] See, for instance, Section 36(1) of the Partnership Act.
[45] See, for instance, Sections 3(1), 11(1), 14(2), 15(3) 15(4), 20(3), 21, 23(3), 24(1), 25, 26(1), 26(2), 26(3), 29, 31(7)(a), 33(4), 80, and 85(2)(a) of the Arbitration Act; Sections 26, 32, 36(5), 38(1), 39(3), 40, 41(2), and 43 of Sale of Goods Act; Section 15(4) of the Carriage by Road Act, 2007;
[46] See, for instance, Articles 36 and 37, Schedule I to the Geneva Conventions Act, 1960, Article 39, Schedule II to the to the Geneva Conventions Act, 1960, and Article 22, Schedule IV to the to the Geneva Conventions Act, 1960.
[47] Available at https://archive.org/details/IndianContractAct1872 (accessed 09.05.2023). See, for example, Sections 36 and 101(1), the Transfer of Property Act, 1882.
[48] Section 48, the Transfer of Property Act, 1882.
[49] Sections 152 and 219, Contract Act.
[50] See, for instance, Sections 37, 45, 46, 49, 55, 56, 61, 63, 63A(1), 63A(2), 65, 67, 67A, 69(4), 70, 71, 72, 76(c), 76(d), 81, 82, 109, and 133 of the Transfer of Property Act, 1882.
[51] See, for instance, Sections 64 ("*in the absence of a contract by him to the contrary*") and 108 ("*In the absence of a contract or local usage to the contrary*"), Transfer of Property Act
[52] See, for example, Clause 1.2, Part V, Schedule to the International Telecommunication Access To Essential Facilities At Cable Landing Stations Regulations, 2007 (5 of 2007), https://trai.gov.in (accessed 09.05.2023); Regulation 9(3), PNGRB (Access Code for City or Local Natural Gas Distribution Networks) Regulations, 2011.
[53] See, for instance, Hadley v Baxendale (1854) 9 Exch 341 (on the rule of remoteness of damages).
[54] See, for instance, T Raju Shetty v. Bank of Baroda, MANU/KA/0013/1992; Corporation Bank v Mohandas Baliga, MANU/KA/0296/1992.

otherwise.[55] There are various other examples of such inexplicit or implicit default rules.[56]

Considering that default rules perform gap-filling functions, parties can enter into an agreement which does not contain many gaps. In such a case, the default rule might either not apply at all or would apply in a different way (Srinivasan and Yadav, 2022, 203). The effect of the party agreement concerning a subject matter covered by a default rule necessarily entails that parties derogate from the original effect of the default rule. In other words, parties could derogate from the original effect of the default rule. This is a notable function of default rules (Srinivasan and Yadav, 2022, 203).

Default rules are not only promulgated by legislature. Acknowledging the judicial law-making function, default rules are also promulgated by courts (Riley, 2000; Solum 2022). These have been called as adjudicative default rules (Riley, 2000).

2.2.4. Types of Default Rules

Default rules have been classified in a variety of ways. In terms of derogation, default rules could be classified into those default rules which expressly allow parties to derogate therefrom and which do not expressly so allow. Contract Act which was drafted more than 150 years ago consists of several rules which are of the latter category. Rarely does the Contract Act contain express default rules.[57]

Default rules could also be classified into several types such as majoritarian, sticky rules and penalty default rules (Srinivasan and Yadav, 2022, 202).

Majoritarian default rules: Majoritarian default rules are those default rules which most of the parties would agree upon (Srinivasan and Yadav, 2022, 202). Thus, while

[55] Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 572
[56] See, for instance, Chapter 5, which deals with another implicit default rule: Section 133, the Contract Act. See, for instance, HB Basavaraj v Canara Bank Corporation MANU/SC/1785/2009, holding that Section 133 could be contracted around by the parties.
[57] See, for instance, Sections 37, 42 and 43, the Indian Contract Act, 1872.

drafting a statute, drafters should be aware of the choice of contractual provisions that parties would normally opt for and should design the statute such that the default rule is set for those clauses (Newman, 1998, 585).

Although, it is easy to theoretically construct the concept of majoritarian default rules, it may be difficult in practice to empirically find out the majority party choice(s).[58] Further, it is possible that parties may choose, not one, but a few or many options, given a particular situation. Given the plurality of choices that parties could choose, it may not be possible to identify a single majoritarian default rule.

Another problem with the construct of majoritarian default rule is that the issue is more or less situational. For instance, the question is whether the parties opt for liquidated damages more common in the case of a contract for sale of goods[59] or a construction contract as compared to a consumer contract for purchase of goods. Given this, the choice of a majoritarian default rule may depend on the situation or the type of the contract.

Tailored and Untailored Default Rules: Close to this idea, default rules could also be tailored or untailored (Ayres and Gertner, 1989, 91; Ayres, 1993, 4). Untailored default rules are those default rules which provide a generalised "off-the-rack" (Ayres and Gertner, 1989, 91) (one-size-fits-all) default solution to parties to a contract. In case contracting parties are of the view that the rule is too general, they change it through an explicit provision Ayres, 1993, 4).

On the other hand, tailored default rules are default rules which aim to provide contracting parties with performance standards that are tailored to their situation. A typical example is the reasonableness standard in various contract law provisions, which concern what is reasonable conduct, given the circumstances the parties are in

[58] This challenge has been called as "acceptability constraint" (Schwartz and Scott, 2016, 1529).
[59] Available at https://archive.org/details/dli.ernet.5593 (accessed 09.05.2023).

(Ayres and Gertner, 1989, 91). Such provisions are regarded as "tailored" because they required a tailored determination by a court of law.

Tailored default rules have been called as default standards (Ayres and Gertner, 1989, 95).[60] Strictly speaking, a rule in contract law stating that goods should be delivered within a reasonable period of time if the agreement is silent on the delivery period is a default standard and not a default rule (Schwartz and Scott, 2016, 1529; Srinivasan and Yadav, 2022, 202). This is because the standard of reasonableness would depend on the context (Schwartz and Scott, 2016, 1529).

Related to the concept of tailored default rules are personalised default rules, which are highly customised default rules applicable to identified classes of individuals sharing similar preferences (Poppe, 2021, 110; Srinivasan and Yadav, 2022, 202).

Penalty/ Information Forcing Default Rules: Penalty default rules are different form majoritarian default rules. They are not concerned about whether majority of the parties would opt for such a default. Penalty defaults force a contracting party to disclose useful information by contracting around the default. Such information may be useful either to the courts or the parties (Ayres and Gertner, 1989, 91; Goldford, 2022). This is done so by giving at least one of the parties to a contract an impetus to contract around the penalty default (Ayres and Gertner, 1989, 97; Florou, 2019). This reduced information asymmetry and leads to an efficient contract.

The foreseeability rule Section 73, the Contract Act is a penalty default rule. This rule limits compensation to the promisee for losses that naturally arose in the usual course of things from a breach of the contract and does not cover special loss or damage, unless both parties knew when they contracted as to be the likely result of the breach (Lau, 1994). Had the promisee informed the promisor regarding the special loss or damage

[60] Also see, Ayres (1993, 2) criticising the literature on rules v. standards as not considering the ability of private parties to contract around law as a factor relevant for determining whether a provision has to be designed as a rule or a standard and arguing that the existing literature was more about the choice between mandatory (at that time the term "immutable" was popular) rules and standards and not about rules versus standards in the default rules context.

in case of breach, the promisor would have better allocated resources in order to ensure performance, making both the parties well-off in such a situation, perhaps at some extra cost to the promise owing to the increase in risk or cost of performance to the promisor. This rule is exemplified by the popular case of Hadley v Baxendale[61], whose facts are reflected in Illustration (i) to Section 73, the Contract Act.

Had the restrictive rule not been there, the promise could simply withhold information about the special damage or loss and later claim compensation from the promisee in case of breach, thereby leading to socially undesirable result of having contractual breaches in two fronts, and leading to substantially high transaction costs to be incurred by the promisor in finding out those special circumstances (Ayres and Gertner, 1989, 102-103).

Section 16 of the Sale of Goods Act contains another penalty default rule. Section 16 lays down the general provision that under a contract for the sale of goods, there is no implied warranty or an implied condition regarding the quality or fitness for any particular purpose of goods.[62] The provision has been doctrinally eclipsed by the caveat emptor doctrine but the provision is, at least in the mercantile context, a penalty default rule with considerable informational effects, which are captured by the exceptions contained in the provision.

The first exception is provided in Section 16(1) and covers scenarios where the buyer informs the seller, either expressly or impliedly, the specific purpose for which the goods were required and that such information is passed on to the seller to show that the buyer relies on the skill/ judgment/ expertise of the seller and that the goods are of a description such that the seller in his course of business supplies such goods (Lau, 1994). The proviso to Section 16(1) is another penalty rule in the context of sale of an article under the patent or trade name of the seller. For instance, if goods are purchased

[61] 9 Ex. 341, 156 Eng. Rep. 145 (1854), cited in *Filling Gaps*, 101-103.
[62] Available https://archive.org/details/dli.ernet.5593 (accessed on 09.05.2023)

on the basis of the trade name of the seller, the buyer cannot then claim that there was an implied condition in the contract as to the fitness of goods for a specific purpose.

From a mercantile perspective, if a seller has to contract around the default rule that there is no implied warranty or condition of quality or fitness for purpose, he has to inform the seller the specific purpose.[63] Hence, contracting around entails informational effects. If the provision is not contracted around, it penalises the buyer for not revealing information by denying it the benefit of a condition or a warranty of quality or fitness for purpose.

Another example of a penalty default rule is the one providing for a default interest rate in the absence of a contract (Ayres, 2006, 590). The choice of a default low or a high interest rate has information forcing effects (Ayres, 2006, 590).

Other examples of penalty default rules include the rule proscribing oral evidence of written instruments[64], *contra proferentem* rule (Ayres, 2001, 7; Ayres, 2006, 596; Goldford, 2022, 17-18), prosecution history estoppel in patent law (Ayres, 2006, 601), etc.

Penalty default rules are justifiable if they serve the function of inducing a party or the parties to reveal useful information (Ayres, 2006, 601). Ayres and Gertner argue in this regard: "*In contrast to the received wisdom, penalty defaults are purposefully set at what the parties would not want-in order to encourage the parties to reveal information to each other or to third parties (especially the courts)*." (Ayres and Gertner, 1989, 91; Ayres, 2006, 594)

One of the central debates on the penalty default rules is the debate between Ian Ayres and Eric Posner in 2006. While Posner provided a restricted definition of what constituted default rules (Posner, 2006), Ayres argued that the definition of penalty

[63] Available https://archive.org/details/dli.ernet.5593 (accessed on 09.05.2023)
[64] See, Section 90 and 91, Indian Evidence Act, 1872.

default rules was unduly restrictive (Ayres, 2006, 591). In justifying the existence of penalty default rules, Ayres argued that certain default rules could be justified owing their ability to induce information from one party to another, to the legal system, to third parties and even to courts (Ayres, 2006, 593).

The focus in *Filling Gaps* was, originally, on penalty default rules that has information revealing effects where the parties (at the instance of the party with better information) wanted to alter the default. But the theorization of the informational effects produced by default rules was also dealt with in *Filling Gaps*, as has been noted in the above quote. Even so, it is in the article where Ayres sought to rebut Posner (2006, 571) that the generalisation regarding the informational effect of default rules was specifically dealt with (Ayres, 2006).

That contract law contains rules/ doctrines which make parties reveal information can be traced to Lon L. Fuller (Fuller, 1941; Posner, 2006). The argument on penalty default rules goes a step further to state that penalty default rules force parties to address certain situations in their contracts.

There have been some objections against penalty rules (Ayres, 2006). One strand of objection is that there are no penalty default rules at all (Posner, 2006) and the other is that penalty default rules are not efficient (Maskin, 2006). The first strand of objection argues that existence of information asymmetry between the contracting parties does not mean that majoritarian default rules should be abandoned by the drafters (Posner, 2006, 569) and that all default rules would be penalty default rules (Posner, 2006, 570) possibly because they might be information forcing.

Another argument that has been raised is that contract law, such as consumer protection law, might require certain formalities regarding manner of packaging, or displaying product information, etc. to be complied with specific objectives such as consumer protection, and not the concerns that are shown by proponents of the penalty default theory (Posner, 2006, 585-586). In sum, the stance against existence of the penalty

default rules is that contract law uses mandatory rules (or immutable rules), contract formation rules and interpretative presumptions and not default rules to address information asymmetry (Posner, 2006, 586). As a subsidiary point, it has also argued that general contract law is not well-suited to address information asymmetries that may exist in specific market conditions such as insurance, consumer contract, etc (Posner, 2006, 587). The other strand of objection points out that the penalty default rules concept is of limited value (Maskin, 2006, 562).

Against these criticisms, it has been argued that when parties displace a default rule, it produces certain informational effects which mandatory rules cannot achieve and that drafters should consider this while choosing the type of rule to be adopted. Law-makers may in fact be guided unconsciously to choose a penalty default rule without so intending.

Goldford gives a broader notion of penalty default rules: any default rule that parties which imposes a burden on one or both the parties to a contract if they failed to depart from it is a penalty default rule (Goldford, 2022). He does not require informational effects to be produced by that rule (Goldford 2021-2022, 8).

Sticky Default Rules: These are a combination of default and mandatory rules (Ayres, 2012, 2084; Weisbord and Horton, 2018, 704; Srinivasan and Yadav, 2022, 206). Legislators employs sticky default rules when the default setting is likely to be chosen by majority of the parties (majoritarian default rules) and the minimum conditions for displacing the default are set in an onerous fashion so as to discourage parties from contracting around the default (Maskin, 2006, 562). They are not drafted as mandatory rules in order to protect the freedom of parties to modify the rule but modification is made as a costly affair.

A typical example of this rule is the amended Section 12(5), Arbitration Act. Parties can appoint an arbitrator failing within the VII Schedule only on satisfaction of the onerous condition that they execute such an agreement in writing. Paternalism and

externalities have been regarded as justifications for sticky defaults (Ayres, 2012, 2086).

2.2.5. Justification for Default Rules

Similar to default rules, altering rules may be justified from the perspective of transaction costs. By incorporating certain words in their agreement, parties would be able to produce a chunk of legal effects and thereby minimising transaction costs (Ayres, 2012, 2054). INCOTERMS are typical examples. By using just a few words such as “Ex Works” along with the place or “FOB”, etc. a substantial number of rules regarding sale of goods can be altered to suit the commercial effects that parties may wish for their agreement (Ayres, 2012, 2054).

From a normative perspective, the DRD requires courts to state how a particular default rule could be altered in specific situations where they hold that the clause intended to displace the default did not produce that effect (Ayres, 2012, 2054).

Another justification for altering rules is to reduce errors, either by parties or by courts. By insisting on the “necessary and sufficient conditions” for altering a default rule, they provide more clarity in contracts and thereby provide more contracting clarity (Ayres, 2012, 2061).

Altering rules can be structured to induce information from a party just like information forcing default rules. Known as altering penalties, these will pave for better information disclosure from a party, which will be useful for other parties to the contract or even the courts (Ayres, 2012, 2096- 2097).

Various strategies have been conceived towards the error reducing function of altering rules. Taking cue from computers and operating systems which require, for instance, confirmation from the user for deletion of a file so as to avoid erroneous deletion, it has been argued that certain altering rules require thought/ confirmation from the parties.

Confirmations tend to make parties take a cautious and informed decision on a particular aspect (Ayres, 2012, 2035- 2069- 2070).

Formally, altering rules have been classified as thought requiring, clarity-requiring, altering rules enhancing manifestation of assent, train and testing altering rules, password altering, and altering rules with element of reversibility (Ayres, 2012).

2.2.6. Designing of Default Rules

There have been several debates on the optimal design of default rules. Numerous theories have been offered as regards design and setting of the same. Some of the main objectives for setting default rules are minimisation of transaction cost of parties, addressing information asymmetry, error reduction, and so on (Ayres, 2012, 2043-2044; Michaelsen and Sunstein, 2023, 1-2). The manner of filling gaps in incomplete contract has been regarded as one of the foremost questions in contract law (Ben-Shahar, 2009, 396; Burton, 2016, 1063).

One of the oft-suggested ends of designing defaults is to promote efficiency by enabling parties generate surplus from a default rule (Burton, 2016, 1064). Law and economics literature has considerably focussed on designing efficient default rules (Burton, 2016, 1064). The idea is that parties would not expend transaction costs if the default rule is efficient (Burton, 2016, 1064). If the rules are not efficient, they would be forced to expend transaction costs and modify the default (Burton, 2016, 1064).

Apart from efficiency, another standard that is sought to be set is that the majoritarian standard- default rules are to be designed which are chosen by majority of the parties (Goetz and Scott, 1983, 971; Ben-Shahar, 2009, 400- 401). A slightly modified majoritarian standard is the one that most well-informed parties, i.e., the hypothetical majority, would have wanted in a particular situation (Schwartz, 1988, 361; Burton, 2016, 1064). Mimicking party intent is another aspect of design of default rules (Craswell, 2000, 3-4; Ben-Shahar, 2009, 396). It is argued, ultimately, that these

standards collapsed into the Coasian standard of efficiency (Coase, 1960, 12-15; Burton, 2016, 1064). It is argued, in effect, that default rules ought to guide courts to supply terms of contract that parties should have adopted to generate surplus (Coase, 1960, 12-15; Burton, 2016, 1064).

Note that it is not only the legislature that creates default rules (Burton, 2016, 1066). Where disputing contracting parties approach the court (or an arbitral tribunal) to resolve the dispute and reach an efficient result, a tailored default standard allows the court to consider the entire contract and supply the default that would generate surplus from a clause or a cluster of clauses (Burton, 2016, 1067). It is argued that a tailored standard enables this function better than a rule with a similar objective (Burton, 2016, 1079). But whether this will apply in all jurisdictions is doubtable, especially in jurisdictions whose contract law is a code such as in India.

Tapping the Informational Effects of Default Rules: This research discussed the information-forcing effects of default rules, also known as penalty default rules. Default rules can be designed to force a party having better information to make disclosures to the party with limited information, thereby eliminating or reducing information asymmetry (Ayres and Gertner, 1989).

Generally, as regards default rules in a broader sense, four questions are posed to evaluate the efficacy of such rules (Michaelsen and Sunstein, 2023, 59):

- What is the total consequence of these rules on social welfare?
- Who would stand to benefit and be injured due to the said rule?
- Are there expected benefits on the parties who stand to be the least benefitted from this rule?
- In balance, would the benefits outweigh the injury caused?

It is possible to use the same framework for analysing default rules in the context of contract law (Michaelsen and Sunstein: 2023, 61).[65]

2.2.7. Importance of Default Rules

The gap filling function is not fulfilled merely by default rules. Parties use standard form agreements to reduce the possibility of obligationally incomplete contracts. Further, such standard forms are used to reduce transaction costs by eliminating the need for negotiating each term of an agreement (Nyarko, 2021, 24). The overdependence on templates for contract drafting implies that default rules play a significant role in regulating the transaction between parties (Nyarko, 2021).

Default rules fulfil not only the gap filling function thereby reducing transaction costs but also play a prominent role in supplying rules that are optimal (Grochowski, 2020). Default rules play an important role in promoting efficiency (Ayres and Gertner, 1989; Craswell, 1989; Ayres and Gertner, 1992; Craswell, 1992). They have also considerable economic impact in agreements (Nyarko, 2021, 72). Proper design of default rules has enormous welfare implications (Nyarko, 2021, 72; Michaelsen and Sunstein, 2023).

The immense utility of default rules (in terms of default nudges) in USA has been documented by Patrik Michaelsen and Cass R. Sunstein in great detail, in the context of better environmental protection through encouragement of the use of green electricity (Michaelsen and Sunstein, 2023, 5-7), promotion of spread of vaccination through providing default appointment for vaccines (Michaelsen and Sunstein, 2023, 7-8), organ donation (Michaelsen and Sunstein, 2023, 8), etc.

Default rules are considered to be a meta-concept and therefore, it is not restricted to a single jurisdiction or a legal system but applies across various jurisdictions (Goldford, 2022, 8).

[65] For details as to how these tests could be applied, see (Michaelsen and Sunstein: 2023, Chapter 4, p. 59- 70),

2.2.8. Critique of Default Rules

The conception of default rules is not free from criticisms (Schwartz, 1993, 416; Scott, 2000a, 848, Schwartz and Scott, 2003; Posner, 2006, Maskin, 2006). From an institutional point of view, one school of thought considers that the purpose of contract law should predominantly be the supply of default rules for the parties, apart from defining promises that are legally enforceable and to lay down conditions for free consent by parties for contracting (Craswell, 1989; Ayres and Gertner, 1992; Barnett, 1992). Another school of thought questions this perspective (Schwartz and Scott, 2016). It argues that Contract law does not perform such a function as envisaged by the default rule project considering that parties inevitably choose to opt out of default rules or standards, which only increase the contracting cost, if left unattended by the parties (Schwartz and Scott, 2016, 1530). On the other hand, proponents of this perspective contend that common law has been an effective vehicle in creation of default rules (Schwartz and Scott, 2016, 1530).

The default rule project has been called a quixotic quest and it has been argued that there are hardly any default rules but only vague standards (Schwartz and Scott, 2003). It has also been argued that Default Rules Doctrine is impractical owing to reasons of institutional incompetence (Schwartz, 1993; Scott, 2000; Scott, 2000a).

2.2.9 Default Rules in Various Contexts

The Default Rules Doctrine and its various facets and outcomes have been applied in various contexts. Take the example of Section 219, the Contract Act regarding agent's remuneration, which states that payment for the performance of an act by the agent does not become due until such act is completed. However, this is subject to "*any special contract*". In other words, where there is agency agreement is silent in addressing this situation, the agent is entitled to payment only on completion of the act for which the agent was appointed owing to Section 219, the Contract Act. Nevertheless, parties can agree that payment would become due otherwise than on completion of such act. To

illustrate, assume that there is an agency agreement between principal, P, and agent, A for collection of 5,000 "C-Forms"[66] by the agent on behalf of the principal. The agency agreement could provide: "*P shall pay A an agency commission at Rs. 1,000/- (Rupees one thousand only) per C-Form within ten days from handing over of a minimum of 1000 C- Forms.*"

In the absence of a contractual clause like the one quoted above, the agency commission under the agreement would fall due only after the agent collects and hands over the entire lot of the 5,000 C-Forms.

The Arbitration Act also contains several rules which parties could contract around. To illustrate, Section 10 of the said Act declares that the parties have the freedom to determine the number of members of the arbitral tribunal for deciding a particular dispute. In case their arbitration agreement or arbitration clause does not explicitly provide for the number of arbitrators, the section provides for one arbitrator as the default option.

2.3.9.1. Default Rules in Corporate Law

Default rules are contractual in nature, in that, it allows parties to agree on something than what is specified in the rule. Consequently, it might be thought that these rules predominantly fall within the ambit of contract law. However, that is not so. Take the case of the Companies Act, 2013, which is thought of as a statute that predominantly provides for mandatory requirements for companies to comply with. Nevertheless, it contains a few default rules. Take Section 152(6)(d), for instance. It states that retirement of directors who became directors on the same day shall be determined by a lot system, unless the directors agree to another mode of determination of retirement. This is a default rule.

2.3.9.2. Default Rules in Family Law

[66] A filled-up form which enables the buyer pay lesser value added tax in case of inter-state sale.

Any relationship, which may not strictly come within the parameters of contract law, but might involve consent and agreement, is regulated not merely by mandatory rules but also default rules. Take the case of prenuptial agreements. These agreements are enforced as valid to the extent they are allowed to contract around the rules[67] (default rules) but are held unenforceable where they attempt to contract around mandatory rules.[68] Ribstein (2011) and Ellickson (2011) have dealt with the operation of default rules in family arrangements, including prenuptial agreements. Ribstein argues that although family arrangements and business entities are broadly in the nature of partnerships, they require different default rules and consequently different standard forms, and that common standard forms could impair both family law and business law (Ribstein, 2011, 277, 285- 286). Ellickson focuses on the design of mandatory rules in family law to put forth the point that those immutable rules could be designed with the objective of paternalism or for protection against externalities (Ellickson, 2011, 302-303).[69]

2.3.9.3. Default Rules in Statutory Interpretation

The Default Rules Doctrine has also been applied in statutory interpretation. The endeavour of the courts to construe a statute has two elements, broadly. The first element is finding the meaning of a rule that the legislature attributed. If this is not possible, the second element kicks in: how should courts decide when they are unable to find out the meaning that the legislature attributed to the rule.

[67] Sandhya Chatterjee v. Salil Chandra Chatterjee, MANU/WB/0057/1980 (holding pre-nuptial agreement to be valid); Muhammad Muin-Ud-Din v. Musammat Jamal Fatima, (1921) ILR 43 All 650; Buffatan Bibi v. Sheikh Abdul Salim, AIR 1950 Cal 304; Razia Begum v. Sahebzadi Anwar Begum, 1959 SCR 1111; Mohd. Khan v. Mst. Shahmali, AIR 1972 JandK 8. See also, Ghosh and Kar (2019), for a survey of enforceability of prenuptial agreements in India.

[68] A.E. Thirumal Naidu v. Rajammal, MANU/TN/0176/1968 (holding an agreement between spouses to live separately as forbidden by Hindu law)

[69] See also, Davis (2009), using the default rules framework to address "marital multiplicity" (Davis, 2009, 1958).

The second element is more controversial because courts would then enter into the realm of policy. Also, there could be policies that could conflict and courts would have to inevitably choose between conflicting policies in those cases. For instance, the policy of enforcing the arbitration clause could conflict with the policy of barring unregistered partnership firms from enforcing rights emanating out of contracts with third parties.[70]

It has been suggested (Elhauge, 2002) that the courts can and do adopt a set of default rules to decide based on legislative policy, when the meaning is not clear (Elhauge, 2002, 2029-2030). The idea is borrowed from the Default Rules Doctrine in its application to contract law: where contracts do not provide explicitly for a particular situation, the default rules in contract law kick in such that they reflect party intent (Elhauge, 2002, 2033). This perspective is taken and applied to statutory interpretation (Ayres and Gertner, 1989, 129- 130; Garett, 1999, 682, 685- 686; Vermeule, 2000, 85; Elhauge, 2002, 2029-2030).[71]

The claim is both descriptive and normative. It is descriptive in the manner in which judges actually decide cases but is also normative since it legitimises judicial decision making and reduces political dissatisfaction Elhauge, 2002, 2035).

2.3.9.4. Default Rules in Regulatory Law

The term "default rules" is used in literature not only to include gap filling provisions, but generally, provisions, which apply in the absence of action by the decision-maker to change (Michaelsen and Sunstein, 2023, 1). Default rules, in a broader sense, are also concerned with the question as to how to design such rules to favour specific outcomes, without actually enforcing a ban or imposing a mandatory rule (Michaelsen and Sunstein, 2023, 3). Examples of such rules include default nudges. Thus, the concept of default rules is, in a broader sense, the genus of which default rules in contract law

[70] Section 69(2), Indian Partnership Act, 1932.
[71] For argument to the contrary see, Sunstein (1999, 645- 650)

constitute a species. Extending this broader notion, altering rules, in a broader sense, are those rules which lay down the conditions for opting out of the default option.

2.3.9.5. Default Rules in Labour Law

Default rules could be contained even in heavily regulated legislations, where it has traditionally been regarded as mandatory law. Labour law is one such example. Here, the law lays down minimum standards necessary for dealing with employees. Therefore, the law allows parties to contract around such provisions for ensuring higher standards of compliance and to that extent they are default rules.[72] However, labour laws do not permit lessening of the standards of compliance by agreement: they are imperative in character.[73]

To that extent, many of the labour legislations prohibit contracting out of various provisions meant to protect labour/ employees. For instance, Section 17, Employee's Compensation Act, 1923 states:

"*Any contract or agreement whether made before or after the commencement of this Act, whereby a employee relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment, shall be null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under this Act*."[74]

Similar provisions are contained in the Payment of Wages Act, 1936[75], the Minimum Wages Act, 1948[76] and the Shop and Establishment laws of various states/ territories

[72] See, for instance, Section 4(5) of the Payment of Gratuity Act, 1972.
[73] Krishna Bahadur v. Purna Theatre and Ors., MANU/SC/0667/2004
[74] https://shorturl.at/aDKQ9 (accessed 18.12.2023).
[75] Section 23.
[76] Section 25.

such as Delhi[77], Goa[78], Andhra Pradesh[79], Telangana[80], etc.[81] The recent legislation, which seek to "consolidate and amend" the labour laws also contain similar provisions. Section 60 of the Code of Wages, 2019, for instance, declares null and void an agreement which seeks to relinquish "right to any amount or the right to bonus" under that Code.[82]

Merely because some labour laws contain specific provisions on contracting out does not mean that other labour legislations which do not contain similar provisions allow contracting out. The mandatory nature of the statute and its provisions is apparent from the consequences provided for non-compliance. For instance, the Factories Act, 1948 does not explicitly allow contracting out. However, the penal consequences associated with non-compliance clearly signal the mandatory nature of the provisions. Section 92 of the Factories Act, 1948 deals with contravention of the provisions of the said statute or the rules made thereunder: contravention is met with imprisonment up to two years or fine up to Rs. One lakh or both.[83] These clearly convey that statute requires compulsory compliances.

2.2.10. Personalisation of Default Rules

Related to the concept of tailoring of default rules is the notion of personalisation of default rules. According to this idea, default rules can be personalised to particular preferences of various classes of parties rather than providing a generalised rule.

It is possible to obtain the preferences of various classes of persons to whom the default rules are applicable using big data (Porat and Strahilevitz, 2014). It is noticed that

[77] Section 24, the Delhi Shop and Establishments Act, 1954.
[78] Section 56, the Goa Shop and Establishments Act, 1973.
[79] Section 88, the Andhra Pradesh Shop and Establishments Act, 1988.
[80] Section 88, the Telangana Shop and Establishments Act, 1988.
[81] Similar provisions are available in other state labour legislations such as the Tamil Nadu Manual Workers (Regulation of Employment and Conditions of Work) Act, 1982 (Section 28); the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 (Section 26), etc..
[82] https://labour.gov.in/sites/default/files/the_code_on_wages_2019_no._29_of_2019.pdf (accessed 18.12.2023).
[83] https://labour.gov.in/sites/default/files/factories_act_1948.pdf (accessed 18.12.2023).

sometimes law is personalised. To give an illustration, prior to the Specific Relief (Amendment) Act, 2018, damages was the default remedy for breach of a contract. In that situation, a party could obtain specific performance relating to movable property if it related to special goods, which was of special value or which could not be easily obtained in the market.[84] This is an illustration of personalisation because the law provided for specific rules in case of special classes of goods (specific performance was available as a default remedy), while the law was different for other classes of goods (damages was the default remedy and specific performance was not available as the default remedy) (Porat and Strahilevitz, 2014, 1426).

The concept of personalisation has been criticised on various grounds. While tailoring default rules might be efficient, hyper-tailored rules which are personalised and based on big-data may be theoretical constructs more in fiction than in fact (Bender, 2020, 372).

Another criticism relates to privacy concerns: personalisation necessarily involves collection, storage and use private data and hence privacy safeguards should be in place (Sunstein, 2016, 183). Also, it is questionable whether data collected and stored would be reflective of the actual (and possibly changed) preferences of individuals (Bender, 2022, 392).

A further argument against personalisation is that individuals may not have any preferences on their own and default rules play a substantial role in individuals having preferences (Bender, 2022, 382-383). Therefore, it would akin to a chicken-and-the-egg problem in finding out preferences which are in turn shaped by default rules.

Another problem with the personalisation of default rules is that a person may not have preferences at all or preferences may be ephemeral or may even change with time.

[84] See, Explanation (ii)(a) to Section 10 of the Specific Relief Act, 1963, as originally enacted (prior to the amendments in 2018).

Therefore, to say that personalisation involves finding out preferences of individuals may not even be possible (Bender, 2022, 383).

The larger argument against personalisation is that designing default rules based on preferences give scant regard for normative values that may underlie design of such rules (Bender, 2022, 387-388). A corollary of the argument is that personalisation does not address a situation in which giving way for preferences of one party may conflict with preferences of another party to the transaction.

Finally, it has also been argued that personalisation is against the democracy: democracy involves transparency in the making and debating of laws while personalisation necessary involves collection, storage and use of private data and making laws in accordance with the private data (Bender, 2022, 396-398). Further, it is also argued that personalisation is against the principle of equality because general applicability of law is the fundamental principle of equality and rule of law and personalisation seeks to challenge the generality of law. (Bender, 2022, 398-399). Therefore, it has been contended that the purpose of law should not be running the State by finding out personalised preferences but to ensure that private parties do not control illegitimate personalisation (Eidenmüller, 2022).

2.3. Mandatory Rules

Mandatory rules constitute one of the crucial and oft-studied set of rules in contract law. Mandatory rules are often highlighted in the legal system owing to their interference in party autonomy. There has been a growing interest in the recent years on the use of mandatory rules as the appropriate means of regulation in situations where default rules and nudges have not worked well (Katz and Zamir, 2023, 781).This portion of Chapter 2 discusses the concept of mandatory rules.

2.3.1. Mandatory Rules- Meaning

Mandatory rules are those rules which cannot be contracted around. They are binding on the parties and restrict freedom of the parties. Examples are galore in contract law of mandatory rules. The oft-cited provision is Section 23, the Contract Act which declares that "*consideration or object of an agreement is lawful, unless— it is forbidden by law; or is of such a nature that if permitted, it would defeat the provisions of any law; or is fraudulent ; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy*".[85]

Other such examples include Sections 25 (agreement without consideration), 26 (agreement in restraint of marriage), 27 (agreement in restraint of trade), 28 (agreement in restraint of legal proceedings and 30 (agreements by way of wager).

Section 151, Contract Act is another illustration of a mandatory rule. It requires the bailee to employ "*care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods*" of the same nature.[86] The Supreme Court has held that this provision could not be contracted out in case of a hotel providing valet parking for guests.[87]

2.3.2. Substantive and Procedural Mandatory Rules

Mandatory rules can be procedural or substantive (Zamir and Ayres, 2020, 285). Procedural mandatory rules generally aim at protecting parties to a bargain. Section 7 of the Arbitration Act requiring arbitration agreements to be in writing[88] is an example of such a requirement. Thus, procedural mandatory rules provide for compliance of

[85] www.mja.gov.in (accessed 06.05.2023).
[86] http://208.79.211.6/doc/1383349/ (accessed 08.05.2023).
[87] Taj Mahal Hotel v. United India Insurance Co. Ltd., MANU/SC/1566/2019, Para 28. The Supreme Court also clarified that the hotel could disclaim liability where damage to goods was occasioned by third party, force majeure, or even contributory negligence.
[88] See, Cox and Kings v. SAP India Pvt. Ltd., 2022 Live Law (SC) 455, https://www.livelaw.in/pdf_upload/455-cox-and-kings-ltd-v-sap-india-6-may-2022-417288.pdf (accessed 09.05.2023).

certain requirements in order to enable contracting parties or prospective contracting parties achieve a desirable outcome (Srinivasan and Yadav, 2022).

Substantive mandatory rules are aimed at protecting third parties, although at times, they may protect a party to the bargain as well. A common example is Section 74, the Contract Act which restricts the right of the promisee to recover reasonable damages and not an amount substantially more than the losses suffered.

Section 20(4), Rights of Persons with Disabilities Act, 2016[89], which prohibits government discrimination on the ground of disability, is also an instance of a mandatory rule. In Sajimon v. Kerala State Road Transport Corporation[90], owing to disability, the petitioner was allowed a change of category but no pay protection was granted. On challenge before the Kerala High Court, the respondent justified the change in category without pay protection on the ground that it was pursuant to a bipartite settlement between the respondent management and the union. The High Court rejected the argument since Section 20(4) was based on public policy and could not be contracted out.[91]

Another example of a substantive mandatory rule is the rule that bars contracting out the duty of the husband to maintain his wife as per Section 125, Code of Criminal Procedure, 1973, which is against public policy.[92] This is a substantive mandatory rule that is intended to protect a party to the transaction.

Some statutes contain mandatory rules predominantly. Therefore, they may contain a general provision conveying such intent. For instance, Section 6 of the Companies Act provides that the Companies Act would apply "*notwithstanding anything to the contrary contained in the memorandum or Articles of a Company , or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its*

[89] Available at www.ccdisabilities.nic.in (accessed 09.05.2023).
[90] MANU/KE/5929/2019
[91] *Ibid*, para 3.
[92] xxx v. yyy, Order dt. 03.02.2023 in RPFC No. 327/2022, Kerala High Court. See also, Vikraman Nair v Aishwarya, 2018 (4) KLJ 528; Rajesh R. Nair v. Meera Babu, 2013 (1) KLT 899.

Board of Directors."[93] Section 6 also states the effect of violation of Section 6: the provision contained in such memorandum, articles, agreement or resolution repugnant to the Companies Act would be void.[94] At the same time, Section 6 also saves certain provisions in the Companies Act which allows parties to deviate from the statute if it is expressly so provided.

The fundamental difference between procedural and substantive mandatory rules is that procedural mandatory rules "*establish prerequisites for achieving certain substantive contractual outcomes*" while the latter "*limit the range of contractual arrangements that can be agreed upon*" (Zamir and Ayres, 2020, 286).

Mandatory rules are intended to preserve the bargain between the parties, prevent market failures, protect third parties from externalities, or on the basis of paternalism and wealth redistribution concerns (Zamir and Ayres, 2020, 301).

Where contracting parties attempt to deviate from a mandatory rule, commonly, the transaction itself could be declared void *ab initio* and unenforceable (Zamir and Ayres, 2020, 317, 313). In Nutan Kumar v. II Additional District Judge, Banda[95], for instance, the parties entered into an agreement for lease and occupation of a building in violation of the provisions of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.[96] The Allahabad High Court held that tenancy created pursuant to the decision was illegal, void *ab initio* and unenforceable.

At times, a part of the agreement, if separable from the remaining part and the remaining part being enforceable, is declared void and the separable part is enforced.[97] In Tapas

[93] Available at https://mahagst.gov.in/en/act-override-other-laws-memorandum-articles-etc%E2%80%94 (accessed 09.05.2023).
[94] Also see, www.jkja.nic.in (accessed 09.05.2023).
[95] Nutan Kumar v. II Additional District Judge, Banda, AIR 1994 All 298
[96] See, https://shorturl.at/tHLS0 (accessed 09.05.2023).
[97] See, for instance, Muhammad Khalilur Rahman Khan v. Mohammad Muzammilullah Khan AIR 1933 All 468

Kanti Mandal v. Cosmo Films Ltd.[98], the question was whether the garden leave clause which restricted the employment of the petitioner (defendant in the trial court) after his exit from the respondent (plaintiff in the trial court) was enforceable. The court considered past decisions regarding such clauses, called garden leave clauses, and held that such a clause was not enforceable.[99] It is pertinent to note that the court did not invalidate the entire agreement, not simply because there was nothing else to enforce on account of the exit of the petitioner from the respondent company, but because the court simply held the relevant clause providing for garden leave to be unenforceable.

In some cases, violation of a mandatory rule may even be met with criminal sanctions. Section 27T, Industrial Disputes Act, 1947 prohibits unfair labour practices. The list of such practices is listed out in the Fifth Schedule to the said statute. Item 10 of the said Schedule provides that entering into an agreement with a worker for employing him as a temporary or casual employee for several years to deprive such employee the privileges of a permanent worker.[100] Section 25U of the said statute provides for criminal sanctions for a person who violates this rule: imprisonment up to six months/ fine up to Rs. 1,000/ both.

In some situations, the plaintiff may be allowed even to rely on the violation of the mandatory rule, such as where illegality is not required to be pleaded or proved, plaintiff recanted before achievement of illegal purpose, and the illegality is not something which shocks the conscience of the court, the defence of illegality pleaded by the defence is not allowed.[101] Likewise, the law may provide for some specific consequence for violation of a particular mandatory rule, such as vesting of land with the government where land held is in excess of the land ceiling law rather than invalidating the transaction.[102] However, the consequences of violation of mandatory rules may vary.[103]

---

[98] Writ Petition No. 2875/2018, Bombay High Court, dt. 16.08.2018, available at https://indiankanoon.org/doc/141232238/ (accessed 21.06.2021).
[99] *Ibid*, para 46.
[100] The text of the statute uses the term "workman". This paper employs the word "worker" as equivalent.
[101] See, for instance, G.T. Girish vs. Y. Subba Raju (D), MANU/SC/0058/2022.
[102] G.T. Girish vs. Y. Subba Raju (D) by L.Rs,: MANU/SC/0058/2022., Paras 64 and 65.
[103] See, NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd., Civil Appeal Nos. 3802-3803/2020 dt. 25.04.2023 (Five Judge Bench), Para 73.

This is a matter of contemporary research, especially as regards the question of optimal substitutes for clauses that are unenforceable (Katz and Zamir, 2023, 781).

Mandatory rules may be aimed at protecting one of the contracting parties or even third parties (Zamir and Ayres, 2020, 287). Usually, procedural mandatory rules target protection of parties internal to the transaction. The adverse effect that may be produced by the contractual arrangement on the parties internal to the transaction is called as an internality (Zamir and Ayres, 2020, 287). An adverse effect produced on a person external to the transaction is called as an externality (Zamir and Ayres, 2020, 287). Substantive mandatory rules may aim at protecting parties to the bargain or third parties.

2.3.3. Objectives of Mandatory Rules

An externality is an effect, usually adverse, produced on parties external to a transaction owing to that transaction. For example, water pollution caused by a factory outlet which was established pursuant to a lease deed between the owner of the land and the lessee who established the factory in the land is a typical example of an externality. Another such example is the mandatory rule in competition law prohibiting cartels.[104] It protects the consumers who are third parties to the transaction from adverse competitive effects of such agreements. Similarly, the rule making specific performance unavailable where such an order would pose a huge burden on the judicial system[105] protects against externalities.

Same is the case with the relevant portion of Section 23 which declares an agreement that "*it would defeat the provisions of any law; or 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*" as unlawful and therefore void. These are externalities that the provision guards against. As early as in 1775, it has been stated:

[104] See, Section 3 of the Competition Act, 2002.
[105] Section 14(b), Specific Relief Act, 1963.

"*The principle of public policy is this; ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.*"[106]

On the other hand, an internality is an effect, again, usually adverse, produced on parties internal to a transaction owing to that transaction. To give an example, take the case of a health insurance policy issued by an insurer and an insured. If the insured defrauds the insurer by hiding prior medical illness and later falls sick, a claim under the insurance policy is an internality. Similarly, the mandatory rule making an agreement with a minor void[107] protects a minor party. Sometimes, mandatory rules are aimed at protecting against both internalities and externalities. The idea of protecting against internality or externality as justification of a mandatory rule is important for this work because the tests so far framed to determine the mandatory nature of a rule is "public policy".[108] But the relevance of public policy to justify protection of a party internal to a transaction would be to stretch the limits of public policy too far.

2.3.4. Designing Mandatory Rules

A generic approach may not be suitable and the designing of mandatory rules would depend on the situation Ben-Shahar and Porat, 2019). Mandatory rules addressing internalities use different methods as opposed to those addressing externalities (Zamir

[106] Holman v. Johnson [(1775) 1 Cowp 341, 343 : 98 ER 1120, 1121. See also, Palaniyappa Chettiar v. Chockalingam Chettiar, (1920) ILR 44 Mad 334; Bhola Nath v. Mul Chand, (1903) ILR 25 All 639; Kedar Nath Motani v. Prahlad Rai, AIR 1960 SC 213.
[107] Section 11, Contract Act.
[108] See, for instance, Lachoo Mal v. Radhey Shyam, MANU/SC/0715/1971; City bank N. A. New Delhi v. Juggilal Kamalapat Jute Mills Co. Ltd., Kanpur MANU/DE/0004/1982; T. Raju Setty v. Bank of Baroda, MANU/KA/0013/1992; Sita Ram Gupta v. Punjab National Bank and Ors., MANU/SC/7385/2008; HB Basavaraj v Canara Bank Corporation MANU/SC/1785/2009.

and Ayres, 2020, 289-290). Internalities are targeted by tools forcing or nudging parties towards better disclosure of information or entering into detailed contractual provisions, usually mandatory procedural rules (Zamir and Ayres, 2020, 289-290). When it comes to externalities, mandatory rules are styled in terms of prohibitions, generally mandatory substantive rules (Zamir and Ayres, 2020, 286).

Substantive mandatory rules have been recommended in order to protect people external to the contract or when substantive procedural rules may not be adequate (Zamir and Ayres, 2020, 290-291). To contextualise the issue, substantive mandatory rule of prohibiting an agreement with a minor is justifiable as procedural rules may not be sufficient to protect the minor. Substantive procedural rules enhance free and informed consent of a contracting party (Zamir and Ayres, 2020, 290-291).

Since mandatory procedural rules cannot enhance free/ informed consent by a minor, mandatory substantive rules come into play. Another aspect in the choice of substantive mandatory rules versus procedural mandatory rules is that the latter may not be effective owing to various reasons such as ineffectiveness in changing contracting practices (Zamir and Ayres, 2020, 297; Marotta-Wurgler, 2011), information overload (Zamir and Ayres, 2020, 298), herd effect, sheer complexity of transactions, etc (Zamir and Ayres, 2020, 298- 299). These aspects are to be carefully considered while designing mandatory rules (Zamir and Ayres, 2020, 302).

Several choices or factors are available in the manner of design of mandatory rules. The choice of the instrument, whether statute, delegated legislation, etc. is one of the factors (Zamir and Ayres, 2020, 307-310). Another dimension is whether the regulator would be the legislature/ executive (statute/ delegated legislation) or the judiciary (common law/ judicial decision-making). The choice between rules and standards, including the manner of their formulation, is also another element to the design of the debate (Zamir and Ayres, 2020, 310). The degree of tailoring of the mandatory rules, which answers the question: who is to be regulated is a material aspect in the design of such rules (Zamir and Ayres, 2020, 313). The strictness of regulation is another significant aspect-

this includes various criteria such as the degree of immutability, bidirectional versus unidirectional immutability (Zamir and Ayres, 2020, 314-316; Katz and Zamir, 2023, 781- 782). Sanctions that the regulator may impose for non-compliance of mandatory rules is a critical point that needs to be considered for optimal design (Zamir and Ayres, 2020, 318).

2.3.5. Justification for Mandatory Rules

Contract law scholars have offered various normative justifications for mandatory rules (Zamir and Ayres, 2020, 293- 302). One theory, which represents the will theory of contract, suggests that contract law is aimed at enforcing the bargain between the parties but mandatory rules can exist in order to preserve the liberty between the parties (Zamir and Ayres, 2020, 291-292).

The economic efficiency theory relies on market failures and competition as justification for mandatory rules, although proponents of this theory prefer mandatory procedural rules over mandatory substantive rules since mandatory substantive rules interfere with party autonomy (Zamir and Ayres, 2020, 294- 299). Whether such preference is justified is a different question (Zamir and Ayres, 2020, 294- 299).

Concerns of paternalism and redistribution also justify mandatory rules (Zamir and Ayres, 2020, 299- 300). Such rules may also provide for re-distribution of wealth. Mandatory rules can empower parties with lesser bargaining power or for specific policy objectives. Examples would include laws protecting against exorbitant interest rates (Zamir and Ayres, 2020, 300). There are also paternalistic justifications for mandatory rules: it has been argued that mandatory rules are required to protect parties against imprudent decisions which may be taken by them due to biases and limited abilities (Zamir and Medina, 2010; Blumenthal, 2012, 728-729; Zamir, 1998, 237-254).

In the second half of the 20th century, the party autonomy doctrine considerably prevailed and it led to scholars questioning the very need for mandatory rules (Zamir and Ayres, 2020, 301-302). It was thought that the market took care of any internality or externality (Zamir and Ayres, 2020, 301-302). However, this notion never came to be accepted completely and it is now well-recognised that states should regulate contracts in order to address internalities and externalities, wherever appropriate, especially in situations where parties are in the opposite ends of the bargaining strength (Zamir and Ayres, 2020, 298). The need for mandatory rules and disclosure duties have become acute with prevalence of standard forms and clickwraps (Zamir, 2022). Empirical studies in USA revealed that parties tend to desire mandatory rules especially in specific sectors such as business to consumer, insurance, construction and real estate sectors, when they protect contractual freedom of parties (Zamir and Katz, 2020, 1082-1084).

2.4. Altering Rules

The term "altering rules" was first coined by Ian Ayres in a paper published in 2006 (Ayres, 2006, 3).[109] This was taken up further by Brett H. McDonnell in a paper published in 2007 where he dealt with altering rules in corporate law (McDonnell, 2007, 384). Existence of altering rules presumes the existence of default rules. If there are default rules, there would be altering rules, whether implied or explicit.

2.4.1. Altering Rules: Meaning

Altering rules state the method by which a default rule could be displaced by the parties. Altering rules prescribe the "necessary and sufficient conditions" for altering a default rule so as to bring forth a legal consequence other than that provided by the default rule (Ayres, 2012, 2035). Some of the examples of altering rules in Indian law are discussed below.

[109] Although Ian Ayres hoped in this 2006 paper that it would be a prelude to a fuller analysis of altering rules (p. 3), it took him six more years to get the detailed analysis of altering rules published in 2012 in the Yale Law Journal (Ayres, 2012).

Section 171, the Contract Act lists out the persons who have a right of general lien over goods bailed to them.[110] Note that this is right is subject to a contract to the contrary between the parties, as provided in the section.[111] For instance, if in the agreement between the banker and her customer that there would be no right of general lien to the banker, such an agreement is enforceable.[112]

The section also clarifies that no other person would have such a right except in the case of an express contract to that effect. There are two default rules here: one is the exhaustive list mentioned in the provision and the other is the clarification that no other person would be entitled to that right. But, parties may, by express agreement, contract around the second default rule and agree that the goods bailed to a bailee (who does not fall within any of the persons specified in Section 171) could be retained by the latter for any general balance of account due from the bailor. This is an altering rule because the form of an agreement, that is, an express agreement, modifying the default rule has been laid down.

Section 202, Contract Act is another example of an altering rule requiring express agreement. The provision states that in a situation if an agent has an interest in the property which is the subject of the agency[113], the principal cannot terminate the agency to the prejudice of the said interest. This is the default rule. However, Section 202 permits this default position to be altered by an express contract. Here, manner of altering the default position is through an express provision. Courts have recognised a termination clause granting the power to the principal to terminate the agency as a method to alter the default position expressly.[114] Hence, Section 202 contains an altering rule.

---

[110] Available at https://archive.org/details/IndianContractAct1872 (accessed 09.05.2023).
[111] State Bank of India v. Jayanthi (23.02.2011 - MADHC) : MANU/TN/2511/2011
[112] Kunhan Mayan v. The Bank of Madras (25.10.1895 - MADHC) : MANU/TN/0132/1895
[113] Available at https://archive.org/details/IndianContractAct1872/page/n1/mode/2up (accessed 09.05.2023)
[114] P. Venkata Ravi Kishore and Ors. vs. JMR Developers Pvt. Ltd. and Ors. (10.06.2022 - TLHC) : MANU/TL/0983/2022, Para 35.

Section 35, Sale of Goods Act is another illustration of an altering rule. It states that the seller is not liable to deliver the goods under a sale of goods contract until the buyer applies for delivery. For a breach to take place, the buyer should apply for delivery and the seller should refuse or fail to comply.[115] This is the default position. However, this default position can be altered by an "express contract", according to Section 35. Note that unlike other default rules in the Sale of Goods Act such as Section 38(1), Section 35 is explicit in the use of the phrase "express contract", conveying thereby that parties could expressly agree that the seller would be bound to deliver the goods without the buyer applying for delivery.[116] An implied agreement would not displace the default position.

This was not always so. The erstwhile Section 93, Indian Contract Act, 1872 used the expression "in the absence of any special promise". Construing Section 93, the Privy Council held that "special promise" indicated the existence of an express stipulated in the contract that relieved the buyer from the obligation of applying for delivery or an implication which arose from an express contract or even a usage or custom of trade.[117] By specifically employing the phrase "any express contract" in Section 35, Sale of Goods Act, the legislature intended to do away with uncertainties regarding implied stipulations, usage or custom of trade, etc. and required an express contract between the parties.[118] Therefore, Section 35 contains an altering rule.

Section 32, Indian Partnership Act, 1932 ("Partnership Act") deals with retirement of a partner. Section 32(1) prescribes the grounds on which a partner would retire from the partnership. It also states that parties could agree on the situations where a partner could retire. Importantly, the provision requires that such agreement should be "express". So, the requirement that such agreement should be express is an altering rule.

---

[115] Anakapallee Co-operative Agricultural and Industrial Society Ltd. v. R. Palaniappan, MANU/TN/0582/1990, Para 8.
[116] Available at https://archive.org/details/dli.ernet.5593 (accessed 09.05.2023).
[117] Nune Sivayya and Ors. vs. Maddu Ranganayakulu and Ors. (12.02.1935 - PRIVY COUNCIL) : MANU/PR/0021/1935, Para 9.
[118] Alapaty Ramamoorthy and Ors. vs. Polisetti Satyanarayana (06.11.1957 - APHC) : MANU/AP/0213/1957, Para 13. See also, Akshay Sapre, Pollock and Mulla: The Sale of Goods Act 221-222 (11th ed. 2021).

Section 12(5), Arbitration Act prohibits a person falling within a category specified in Schedule VII to the Act from acting as arbitrator. Proviso to the section offers a way around. Parties could agree to appoint a person falling within Schedule VII as arbitrator if they agree in writing after the dispute has arisen. Thus, the altering rule allows parties to contract around the rule on satisfaction of conditions mentioned in the proviso.[119]

Another example of altering rule of similar nature is Section 31A(5) of the Arbitration Act. The rule, at the first instance, declares invalid an agreement where one party is asked to bear costs of a future arbitration.[120] It also provides a method to contract around the rule. Parties could circumvent the effect of the provision by entering into an agreement to that affect provided such agreement is made after commencement of the dispute.

Since an altering rule prescribes how a default rule is to be altered, default rules have associated altering rules.[121] To provide an example, Section 3(1) of the Interest Act, 1978[122] provides for award of interest in legal proceedings for debt or damages.[123] This is in the nature of a default rule. Section 3(3)(a)(ii) excludes the applicability of the said section where payment of interest is barred in relation to any debt or damages by virtue of "an express agreement". Contrarily, Section 3(3)(a)(i) excludes the applicability of that section where interest is payable on any debt or damages by virtue of "any agreement".

Every altering rule has three elements in it: the actors, the act and the effect (Klass, 2023, 8). The act by which the default rule is sought to be altered is known as the altering act (Klass, 2023, 8). The signature of an agreement between two parties which contains an explicit clause barring interest for debt or damages is the altering act which

[119] Smaaash Leisure Ltd v. Ambience Commercial Developers Pvt. Ltd., 2023: DHC: 9087.
[120] Also see, www.jkja.nic.in (accessed 09.05.2023).
[121] See, for instance, Ian Ayres and Edward Fox, Strengthening the Passivity Default, 44 Actec law Journal 289, 291 (2019).
[122] Available at https://shorturl.at/BRW06 (accessed 09.05.2023).
[123] *Ibid*.

has the legal effect of altering the default rule providing for interest, in compliance with Section 3(3)(a)(ii).

Every default rule is accompanied by an altering rule, either explicitly or impliedly. If the rule states expressly the act required for contracting around the default, the altering rule is explicit. A common provision of this sort is the requirement of agreement to contract around the default to be in writing. Take Section 43, Para 1, the Contract Act, for instance. The provision allows contracting around the rule that a promisee to a joint promise could proceed against one or more joint promisors for demanding performance of the contract. However, this is subject to an "*express agreement to the contrary*" providing for a different right to the promisee against the promisors. Therefore, Section 43, Para 1 is a default rule. This default rule also explicitly specifies the altering rule: for such an agreement to have the effect of contracting around the default, it should be an express agreement. Now, if we examine the three elements in this altering rule, the following is the outcome:

Table 3 Elements of Altering Rules in S. 43, Contract Act

Elements of Altering Rules	**Elements in S. 43, Para 1, Contract Act**
Actors	Agreement between joint promisors and promisee
Act	Express agreement contrary to the right provided in the provision to the promisee to compel perform one or more joint promisors to perform
Effect	Contracting around of the default position in Section 43, Para 1, as per the express agreement

It is possible that a default rule may not require a special act for contracting around the default, which is common in most cases. Where the default rule is silent, the act would be similar to that for forming a contract in the usual course.

There are many variants of altering rules. Some altering rules require the use of specific words for displacing the default while some do not. Altering rules may also be in terms of standards. For instance, Section 11, Sale of Goods Act contains the default rule that time stipulation are not essential, "unless a different intention appears from the contract".[124] However, how the parties should express such different intention in their contract is left to the parties.

From a broader perspective, the right to approach a civil court to enforce a contractual right is a default option. Parties could contract around that default by opting to arbitrate. But the manner of contracting around that default is through a written arbitration agreement and not an oral one.[125] Therefore, the requirement in Section 7, Arbitration Act that an arbitration agreement is to be in writing is an altering rule which displaces the default rule of approaching the civil court.

Altering rules also perform the functions of minimisation of transaction cost, addressing informational concerns, reduction of error, and achievement of policy objectives (Srinvasan and Yadav, 2022). Of these, the error reducing function is prominent because there needs to be clarity on whether a default rule is altered or not (Srinvasan and Yadav, 2022). Examples of altering rules intended to reduce errors: requirement of agreement to be in written form, the necessity of express agreement and the requirement of consideration (Srinvasan and Yadav, 2022).

2.4.2. Function of Altering Rules

A discussion on the justification for altering rules (or even default rules) is Lon Fuller's article published in 1941 in the Columbia Law Review (Fuller, 1941). Fuller argued that contractual formalities perform, broadly, three functions: evidentiary, cautionary and channelling functions (Fuller, 1941, 800-801).

[124] https://shorturl.at/mEJKT (accessed 09.05.2023).
[125] Section 7 of the Arbitration Act.

Fuller argued that formalities (such as consideration) exist to provide evidence of a contract. This was the evidentiary function performed by that formality (Fuller, 1941, 800). Likewise, altering rules provide clear evidence of parties' intent in contracting around the default rule (Klass, 2023, 14-15).

The cautionary function is about cautioning the parties from acting hastily and is intended to enable parties take a considered step (Fuller, 1941, 800). The channelling function furnishes an "external test of enforceability" (Fuller, 1941, 801). The channelling function allows parties to express their intention in a "legally effective" manner (Fuller, 1941, 801). Also, Fuller identified these functions distinctly, but he stated that when one of these purposes is sought to be achieved, parties also accomplish the other two purposes (Fuller, 1941, 803).

Taking this analogy and applying it to altering rules, Brett McDonnell argued that even altering rules performed these three functions (McDonnell, 2007, 392-393).

Altering rules are formalities that should be complied with for recognition of parties' intent to modify the default rule. An example is the erstwhile Section 10, Indian Railway Act, 1879 which declared an agreement to limit the obligation imposed on a carrier by railway by Sections 151 and 152, Contract Act for loss or damage to property as void unless: (a) the agreement was signed by the party sending the property through railway; and (b) such agreement was in a form approved by the Government.[126] This provision prescribes the requirements of form and signature as means to caution the consignor as regards the reduction in liability attempted by the railway.

From a normative aspect, it is the call of the DRD that in case parties attempt at altering the default was unsuccessful, the court should provide directions on how the altering rule could have been complied with, in order to aid parties in future to successfully alter the default rule (Ayres, 2012, 2054; Srinivasan and Yadav, 2022).

[126] Cited in Mathoora Kanto Shaw v. IGSNL (CALHC) : MANU/WB/0209/1883, Para 12.

Another function of altering rules is to reduce errors, either by parties or by courts. By insisting on the "necessary and sufficient conditions" to alter a default rule, they provide more clarity in contracts (Ayres, 2012, 2061).

Klass argues that altering rules perform the following functions: accurately convey parties' intent to contract around default rules, reduce adjudication, compliance and relational costs, ensure predictability of legal outcomes, and other societal goals (Klass, 2023, 14).

2.4.3. Types of Altering Rules

2.4.3.1 Necessary and Non-Exclusive Altering Rules

Necessary altering rules are those altering rules that prescribe the exclusive means of altering the default (Ayres, 2012, 2037; Srinivasan and Yadav, 2022). A typical example is the proviso to Section 12(5) which prescribes the exclusive means of altering the default rule prohibiting a person falling within VII Schedule from being appointed as arbitrator. If the person who falls within the VII Schedule to the Arbitration Act is to be appointed as an arbitrator, the proviso prescribes two conditions which are necessarily to be followed:

- Parties may by written agreement waive the prohibition contained in Section 12(5);
- Such waiver would be valid only after the dispute has arisen between parties.

On the other hand, Section 131, Contract Act prescribes only a contract to the contrary to alter the default rule that the death of the surety would operate as a revocation of a continuing guarantee, but leaves it to the parties to achieve such a contract through multiple modes, whether in writing or orally, etc. These are sufficient altering rules (Ayres, 2012, 2037).

2.4.3.2 Altering Standards, Court-Created and Statutory Altering Rules

Like default standards, Ayres states that altering rules can also vary in terms of their specificity such that general altering rules could be denoted as altering standards. Altering rules may be prescribed in the statute or delegated legislation or, alternatively, through judge-made law.

2.4.3.3. Exclusivity, Ex Ante, Ex Post Altering Rules, etc.

Just like the classification of default rules, altering rules are also classified on parameters such as exclusivity, rules and standards, tailored and non-tailored, mutable altering rules and immutable altering rules, and rules of interpretation as altering rules (Ayres, 2012; Srinivasan and Yadav, 2022).

Similar to default rules, altering rules may be justified from the perspective of transaction costs. By incorporating certain words in their agreement, parties would be able to produce a chunk of legal effects and thereby minimising transaction costs (Ayres, 2012, 2054). INCOTERMS are typical examples. By using just a few words such as "Ex Works" along with the place or "FOB", etc. a substantial number of rules regarding sale of goods can be altered to suit the commercial effects that parties may wish for their agreement (Ayres, 2012, 2054).

Altering rules can be structured to induce information from a party just like information forcing default rules. Known as altering penalties, these will pave for better information disclosure from a party, which will be useful for other parties to the contract or even the courts (Ayres, 2012, 2070- 2084).

Ayres identifies various types of altering rules such as "thought-requiring altering rules, clarity-requiring altering rules", altering rules "enhancing manifestations of assent, train-and-test altering rules, password altering rules", sticky altering rules, etc. (Ayres,

2012, 2096- 2097) In addition, there are meta-altering rules, which may alter the rules required to alter default rules (McDonnell, 2007, 395).

2.4.3.4. Hermeneutic altering rules and juristic altering rules

Gregory Klass brings forth the distinction between juristic altering rules and hermeneutic altering rules (Klass, 2012). Hermeneutic rules, according to Klass, are those rules that concern the non-legal meaning of the use by the parties of certain words and their actions (Klass, 2012, 4). These rules aim at making legal outcome dependent on facts which are not concerned with parties' legal intent (Klass, 2012, 4). Klass has called this classification as non-juristic and juristic altering rules in a subsequent paper (Klass, 2023, 9-11). The fundamental difference, it appears, between juristic and non-juristic altering rules is that juristic altering rule requires the parties to express their intent to contract around the default while in a non-juristic altering rule, there is no need for looking at the intent of parties for contracting around the default (Klass, 2023, 11-14).

2.4.3.5. Formalistic, Interpretative and Mixed Altering Rules

Gregory Klass in a paper published titled "**Formalism in Contract Exposition**" (Klass, 2023) has come up with another classification of altering rules: formalistic, interpretative and mixed altering rules. Formalistic altering rules are altering rules that merely require use of formalities such as a word or a phrase to contract around the default. For instance, the use of the term "Ex Works" coupled with the place of factory of the seller contracts around or addresses several default rules in the law on sale of goods. On the other hand, when it comes to the altering rule requiring an express agreement to contract around Para 1 of Section 43, Contract Act, the court may have to interpret the agreement to examine if the default rule has been contracted around. Klass regarded the former type of altering rules as formalistic altering rules and the latter as interpretative altering rules (Klass, 2023, 9). Simply put, a non-formalistic altering rule has elements of an interpretative altering rule.

Klass also notes that altering rules could be mixed, in that, it could have both formal as well as interpretative components. To give a hypothetical example, suppose a rule in a special contract statute requires an agreement relating to a particular thing to be in writing and be registered, and may permit contracting around such agreement by following the same conditions: the agreement is to be in writing and is to be registered, registration could be a formal requirement while the question whether there was an agreement, in writing, contracting around the rule, could be an interpretative question. Such an altering rule has been called as a mixed altering rule by Klass (2023, 9)

2.4.4. Strategies towards Error Reducing Function of Altering Rules

Various strategies have been conceived towards the error reducing function of altering rules. Some of the strategies are discussed below:

Thought Requiring Altering Rules: Taking cue from computers and operating systems which require, for instance, confirmation from the user for deletion of a file, it has been argued that certain altering rules require thought/ confirmation from the parties. Confirmations tend to make parties take a cautious and informed decision on a particular aspect (Ayres, 2012, 2069- 2070).

Formally, they have been classified as thought requiring, clarity-requiring, altering rules enhancing manifestation of assent, train and testing altering rules, password altering, and altering rules with element of reversibility (Ayres, 2012).

Thought requiring altering rules are aimed at minimising informational or paternalistic concerns (Ayres, 2012, 2044). These rules, also called error-reducing, reduce the likelihood that:

- parties, especially the non-drafting party, would mistakenly consent to an unwanted term; and

- it is possible for judges not to recognise party intent as regards altering or complying with the default (Ayres, 2012, 2044).

Sticky Altering Rules: There are various policy reasons that may militate in favour of making altering rules sticky. There are several ways to make altering rules sticky. One way to make them so is through a sunset provision, which states that the contracting around the default would apply only for a particular period after which such contracting around may have to be re-agreed or re-approve (McDonnell, 2007, 410).

2.4.5 Altering Penalties

Ayres (2012) brought out a comprehensive theoretical framework for penalties. Imposition of penalties by law for attempting to contract around mandatory or immutable rules are immutable penalties (Ayres, 2012, 2097). Likewise, law might penalize for not contracting out defaults, known as default penalties (Ayres, 2012, 2097). As is the case with default penalties, altering penalties may be applied to attempts to alter the default rule which are not preferable in nature (Ayres, 2012, 2096-2097). Lawmakers may prefer to use altering penalties to deter parties from altering a default in a particular manner (Ayres, 2012, 2097). Ayres argues that some form of contracting around may be more preferable than other forms and would be more effective in ensuring communication of valuable information to the other party or even to third parties (Ayres, 2012, 2098- 2099).

Section 12(5) of the Arbitration Act discussed earlier can be cited as an example of an altering penalty. In the process of parties agreeing to alter the default rule prohibiting an arbitrator falling within a relationship specified in the VII Schedule to the said legislation, the party with whom the prospective arbitrator has a relationship noted above is forced to disclose the said information based on which parties would agree to appoint that arbitrator after the dispute has arisen. Therefore, Section 12(5) is an altering penalty.

2.4.6. Altering Rules and Contract Interpretation

As regards rules of interpretation, it has been argued that rules of interpretation produce certain legal effects given parties' actions. In the light of this idea, altering rules are part of the law of contract interpretation (Ayres, 2012, 2046- 2047). The larger law of interpretation governs situations where parties displace an empty no-right/ no-duty using some language conveying agreement to some right/ duty (Ayres, 2012, 2046-2047).

Mathematically, e = f(a, c),

where "e" refers to particular legal effects while "a" refers to parties' contractual actions and "c" consists of surrounding circumstances (Ayres, 2012, 2046).

On the other hand, altering rules do not displace an empty no-right/ no-duty scenario but a default rule conferring some right/ imposing some duty.

Gregory Klass highlighted the interrelationship between altering rules, contract interpretation/ construction dichotomy (Klass, 2012, 3). He noted the oft-made distinction between interpretation and construction. Regarding contracts, Klass was of the view that interpretation of a contract referred to ascertainment of the content of a text sought to be communicated but construction referred to determination of the legal effect of the agreement between the parties (Klass, 2012, 3).[127] Altering rules, according to Klass, are rules of construction in that they determine the legal effect of parties' actions/ statements (in the contract) (Klass, 2012, 4).

[127] See also, https://lsolum.typepad.com/legal_theory_lexicon/2017/05/legal-theory-lexicon-079-communicative-content-and-legal-content.html (accessed 04.02.2024).

2.5. Blurred lines in the Default Rules Doctrine

Although this research discusses default, mandatory and altering rules as distinct concepts, there is considerable overlap between them (Riley, 2000; Coyle, 2016, 595ff; Zamir and Ayres, 2020, 320ff; Zamir, 2022, 1). The conceptual distinction between default, mandatory and altering rules seems to suggest that these types of rules are conceptually separate. But that is only a partial description: at a minute level, these, like quantum mechanics, lose their conceptual separateness and lead to blurred lines (Srinivasan and Yadav, 2022, 205).

For instance, Section 55 is styled in terms of default rules where parties could agree that time of performance was crucial. In practice, however, courts rarely hold so, in case of termination by the promisee owing to failure by the promisor in performing the contract within the time specified (Srinivasan, 2021).

The underlying idea behind the concepts of default and altering rules is that the rule would apply mandatorily unless they address the issue covered by the clause in their agreement in order to modify the rule (Srinivasan and Yadav, 2022, 205). Zamir and Ayres argue that default and altering rules have an element of procedural mandatory rules because they must comply with the procedural requirement to displace the default (Zamir and Ayres, 2020, 290). Zamir also argues that altering rules tend to blur the distinction between default and mandatory rules.[128]

In addition, the concept of sticky default rules has been considered in literature as "quasi-mandatory" (Srinivasan and Yadav, 2022, 205) in the sense that they do not easily permit the default to be opted out by impeding them (McDonnell, 2007, 384; Ayres, 2012, 2073; Zamir and Ayres, 2020, 291; Zamir, 2022, 2-3). Brett H. McDonnell goes to the extent of calling mandatory rules as "*defaults with extremely sticky altering rules*." (McDonnell, 2007, 384) Also, a vague formulation of a mandatory rule has been regarded as allowing for deviating from them (Zamir, 2022, 3).

[128] Email dt. 18.01.2022 from Eyal Zamir to the author (on file with the author)

Another instance of blurring between the three-fold classification of rules is Section 17 of the Employees Compensation Act, 1923, which made null and void any agreement that relinquished the right of an employee to claim compensation under the said statute for personal injury in course of employment to the extent it reduced or removed the liability of the employer to compensate. This is a mandatory rule as regards a situation where the agreement reduces or eliminates the liability but a clause enhancing the compensation payable is very well valid.

Thus, the triumvirate are not water-tight compartments making Zamir even argue that all contract law rules are either default or mandatory or placed somewhere in between (Zamir, 2022, 1).

Even so, the triumvirate ought to be considered as starting points for analysing contract law rules through the lens of the Default Rules Doctrine.

2.6. Types of Rules other than the Triumvirate

It is also possible to contemplate a distinct set of rules in contract law which could be declaratory in nature in that they declare something and may not strictly fall within the default -mandatory-altering-rules compartments.

To elaborate, let us take the case of a provision in a contract law statute that states the short title of the statute. The provision does not strictly affect the contractual relation between the parties but is nevertheless found in the statute. The parties may refer to the short title of the statute in their agreement and thereafter refer to the statute differently (such as “Contract Act” or “Arbitration Act”). But that does not make it a default rule, because in order to refer to the statute, the parties cannot use any other name or designation except the short title. It is true that parties could use the long title or the number designated by the Parliament for the statute (such as Act X of 2020) but in case the parties want to refer to that statute by reference to the short title, they have to do it

through the short title as provided in the said statute. To that extent, it is "mandatory" in nature. But parties are free to designate the said statute differently in remaining places in the agreement.

Same goes with various definitions contained in contract law. Take the definition of contingent contracts in Section 31, Contract Act. Hypothetically, assume that party A agrees with party B that the contract that B would pay A for the work done is a contingent contract. In that case, it could be argued that parties are under a mutual mistake as to the legal nature of their agreement, that is, a mistake as to whether the agreement is legally a contingent one or a non-contingent one. This is a mistake of law or of legal effect and the agreement in such case is enforceable on its terms and is not unenforceable or void.[129] At the same time, it renders unenforceable the clause defining the agreement as a contingent contract.

In other words, courts do not grant any legal force to such a clause. In that sense, the rule in Section 31 applies compulsorily: parties by agreement cannot define anything other than what is defined as a contingent contract. But such provisions do not have the effect of a mandatory rule which proscribes certain acts or requires certain acts to be done. Section 31 neither proscribes nor requires conduct. It simply states the meaning of a concept legally: it declares.

Per contra, Ayres argues that default, mandatory and altering rules exhaust all categories in contract law.[130] Further Ayres states that the Savings Clause in the Contract Act might not be a contract rule but a rule informing the manner of finding "authoritative contract law rules".[131] But Ayres' explanation does not apply to the definitions clause.

While reserving the questions as to whether default, altering and mandatory rules exhaust all rules of contract law and as to whether declaratory rules exist to future work,

[129] See, for instance, Bashir Ahmed v. Government of Andhra Pradesh, AIR 1970 SC 1089;
[130] Email dt. 19.01.2022 from Prof. Ian Ayres to the author (on file with the author).
[131] *Ibid*.

this posits, *albeit* tentatively, that there could be rules other than the trio in terms of declaratory rules.

2.7. Relationship between Default Rules Doctrine and Statutory Interpretation

There is also a perspective in the Default Rules Doctrine that default rules are akin to rules of construction (Klass, 2012). Zamir argues to the extent of stating that construction includes filling gaps in contracts in accordance with statutory and judge made laws and courts/tribunals (Zamir, 2022, 1-2). Since there is an inherent difficulty in ascertaining people's intentions, courts rely on background circumstances and it is not easy to separate the act of interpretation from gap-filling (Zamir, 2022, 1-2).

2.8. Default Rules Doctrine and Legal Education

This portion of the present work deals with the potential of Default Rules Doctrine in augmenting legal education in India and connecting law as taught in law school and law in practice.

2.8.1 Gaps between Taught Law and Law-in-Practice

Teaching Contract Law noted that one of the foremost challenges in legal education world over is addressing the problem of discordance between law as is taught versus law in practice (Srinivasan and Yadav, 2022, 203; Gupta and Moti, 2024, 14). Both facets of legal education, that is law-in-theory and law-in-motion are important for descriptive understanding of legal phenomena, critically evaluating it and for finding solutions to legal problems (Srinivasan and Yadav, 2022, 206).

This research employs the term "legal education" as a catch-all phrase. However, not all law colleges in India are uniform in terms of infrastructure, faculty quality, library facilities, etc. In this respect, law colleges in India can be classified into premium law

schools, consisting of national law schools, and premium private law schools on the one hand, and other law colleges, on the other, which can be classified as traditional law colleges. Traditional law colleges, which are usually based in tier 2 and tier 3 cities[132], semi-urban and areas that have been predominantly regarded as rural, devote attention to court litigation and drafting agreements in traditional areas such as property law, family law, etc (Srinivasan and Yadav, 2022, 206). Conversely, premier law schools give emphasis to areas such as corporate law, information technology law, artificial intelligence law, intellectual property law, commercial law and in transactions related to such fields (Srinivasan and Yadav, 2022, 206).

There is a stark difference in terms of quality of legal education in these two broad categories. The premium law schools are regarded as islands of excellence (Jain *et al*, 2016; Dhanda, 2010, 132; Kanekal, 2012, Singh, 2010), while traditional law colleges suffer from several issues, such as dearth of quality faculty members, archaic syllabus, etc (Srinivasan and Yadav, 2022, 207; Kumar, 2023). Students in such colleges are not equipped to handle those cases/ transactions involving the non-traditional areas. The sheer number of law graduates passing out in those areas every year[133] imply a severe competition for lawyers (Kumar, 2023).

More acute is the problem of wide gap between law as is taught law schools and the law as is practised. Although this gap exists in both premier law schools and traditional law colleges, it seems to be more pronounced in the latter (Kumar, 2023). This problem is not restricted to India but is a common problem worldwide and the severity of the problem may vary (Cohen, 2004; Fleischer, 2002).

Further, in terms of curriculum development, it is rare for law schools to get inputs from law practitioners, the common exception being advocates (Srinivasan and Yadav, 2022, 206-207). The purpose of taking inputs is not only to enable students with field skills (Srinivasan and Yadav, 2022, 206-207), but also to enable them understand and

[132] Department of Expenditure, OM ,No. 2/5/2014-E(II)B dt. 21.07.2015, https://shorturl.at/tRTY8 (accessed 15.02.2023).
[133] It is estimated that about 1 lakhs law graduates pass out every year (Kumar, 2023).

critically look at ideas more comprehensively (Srinivasan and Yadav, 2022, 206-207). The goal of legal education, especially at the undergraduate level, is not only to enable students understand legal concepts or think critically but also to equip them for law practice (Srinivasan and Yadav, 2022, 206-207) (Toussaint, 2023, 9; Hamilton and Bilionis, 2022, 1-2). Scholars have complained in the past about the failure of law schools to prepare law students for law practice (Cohen, 2004; Johnson, 1991). The need for bridging this gap has been noted aptly by Cohen (2004, 634):

"*My experience has persuaded me that one way to counter this disdain and cynicism is to encourage or even require law professors to connect with the world of practice and to see for*
themselves how lawyers conduct themselves in that world. For me, observing lawyers engaged in practice was enlightening, uplifting, and humbling."

In addition, the public purpose of legal education is to undertake a critique of law from a justice- oriented perspective and to prepare law students to aid marginalised communities through the practice of law (Toussaint, 2023, 11). The argument is not just to read theory as such but to read and understand it in the context of history and context (Kirkby, 2022, 381).

2.8.2 Gaps between Taught Law and Law-in-Practice in Contract Law Context

In India, General Contract Law (from Sections 1-75, the Contract Act) is taught in the first or the second year of the five-year law course. Even though some Indian universities offer specialised courses on drafting contracts in the latter part of the undergraduate law course, contract law is usually taught from a theoretical angle. Typically, the teachers take up contract doctrine- statutes and precedents- and rarely deal with the manner in which contracts operate in real life situations (Srinivasan and Yadav, 2022, 206-207). The syllabus to be covered is substantial (Srinivasan and Yadav, 2022, 206-207).

Although a practical approach while teaching contract law is given as an objective of teaching law, judgments and law review papers generally form the subject matter of the study material. Reading judgments and law review papers are generally not of assistance in achieving the objective of providing a practical perspective in law (Bennett, 2010, 91-92). Hence the oft-repeated complaint that law students complete several courses on contract law (including general and special contracts) without even going through a term sheet or an agreement (Srinivasan and Yadav, 2022, 206-207).

In addition, unless law teachers are trained in law practice, it would be difficult to teach law with a practical approach (Cohen, 2004). One of the suggestions is to allow them practice law (Srinivasan and Yadav, 2022, 207-208). But if they practice law, whether there be sufficient time for class preparation and teaching law is questionable. Lack of practical training for law teachers is a larger issue (Cohen, 2004). Nevertheless, it is possible to weave in practical elements into the contract law curricula.

Law teachers focus chiefly on enabling the students learn various doctrines of contract law and not how the law is applied in practice, especially transactional practice (Fleischer, 2002, 478). To illustrate, while teaching Section 55, the Contract Act, law schools discuss case laws regarding the way courts have construed the provision but they do not teach the way time-as-essence clauses work in practice and the drafting a time as essence clause that could be validly enforced (Srinivasan and Yadav, 2022, 208). Similar problems have been found in other areas of law such as labour law (Arnow-Richman, 2009, 367).

The starting point in teaching contract law in classroom is case law while in practical terms it is the contract (Burnham, 2000, 1535). Law students might study several courses on contract law even without studying a single contract (Burnham, 2000, 1535). Even case laws provided in the required readings for students would describe the disputed clauses and the strategies used by the parties in specific situations (Srinivasan and Yadav, 2022), and law review articles might provide helpful guidance on the

subject and be educational when taught in a classroom (Srinivasan and Yadav, 2022, 208).

Most students, and at times, even law professors, ignore "facts" in favour of concentrating on the law that the decision established because the transaction and how the dispute came about as discussed in a decision is reduced merely to "facts" and ignored (Srinivasan and Yadav, 2022, 208). Shifting the focus from post-dispute to pre-dispute as well as post-dispute facts brings about a broader understanding to law students (Arnow-Richman, 2009, 369).

But whether a lawyer focuses on transactional law or dispute resolution, they all depend on these "facts" on a daily basis (Srinivasan and Yadav, 2022, 208). Furthermore, merely reading the broad strokes of judicial decisions does not help the students in law practice or even in understanding the law. Frequently, these broad conclusions could just be *obiter dicta*, or the court might have reached a different conclusion based on a case's specific facts despite the broad conclusions.

Unfortunately, this issue has been carried over into legal practice and transactional lawyers repeatedly employ templates even without taking into account newly introduced default and altering rules, new interpretations to such rules, or amendments to existing rules (Srinivasan and Yadav, 2022, 208). The gap between the requirements of transactional practice, typically in a law firm, and what is taught to the law students, is one of the causes for high level of stress for fresh associates who begin their transactional practice in a law firm (Fleischer, 2002, 486). Some of this gap is addressed through excellent law teachers and internships, especially in premium law schools, but whether such gap is systematically addressed or whether this problem is attempted to be resolved for law graduates passing out from non-premium law schools, who constitute majority of the lawyers passing out annually in India, is debatable.

The lack of a comprehensive plan to address the said gap, combined with the absence of a conceptual framework for teaching transactions, the lack of law teachers who have

the experience to teach transactions or integrate their doctrinal teaching with transactions and lack of quality teaching materials have only furthered the problem (Fleischer, 2002, 479).

Often premium law schools try bridging this gap by bringing in practitioners for taking up credit/ seminar/ elective courses.[134] However, this entails law students to connect what they learnt in the doctrinal and the transaction classes, for which they may not have the time or the skills to do so. Consequently, both these courses could operate as islands without connect. Also, considering the constraints of time for law students, not all students may take up credit courses. Therefore, these problems are not addressed in a systematic and comprehensive fashion.

2.8.3 Bridging the Gap between Theory and Practice: Role of DRD

The trio of mandatory, default, and altering rules is a key component that connects law theory and practice in the context of contracts, or even law in general (Srinivasan and Yadav, 2022, 208). This gap needs to be filled, but not just for its own sake; it also needs to be filled so that law students can develop the necessary skills for handling a dispute or an issue relating to contracts, whether in drafting one or in litigation, or even for critically evaluating the law as it stands (Srinivasan and Yadav, 2022, 208).

Determining the manner in which, if at all, the law permits contracting parties to alter their affairs in deviation of a specific rule is a crucial component of transactional law (Srinivasan and Yadav, 2022, 208). Default Rules Doctrine gives a multifaceted viewpoint regarding contract law rules (Srinivasan and Yadav, 2022, 208).

The Default Rules Doctrine, at its most basic level, throws light on whether, and if so, how, a rule could be modified- it answers whether a rule can be altered by parties. An essential component of transactional legal practice is determining whether a specific

[134] See, for instance, NLU Delhi, https://nludelhi.ac.in/acd-osc.aspx (accessed 23.01.2023); NLSIU, Bengaluru, https://www.nls.ac.in/news-events/invitation-to-teach-elective-courses-at-nlsiu-march-2023/ (accessed 23.01.2023);

rule can be contracted around (Ayres and Gertner, 1989, 130; Burnham, 2016, § 16.4.2, arguing that ascertaining default rules is a technique to draft an appropriate contractual clause). It would be dangerous if lawyers draft agreements which result in those agreements recognising an illegal act or which the law deems unenforceable (Srinivasan and Yadav, 2022, 208). Ayres and Gertner argue in this regard:

"*To represent their clients effectively, attorneys need to know not only what the legal rules are, but how, if at all, they can be abrogated to further their clients' interests? A descriptive knowledge of defaults and how to contract around them is a prerequisite of effective advocacy*." (Ayres and Gertner, 1989, 130)

Unfortunately, drafting agreements is one of the skills that law schools then had least prepared law students for (Cohen, 2004, 672). According to an empirical study conducted in USA by Cohen in relation to intellectual property law, 63.54% of the respondents chose ethical issues as the skill that law school prepared law students the least (Cohen, 2004, 672). The next skill that law schools did not prepare law students for was drafting agreements: 50% of the respondents felt that law schools did not equip them with the skill of drafting agreements (Cohen, 2004, 672). Importantly, the study found out that 76% of the respondents were of the view that contracts was the most important general course relevant for law practice (Cohen, 2004, 673).

Thus, the deficiency in equipping law students in the skill of drafting agreements could be substantially mitigated using the Default Rules Doctrine. Using Section 55, Contract Act as an example, it is possible to see the significance and utility of the Default Rules Doctrine (Srinivasan and Yadav, 2022, 209). This provision is found in Chapter IV, "Of the Performance of Contracts," and its subchapter, "Performance of Reciprocal Promises." It has three paragraphs that address various circumstances: the first paragraph discusses the consequences of a contractor's failure to comply the stipulated deadline when the contract's time of performance is crucial (Srinivasan and Yadav, 2022, 209).

The impact of a contractor failing to complete a contract by a specified time when that time is not a necessary aspect of the agreement is discussed in the second paragraph. The third paragraph gives the promisee the option to permit the other party to perform the work at a time other than the time specified in the first paragraph, but without payment. Where the promisee accepts the promise to be performed at the new time but notifies the contractor of his intent to seek compensation for the loss caused due to the delay, the third-paragraph rule against compensation is disregarded. In certain categories of contracts, there is a legal presumption that time is not crucial. For instance, time is not essential in contracts involving construction and real estate (Srinivasan and Yadav, 2022, 209-210).

The use of the theory in better appreciating Section 55 has been the subject of analysis in Srinivasan and Yadav (2022), where was argued that the Default Rules Doctrine enables not only critiquing the prevailing legal position regarding Section 55, in particular, and contract law, in general, but also greatly assists transactional attorneys in drafting the appropriate contract language to contract around the default rule (Srinivasan and Yadav, 2022, 209-210):

Drafting clauses fixing time as essence as non-obstante clauses could be one way to address the issue with time as essence clauses (Srinivasan and Yadav, 2022, 210). This would make it clear that the parties intended the clause to take precedence over any other clauses that might be in conflict, such as those allowing for the extension of time or liquidated damages (Srinivasan and Yadav, 2022, 210).

Another useful provision, which is also the subject of many disputes, is Section 64A, Sale of Goods Act. If the impact of a rise or fall in indirect taxes is not mentioned in a contract for the sale of goods, Section 64A casts the burden of rise of indirect tax (excise or sales tax) on the buyer and the buyer will benefit from the reduction in these taxes. This is the default setting. Section 64A will take precedence if the parties have not provided for a specific term on the same. But, if the agreement states that the seller would be responsible for paying the increased indirect taxes, that agreement would be

enforceable, since Section 64A is not a mandatory rule, but one that is by default: it starts with the words "*[u]nless a different intention appears from the terms of the contract*" (Srinivasan and Yadav, 2022, 208).

This provision is useful from a transactional perspective because contracting parties to a transaction relating sale of goods are not required to discuss expressly the prospect of a future increase or decrease in indirect taxes (Srinivasan and Yadav, 2022, 209). Although this provision applies to sale of goods, The courts have applied Section 64A as if it was a general rule that in case of unanticipated increase or decrease in indirect taxes, the buyer has to bear the burden or take the benefit of such increase or decrease, respectively (Srinivasan and Yadav, 2022, 209).

Another illustration is Section 128, Contract Act which deals with a variation of a contract between the principal debtor and the creditor, and the consequent effects on the liability of the surety (Srinivasan and Yadav, 2022, 210). As per Section 128, "*The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract*." (Srinivasan and Yadav, 2022, 210). The words "*unless it is otherwise provided by the contract*" in the provision make it clear that this is a default rule and that parties may negotiate a different rule. When the term "co-extensive" is used, it implies that the surety's liability is on par with that of the principal debtor (Srinivasan and Yadav, 2022, 210).

Section 133, the Contract Act is a connected provision, which states: in a guarantee, if there is a variance in the contract between the principal debtor and the creditor and that such variance is undertaken without the consent of the surety, such variance entails discharge the surety as regards transactions subsequent to the said variance. Contrast this provision with Section 128 which explicitly conveys that the provision is a default rule: it uses the phrase "unless it is otherwise provided by the contract" (Srinivasan and Yadav, 2022, 210). Nevertheless, courts have construed Section 133 as a default rule (Srinivasan and Yadav, 2022, 210).

Treating Section 133 as a default rule is correct approach since there is no policy reason why parties should be prevented from contracting around this provision. If the surety wishes, it could grant consent to the variation in the contract of guarantee itself: this is not prohibited by the Contract Act. Take, for instance, an oft-used term in bank guarantees in India:

"*4.0 The PURCHASER shall have the fullest liberty without affecting in any way the liability of the Bank under this guarantee, from time to time, to extend the time of performance by the CONTRACTOR. The Bank shall not be released from its liabilities under these presents by any exercise of the PURCHASER of the liberty with reference to the matter aforesaid*."[135]

This term of the bank guarantee has the effect of contracting around Section 133, the Contract Act. It states that the creditor would have the full liberty to extend the time provided in the contract for performance. The clause also clarifies that the bank would not be released from its obligation as a surety if the purchaser/ creditor exercises its liberty to allow for performance at a time different to what is agreed between the parties. Another term in the said guarantee reiterates this position:

"*5.0 The PURCHASER shall have the fullest liberty, without affecting this guarantee to postpone from time to time the exercise of any powers vested in them or of any right which they might have against the CONTRACTOR and to exercise the same at any time in any manner, and either to enforce or to forbear to enforce any covenants, contained or implied in the CONTRACT between the PURCHASER and the CONTRACTOR or any other course or remedy or security available to the PURCHASER and the BANK shall not be released of its obligations/ liabilities under these presents by any exercise by the PURCHASER of his liberty with reference to the matters aforesaid or any of them or by reasons of any other act or forbearance or other acts of omission or*

[135] Neyveli Lignite Corporation, Format of Contract Performance Guarantee, https://www.nlcindia.in/new_website/tenders/files/cocpg.pdf (accessed 27.01.2023). See also, Hindustan Copper, Bank Guarantee Format for Performance Guarantee, <https://www.hindustancopper.com/Content/PDF/BG_Format_PBG.pdf> (accessed 23.12.2020).

commission on part of the PURCHASER or any other indulgence shown by the PURCHASER or by any other matter or thing whatsoever which under law would, but for this provision, have the effect of relieving the Bank Guarantee. The Bank further undertakes not to revoke this guarantee during its currency without the previous consent of the PURCHASER." [136] (Srinivasan and Yadav, 2022, 210)

This clause also purports to modify the default position that variance in the terms of contract or indulgence granted in performance to the contractor would release the surety, in this case, the bank (Srinivasan and Yadav, 2022, 211). Some courts have construed that indulgence granted to a contractor by delaying action to be taken in case of default by the contractor/ principal debtor does not amount to variance (Srinivasan and Yadav, 2022, 210).

However, Section 135, the Contract Act deals with a situation where indulgence of time given is in the nature of a variance of contractual term (Srinivasan and Yadav, 2022, 211). It states that where the creditor grants some indulgence to the principal debtor in an agreement between the creditor and the principal debtor, such indulgence discharges the surety. This is unless the surety grants assent to such indulgence, which Section 135 considers to be in the nature of a contract.

On whether parties can contract around Section 133, the Karnataka High Court's judgment made it clear that a surety could give up its rights:

"*When it is open to the surety to give up his right, it is not possible to appreciate as to why it is not permissible for him to give up his rights under Sections 133, 134, 135, 139 and 141 while entering into an agreement of surety. There is no such obstacle or prohibition whatsoever in the Contract Act, or under any other, law or any principles having the force of law*."[137] (Srinivasan and Yadav, 2022, 211)

[136] Neyveli Lignite Corporation, Format of Contract Performance Guarantee, https://www.nlcindia.in/new_website/tenders/files/cocpg.pdf (accessed 27.01.2023).
[137] Corporation Bank v Mohandas Baliga MANU/KA/0296/1992 : ILR 1993 Kar 201.

Although couched in terms of waiver, this is nothing but an agreement to contract around Section 133. As argued in Chapter 3, India does not have a discourse on default rules. Even so, it is apparent that courts recognise that Section 133 could be contracted around by the parties, wherein the surety agrees that he would not be discharged if there is a variance in the contract between the principal debtor and the creditor (Srinivasan and Yadav, 2022, 210).

There is a difference in point of view of certain High Courts regarding Section 133. For instance, the Punjab and Haryana High Court has held that since Section 133 does not contain explicit provisions allowing parties to agree contrary to the provision, Section 133 could not be contracted out.[138]

However, the Delhi[139], Madras[140], Karnataka[141], and the Bombay[142] High Courts have held that Section 133 could be contracted around.[143]

Ultimately, the Supreme Court settled the question in HB Basavaraj v Canara Bank[144], where it opined that a bank as the surety was entitled to give up its rights in Chapter VIII, the Contract Act (Vardhan, 2018, 1400) that is Sections 124 to 147, Contract Act, which deal with the law on indemnities and guarantees. In doing so, the court approved of Karnataka High Court's stance in T. Raju Shetty v. Bank of Baroda[145], holding that the surety could waive all its rights in Chapter VIII, the Contract Act.[146]

[138] See, for instance, UOI v. Pearl Hosiery Mills, MANU/PH/0085/1961, Para 25.
[139] See, for instance, Lloyds Steel Industries Ltd. v. Indian Oil Corporation Ltd., MANU/DE/0417/1999, Para 15; Citibank N.A. v. Juggilal Kamlapat Jute Mills Co. Ltd., MANU/DE/0004/1982
[140] See, for instance, A.R. Krishnaswami Aiyar v. The Travancore National Bank, Ltd., MANU/TN/0259/1939, Para 3.
[141] T. Raju Shetty v. Bank of Baroda, MANU/KA/0013/1992
[142] Central Bank of India v. Multi Block Private Ltd. and Ors. MANU/MH/0015/1997, Para 27.
[143] See also, Industrial Development Bank of Pakistan v. Hyderabad Beverage Company Private Limited, LEX/SCPK/0258/2014, Para 10 (a decision of the Supreme Court of Pakistan holding that the bank had allowed such variation in the guarantee).
[144] H.B. Basavaraj v. Canara Bank,: MANU/SC/1785/2009.
[145] MANU/KA/0013/1992
[146] *Ibid*, Para 6.

Cohen (2004, 637) argues that using of materials based on real problems of clients enhanced the level of teaching and the understanding of law students. By bringing to the attention of the students various such clauses in the bank guarantee and explaining the reasons for such clauses, the law teacher can address the difficulties of teaching practised-law. The teacher could also cite similar clauses in other guarantee instruments such as corporate guarantees, bonds, loan guarantees and so on. This will enable better understanding of various aspects of the law involved.

Incorporating transactions and real problems into doctrinal law teaching allows the law students to legal aspects prior to disputes which shift the focus from litigation exclusively to transaction as well as litigation, without making substantive changes to the curriculum (Bradlow and Finkelstein, 2007, 68- 69; Arnow-Richman, 2009, 369).

In the aforesaid analysis, contracting practices were linked to the provision and case laws. By using standard form agreements and sample agreements, link could be made between law practice and the rule. Various terms of the bank guarantee made much more sense when the connect could be made with the Contract Act. Thus, the default rules theoretical approach to contractual provisions enables teachers teach contract law practically, thereby providing an all-round education to law students. The Default Rules Doctrine approach provides a springboard for the student to learn to draft a guarantee, which would be a skill of immense relevance in law practice.

The theory has been in vogue in academia for more than three decades. Notwithstanding this, new papers on the topic keep getting published (Nyarko, 2021; Zamir, 2022, Coyle, 2022, Goldford, 2022). Lemley's recent paper arguing that standard form contracts should not be allowed to vary default rules in contract law is a typical example of new aspects emanating in relation to the Default Rules Doctrine (Lemley, 2022). Lemley's argument is that most of the standard form contracts are agreed between the parties without negotiation or bargain, allowing such contracts to contract around default rules would imply that there is no actual choice made by the parties to contract around the default (Lemley, 2022). These papers have immense significance while

teaching contract law. Despite the vintage of the theory, researchers all over the world continue to write substantially on it.

2.8.4. Simulation Based Teaching and Learning

Recently, simulations have become an important and effective method of learning and development (Dreifuerst, 2009; Wood *et al*, 2009; Akselbo and Aune, 2023). Simulations typically involve scenarios mimicking real-time situations, which trainees are asked to go through and provide their responses. Their responses are recorded and based on the same, learnings are shared through de-briefing sessions (Dreifuerst, 2009). Such simulations are used for training of various professionals such as doctors, nurses (Akselbo and Aune, 2023), managers, etc. (Wood *et al*, 2009).

Traditionally, simulation models were used in pilot training, warfare, nuclear energy, etc Karlsaune *et al*, 2023, 2). But there has now been a shift, in that simulation exercises, designed as stand-alone computer applications or cloud- based applications, etc. are extensively used by Learning and Development Departments of corporations to train their employees (Smeds, 2003). Simulation exercises lead to better teamwork, acquisition of leadership skills and an improved ability to take decisions in a cooperative environment (Beckmann and Birney, 2009; Karlsaune *et al*, 2023, 2).

Since simulations are an imitation of the real state of things, it would be a useful educational tool to teach practical aspects of law in law schools. They are not unknown to law teaching (Fajans, 2006, 215-217; Bradlow and Finkelstein, 2007). The first part of a lecture could contain a description of the default, mandatory and altering rules in a specific topic and the second part of the lecture could consist of simulations (Ajayi-Ore, 2022). Based on the responses of students in the simulation, the rules involved and how they were and could be applied in practice can then be explained through debriefing sessions.

In the present context, various contractual clauses can be used in such simulations providing scenarios of choices of contracting around default rules, with some based on exact compliance of altering rules and some, in violation of altering rules. Similar exercises can also be used for designing rules and choices of default and mandatory rules.

Nowadays, simulations are considered an excellent way to engage students, provide them a near real-world experience and an arena to test out their knowledge, in the safety of the classroom (Ajayi-Ore, 2022). The best thing about simulation exercises is that they work well in any learning environment- physical, virtual or hybrid (Ajayi-Ore, 2022). Simulations can be designed for teams as well as for individuals and therefore there is considerable flexibility in designing them (Ajayi-Ore, 2022).

Following is a summary of things to be taken into consideration for using simulations in classroom (Ajayi-Ore, 2022):

- Choice of the appropriate simulation;
- Using of simulations at the right time is critical;
- The teacher should first go through the entire simulation before making students use them;
- Taking notes while the teacher goes through the simulation is important;
- Track the responses of students
- The key to effective use of simulations is debriefing;
- Measure the payoff for the students.

It is not that simulation studies have not been conducted in law (Geis, 2006) but these studies would be more effective if they are graphics based as it would enable better understanding of the model and afford a sense of reality to the simulation.

2.8.5. Role of the Legal Academia and the Default Rules Doctrine

As noted previously, mature jurisdictions with an evolved notion of contract law do provide directions to future contracting parties when they invalidate an attempt to deviate from a default rule or at least give guidance on how that default rule could be validly contracted around. Where there is no such guidance, the legal academia plays an important role in examining why the parties went wrong in that particular case in deviating from the default position and how future contracting parties could alter the default position (Coyle, 2022). The academia could also take cue from other jurisdictions by adopting a comparative approach or even from other areas of law in that jurisdiction.

Whether Indian legal academia engages in research questions of these kind is a matter for introspection. Often, legal academia is characterised by herd behaviour (van Gestel and Micklitz, 2014) and Indian legal academia is no exception. These are areas that have hardly been explored and requires detailed research: an area for future research in India.

2.9. Contracting Practices and the Default Rules Doctrine

Chapter 6 deals with the law relating to contracts where time of essence in construction contracts is worth noting in this context. It noted that parties adopted sticky contracting practices in that although the Supreme Court decided *Hind Construction* in 1979, even after more than four decades and repeated decisions upholding the said judgment, parties have been repeatedly using such clauses without changes, adopting the same contracting practices and making the same arguments in courts, with a substantial failure rate. This reified the argument made by **Julian Nyarko** in a recent paper titled "**Stickiness and Incomplete Contracts**" where it was argued that the longevity and prevalence in use of a clause may not be evidence of its optimality (Nyarko, 2021, 73). Ben-Shahar and Pottow also took the view that that drastic changes in legal

interpretation of a provision did not produce a change in contracting behaviour (Ben-Shahar and Pottow, 2006, 654).

In 1998, Russell Korobkin published a paper argued: "*My thesis is that when lawmakers anoint a contract term the default, the substantive preferences of contracting parties shift-that term becomes more desirable, and other competing terms becoming less desirable*." (Korobkin, 1998, 611) The point that Korobkin was making is that contracting parties preferred status quo to using alternatives and that default rules was a part of the status quo (Korobkin, 1998, 611). However, the fact that parties did not change the default choice that time was of contractual essence and continued the contracting practices but failed in court/ arbitration supports the approach of Nyarko noted above than Korobkin. It appears that when *Hind Construction* converted the default rule into a sticky default, the desirability of continuing with the sticky default is not supported by evidence.

Brett H. McDonnell in a paper published in 2007 discussed in detail the utility of altering rules in corporate law (McDonnell, 2007). He argued that one should pay more attention to the stickiness of altering rules (McDonnell, 2007, 385). This is also relevant here in the context of time as essence. It is not enough for a contractual provision providing expressly for time as essence to contract around the sticky default that time is not of contractual essence but parties need to do something more, such as opting for a non-obstante clause regarding time as essence, or do something further to achieve the desired effect. McDonnell argued that by paying attention to the stickiness of the altering rule, one gets a more nuanced understanding of the law (McDonnell, 2007, 385).

But the mere presence of default rules and caselaw surrounding them is not good enough a reason for the contracting parties to actually change their behaviour. Contracting parties should:

- be aware of the existence of the clause in their agreement or standard forms;

- be aware of the trend of judicial decisions construing the clause in issue in a manner different from their literal understanding;
- take a conscious and studied decision on how the clause re
- quires to be changed so as to alter the default in the manner prescribed by the altering rule, as laid down by the legislature and construed by the courts, literally or otherwise; and
- negotiate the altered clause and incorporate in their agreement.

Unless these happen, contracting behaviour might not change. McDonnell recognised the potential of innovations in contracting practices that had the effect of easing the opting out of the default position and that the stickiness of a rule was a dynamic concept, varying over time (McDonnell, 2007, 394).

Literature, however, shows that there is considerable inertia to change in contracting behaviour in India on the question of time as essence in construction contracts. Chapter 2 herein noted several sticky drafting practices and lack of oversight in contract drafting, even by sophisticated parties and law firms.

All these aspects contribute to changing contracting practices for the better. The role of such sticky contract drafting practices in India is, again, a potential area for future research. Literature on this area is conspicuous by its absence, although there have been a few instances in the past (Srinivasan, 2021, 28-29). The problem of failure to reckon default rules and drafting agreements is not only endemic to India, but also in USA, where the Default Rules Doctrine is firmly entrenched. In a study conducted by Jeffrey Manns and Robert Anderson on the mergers and acquisitions agreements in Delaware, USA, it was found, based on the length of such agreements, that transactional lawyers did not place reliance on default rules in Delaware law and posited that lawyers may either be less aware of or less responsive to default rules (Manns and Anderson, 2020, 1255).

But the present discussion shows that a nuanced understanding of the Default Rules Doctrine would aid the legal system in appreciating these aspects and there could be better efforts at tracking the nature of the rules, the effect of judicial decisions on those rules and the likely changes required in drafting practices.

2.10. Designing Rules of Contract Law and DRD

The DRD suggests that the lawmakers have considerable set of nuanced tools at their disposal to achieve the intended effects while designing default (Ayres and Gertner, 1989), mandatory (Zamir and Ayres, 2020) and altering rules (McDonnell, 2007, 410) and in terms of rules or standards or a combination thereof (Ayres, 1993, 18; Geis, 2006, 1118-1119). The range of tools available are immense and are beyond the scope of this research. All the same, a brief discussion would throw considerable light on the usefulness of the theory in designing laws.

The simplest of tools is the language of the rule. The way a default rule is drafted provides considerable insight on the legislative intent as to the permitted range of contracting around. For instance, Section 10(1), Arbitration Act states that parties to an agreement can determine the number of arbitrators. The default rule in Section 10(2) provides for one arbitrator. The way the language is drafted clearly conveys the legislative intent that parties can agree on more than one arbitrator; they can even agree on five arbitrators. So, the parties have considerable freedom to contract around the default.

Similarly, Sections 26 (deals with passing of risks), 32 (payment and delivery as concurrent conditions), 36(5), 38(1)(buyer is not bound to accept delivery of goods in instalments), 39(3)(seller to give notice to buyer of sea route and buyer to insure goods) and so on. To illustrate, Section 36(5) states that the expenses of putting goods into deliverable state and incidental expenses therefor are to be borne by the seller. The provision employs the phrase "[u]nless otherwise agreed". This entails that there could be various other forms of agreement between the parties which are not in accord with

the default position. For instance, parties could agree that such expenses would be borne by the buyer; or they could agree that those expenses would be shared equally between the buyer and the seller.

But certain provisions use the phrase "in the absence of a contract to the contrary" or similar such phrases. This, prima facie, indicates that contracting around could be restricted to an agreement to the contrary. For instance, Para 2 of Section 37 states that promises would bind promisors' representatives where the promisor dies before performance of the promise, unless an intent to the contrary appears from the agreement between the parties. Contracting out can be considered as a species of the genus of contracting around and can be pictorially represented as below:

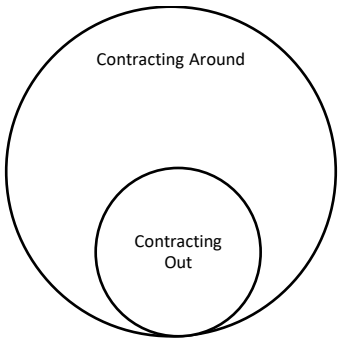

Figure 1 Contracting Around and Contracting Out

A word of caution: it is only through case-law that identification of the extent of permissible contracting around is permitted can be garnered.

Certain provisions are more explicit about how much contracting around can happen. Section 152 exempts a bailee from liability if he took care of the goods bailed in line with Section 151, the Contract Act. But Section 152 also lays down the default position of no liability, unless there is a specific contract. Ordinarily construed, this conveys the meaning that the bailee can agree for a special liability more than specified in Section 151, Contract Act. [147]

[147] Taj Mahal Hotel v. United India Insurance Co. Ltd., (2020) 2 SCC 224

They encourage parties to reveal valuable information to each other as well as to third parties such as courts/ tribunals, etc (Ayres, 2006, 592- 593). As such, penalty default rules are useful in enhancing the freedom of contract of the parties and complements the duty of good faith (Goldford, 2022, 34).

Similarly, designing rules keeping into consideration stickiness of such rules may serve the evidentiary, cautionary and channelling functions that Lon Fuller (Fuller, 1941) identified (McDonnell, 2007, 399-400; Ayres, 2012, 2063ff).

2.11. Adjudication and the Default Rules Doctrine

The previous chapter dealt with how decision-making could be better if the Default Rules Doctrine is used in adjudication. Better understanding and appreciation of law enables courts decide facts based on correct application of law after appreciating the design of the rule involved in the dispute and such rule may be a default, mandatory or an altering rule.

Given the potential of the theory in critiquing existing state of legal affairs, precedential courts could use the theory to correct law based on wrong legislative design, to the extent permitted in the constitutional law of a country, and even correct erroneous construction of a rule which failed to take into consideration the objectives for which the rule was designed.

This topic occupies a substantial portion of the 6th chapter, where it is sought to be demonstrated in specific cases the utility of the theory in better decisional outcomes.

2.12. Findings and Conclusion

Contract theory has evolved in three stages as regards default rules in the West, which is summarised:

Table 4 Particulars of stages of evolution of Contract Law (West)

Stage	Period	Particulars of Stages of Evolution of Contract Law (West, especially USA)
I	Up to 1989	Whether a rule should be mandatory or not?
II	1989- 2012	If a rule should not be mandatory (i.e., default), how should it be designed?
III	2012 and later	How contracting parties should contract around a default rule? How should law facilitate such contracting around?

Various writings on the doctrine have led to three types of rules: default rules, mandatory rules and altering rules. Out of these three types of rules have emerged various insights on the doctrine- these insights are on the facets of law such as legal education, design of law, case presentation and adjudication.

The Default Rules Doctrine enables better analyse rules of contract law and enables effective critique thereof, thereby enabling law reforms. The trio of mandatory, default, and altering rules is a key component that connects law theory and practice in the context of contracts, or even law, in general. The Default Rules Doctrine, at its most basic level, throws light on whether, and if so, how, a rule could be modified- it answers the question of whether a rule can be altered by parties.

The doctrine has two components: descriptive component, which enables understanding why a particular rule is drafted in a particular way, and normative component, which is prescriptive in nature. Where an adjudicating body fails to appreciative the rationale for designing a rule of contract law in a particular manner, the Default Rules Doctrine aids in critiquing the decision of the adjudicating body. Likewise, when the purpose of a rule is better served by designing a rule in the way the Default Rules Doctrine requires, one could question the legislative design of the rule through the lens of the doctrine. Thus, the Default Rules Doctrine helps not only in better understanding rules of contract law but also in enabling courts understand the

real nature of contract law rules and aids in effectively criticising the law when not in accordance with the doctrine.

Determining the manner in which, if at all, the law permits contracting parties to alter their affairs in deviation of a specific rule is a crucial component of transactional law. Better understanding of default, mandatory and altering rules and how they operate in the legal system promotes better understanding, not only to dispute resolution lawyers but also to transactional lawyers. A better drafted transactional document potentially prevents disputes.

It has vast application in legal education and helps in addressing the problem of difference law as is taught in the classroom and law practice, if integrated in teaching contract law.

CHAPTER 3: DEFAULT RULES DOCTRINE: INTERNATIONAL PERSPECTIVES

3.1. Introduction

Default, mandatory and altering rules are meta-concepts and apply across jurisdictions. The Default Rules Doctrine has been extensively used by courts, international tribunals and arbitral tribunals extensively. This chapter surveys the international position on the issue. It first analysis whether the Default Rules Doctrine is employed in various international contract law instruments such as the Convention on International Sale of Goods, 1980 and the UNIDROIT's Principles of International Commercial Contracts. It then explores whether the doctrine has been used by international courts and tribunals. Chapter 3 then analyses if the doctrine has been employed in international arbitration rules.

This chapter also examines if the concept of jus cogens in international law could be regarded as a conceptual counter-part of the concept of mandatory rules. Chapter 3 then goes on to analyse if the Default Rules Doctrine has been used in prominent jurisdictions rich in academic discourse on Default Rules Doctrine, viz., European Union, USA and UK.

3.2. Default Rules Doctrine in International Contract Law Instruments

The Default Rules Doctrine is prevalent to a large extent in international contract law instruments such as the Convention on International Sale of Goods, 1980, the UNCITRAL Model Law on International Commercial Arbitration, 1985, and the UNIDROIT Principles of International Commercial Contracts. This portion of the chapter analyses these instruments.

3.2.1. Default and Mandatory Rules in CISG

The United Nations Convention on Contracts for the International Sale of Goods, 1980 ("CISG" or "Vienna Convention") is one of the earliest and widely ratified international instruments on contract law. Specifically, it relates to international sale of goods and is one of the earliest contract law international instruments to have had a clear-cut distinction between mandatory and default rules. There are several default and mandatory rules in the CISG.

Article 6, CISG explicitly allows parties to derogate from the Convention to the following effect: "*The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions*."[148] The effect of Article 6 is to make the CISG in its entirety as consisting of default rules (Schwenzer and Fountoulakis, 57; Schlechtriem and Butler, 18-19).

Article 6 allows only one exception: Article 12 of the CISG, which explicitly states that "*parties may not derogate from or vary the effect of this article*."[149] Article 12 empowers a Contracting State to the CISG to declare that certain provisions of the CISG allowing offer/ acceptance/ agreement in an unwritten form would not apply where the place of business of a party to an international sale of goods is in that State.[150]

Some of the mandatory rules in CISG include Articles 7(2), 12, 14- 24, 28, performance obligations in Part III, Chapter II, except Section 1, Part III, Chapter III, except Articles 54- 58 (Rustamli, 2020). Default rules in the CISG include Articles 9(2), 35(2) and 55, in addition to Article 6 which makes virtually all provisions (except Article 12) as default rules. Thus, it could be stated that barring a few exceptions, the CISG in its entirety consists of default rules, and has been drafted with a clear-cut distinction between default and mandatory rules.

---

[148] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf (accessed 22.01.2024).
[149] *Ibid*
[150] *Ibid*, Article 96, CISG.

3.2.2. Default and Mandatory Rules in the Model Law on International Commercial Arbitration

The UNCITRAL Model Law on International Commercial Arbitration, 1985 ("Model Law"), was the instrument published by the United Nations Commission on International Trade Law. It was intended to enable jurisdictions adopt it as the law on international commercial arbitration. As originally published in 1985, contained several default rules, including Articles 11(3), 13(2), 17, 19(2), 20(1), 21, etc. A detailed tabulation of the default rules in the Model Law is contained in **Appendix 2** hereto. The Model Law has been drafted to clearly identify default and mandatory rules, with default rules taking precedence. Some of the instances of mandatory rules include Articles 5, 12, 13(3), 18, 24(3), 31(1) and 35(1).[151]

The Explanatory Note to the Model Law published by the UNCITRAL Secretariat stated that parties had the autonomy to decide the procedure and that the Model Law allowed parties to "tailor" rules according to their will.[152] The Explanatory Note also explained the default rules methodology used: the Model Law contained special provisions which afforded party autonomy and in the absence of party consensus, allowed the tribunal to determine the procedure.[153]

3.2.3 Default and Mandatory Rules in UNIDROIT PICC

The International Institute for the Unification of Private Law ("IIUPL"), also known in French as *Institut international pour l'**unif**ication du **droit** privé*, also known in short form as UNIDROIT, is an inter-governmental organisation established in 1926, based at Rome, whose "*purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and*

[151] See, UNCITRAL, Digest of Case Law on the Model Law on International Commercial Arbitration (2012), https://shorturl.at/gimQ4 (accessed 22.01.2024).
[152] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, Para 31, https://shorturl.at/syDF2 (accessed 30.05.2023).
[153] *Ibid*, Para 32.

groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives."[154] India is also a member of the UNIDROIT. The UNIDROIT has been publishing Principles of International Commercial Contracts ("PICC") since 1994. After three editions (1994, 2004 and 2010), the UNIDROIT published its current PICC in 2016.[155]

PICC 2016 concerns general rules regarding international commercial contracts.[156] The PICC 2016 consists of neutral soft law instruments which parties could adopt as the law applicable to their contracts. It consists of several mandatory and default rules. Similar to Article 6 of CISG, Article 1.5 of PICC 2016 contains an omnibus default rule, which makes the entire PICC 2016 as default rules, with specific exceptions. Article 1.5 of PICC 2016 states: "*The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles*."[157] Commentary to PICC 2016 provides that derogation from any provision of the PICC 2016 could be explicit or implicit (International IIUPL, 2016, 14).

The following are instances of mandatory rules contained in the PICC 2016 (IIUPL, 2016, 14):

Table 5 Mandatory Rules in PICC 2016

Article	Provision/ Purpose
1.7	Good faith
1.8	Inconsistent behaviour of a party
2.1.10	Unexpected standard form term
3.1.4	Mandatory nature of certain provisions relating to "fraud, threat, gross disparity and illegality"[158]

[154] https://www.unidroit.org/about-unidroit/overview/ (accessed 22.01.2024).
[155] *Ibid*.
[156] *Ibid*.
[157] *Ibid*.
[158] *Ibid*.

3.2.5 to 3.2.7	Provisions in Section 2 dealing with fraud (Article 3.2.5), threat (Article 3.2.6) and gross disparity (Article 3.2.7).
3.3.1 to 3.3.2	Provisions in Section 3 dealing with illegality: agreements that infringe mandatory provisions (Article 3.3.1) and restitution (Article 3.3.2).
5.1.7(2)	Unilateral and unreasonable price determination by one party
7.1.6	Grossly unfair exemption clauses
7.4.13(2)	Unreasonable liquidated damages
9.1.9(1)	Assigning right to make a monetary payment
10.3(2)	Restrictions on shortening or extending limitation periods

To provide an example, Article 5.1.7(2) of the PICC 2016 states: "*Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary*."[159] As stated earlier, this is a mandatory rule (IIUPL, 2016, 14).

Thus, it could be seen that international instruments dealing with contract law have clear-cut distinction between default and mandatory rules. They also provide, without ambiguity, when a rule is to be considered as a mandatory rule.

3.2.4. Use of Default Rules Doctrine by International Bodies and International Tribunals

The Default Rules Doctrine has extensively been used before several international tribunals, and such tribunals, including the International Court of Justice, Panels of World Trade Organisation, etc. have extensively used the concept of default rules in their jurisprudence in inter-state disputes and investor-State disputes.

[159] https://shorturl.at/kouLS (accessed 22.01.2024).

A search for the search string "*"Default rule" OR "Default rules"*" in the Jus Mundi database, which contains predominantly documents relating to international investment arbitration has returned 353 results.[160]

Recently, in the Final Award rendered in Polyplas v. McNeil and NRM[161] , by an arbitral tribunal which was constituted further to the arbitration rules of the ICC, where the issue was whether Article 418i, Swiss Code of Obligations was derogated from through Article 4.5 of the Agency Agreement in issue. The arbitral tribunal of the ICC Rules found in the Final Award that since the order was cancelled by the customer and no payment was applicable, the default rule in Art. 418i, Swiss Code of Obligations was applicable, which provided that the agency commission fell due at the end of the calendar half-year during which the relevant transaction concluded and not as per Article 4.5 of the Agency Agreement.[162]

In another arbitral award rendered further to the ICC Rules, the arbitral tribunal enquired into the question as to whether time limit provided in the arbitration law of a particular jurisdiction was a mandatory or a default rule. The tribunal held that if it was a default rule and the time limits mentioned in the contract prevailed over the time limit in the statute.[163]

Recently, in Pakistan's Amended Request for Arbitration dt. 28.07.2023 in the Indus Waters Treaty Arbitration (Pakistan v. India)[164], where Pakistan contended that Para 8(e), Annexure D of the Indus Water Treaty, there is a mention of "default rule" that the spillways were to be ungated and that gated spillways could be employed only if site conditions made them necessary.[165]

---

[160] As on 28.08.2023.
[161] Final Award dt. 02.05.2023 in ICC Case No. 27178/PAR
[162] *Ibid*, Para 205.
[163] Final Award in Case 17185, ICC Dispute Resolution Bulletin 2016 No. 2, p. 80, Para 4.39.
[164] Pakistan's Amended Request for Arbitration dt. 28.07.2023 in Indus Waters Treaty Arbitration (Pakistan v. India), PCA Case No. 2023-01, Para 38, https://pcacases.com/web/sendAttach/48315 (accessed 28.08.2023).
[165] *Ibid*.

Strictly speaking, this is not a case where parties could contract to the contrary; rather, spillways were not to be permitted except in certain situations which were contemplated by the Treaty. But then, treaties do not lay down mandatory rules to the effect that States could agree to, say, spillways even when not covered by those exceptional situations. Therefore, this may not be a precise illustration of the use of Default Rules Doctrine and care should be employed while assessing usage of various terms of the Default Rules Doctrine such as "default rules", "mandatory rules", etc.

Thus, there are copious references about the Default Rules Doctrine in decisions and awards of various international tribunals.

3.3. Default Rules Doctrine and International Arbitration Rules

Article 2(e) of the UNCITRAL Model Law states: "*where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;*".[166] The implication of this provision is that a reference in the arbitration agreement to arbitration rules means that such arbitration rules is a part of the arbitration agreement.

Therefore, although most arbitral institutions provide for arbitration "rules",[167] these are not in the nature of default, mandatory or altering rules when it comes to arbitration but apply as a contractually in the arbitration. Given that these "rules" are nothing but extended agreement between the parties, they do not operate as contract law rules.[168] Nevertheless, issues have arisen as to the conflict between institutional rules agreed to by parties and the agreement itself. For instance, in NCC Intl. v. LTA of Singapore[169],

[166] https://maintenance.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf

[167] See, for instance, the Rules of Arbitration of ICC, https://shorturl.at/bhiAF (accessed 21.12.2023); Arbitration Rules of the Singapore International Arbitration Centre, https://shorturl.at/nFJPT (accessed 21.12.2023).

[168] There is an increasing perception that in international arbitration, the rules of arbitration, tend to stifle party autonomy. See, for instance Pryles (2007); Lye (2013).

[169] [2008] SGHC 186, https://www.elitigation.sg/gdviewer/s/2008_SGHC_186 (accessed 21.12.2023).

the issue was whether the incorporation of SIAC Arbitration Rules overrode the arbitration agreement providing for a sole arbitrator. The Singapore High Court held that incorporating the SIAC Rules into the arbitration agreement does not have the effect of overriding parties' explicit contract term.[170] In deciding so, the High Court adopted a textual mode of construction to see if the clause in the institutional rules over the arbitration clause similar to how a legal rule could be classified as permitting contracting around.[171]

Another similarity as regards the institutional arbitration rules and default rules is that institutional rules fill gaps in the arbitration clause as regards the arbitration, much like how default rules do. To demonstrate how this works, Article 18(2) of the ICC Arbitration Rules may be considered. It reads: "*The arbitral tribunal may, after consulting the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties*."[172] This provision employs the phrase "*unless otherwise agreed by the parties*". This provision acts like default rules in contract law, which apply in the absence of party consensus. In other words, the tribunal could hold hearings at any venue it considers as appropriate, after complying with those requirements of consultation. This is subject to party consensus that the tribunal could hold the hearings only at a specific place. In that sense, there is no difference between institutional arbitration rules and ad hoc arbitration rules, as both these types of rules produce the same effect. This is akin to how Section 20(3), Arbitration Act operates. Section 20(3) reads:

"*(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property*."

[170] [2008] SGHC 186, Para 45.
[171] *Ibid*, Para 39.
[172] https://shorturl.at/emxEF (accessed 21.12.2023).

It may be noted that both these provisions operate similarly. Like Rule 18(2) of the ICC Arbitration Rules, as per Section 20(3), the tribunal could hold hearings at any venue it considers as appropriate, after complying with those requirements of consultation, the tribunal could hold the hearings only at a specific place. Thus, it can be seen that the effect of Rule 18(2), ICC Arbitration Rules is the same as Section 20(3).

However, there is an important difference between Rule 18(2), ICC Arbitration Rules and Section 20(3), Arbitration Act. Where the Arbitration Act applies, parties need not specifically provide in their agreement for the statute to apply: it applies automatically. Rule 18(2), ICC Arbitration Rules to apply needs consensus. This difference is vital because it relegates arbitral rules, ad hoc or institutional, to the status of a contract rather than a statute.

Another illustration of the similarity between rules of international arbitration and default rules is the rule in Article 1(2) of the UNCITRAL Arbitration Rules, 2010 (as amended). The provision reads:

"*The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date*."[173]

When parties had already agreed to UNCITRAL Arbitration Rules before the 2010 version of the UNCITRAL Arbitration Rules came into force, but arbitration was invoked, say, in 2011, the question was whether the 2010 version or the previous one (UNCITRAL Arbitration Rules, 1976) would apply. The drafters intended to address this provision through a default rule in terms of Article 1(2) (Castello, 17.33- 17.36). The "presumption", as the rule states, is in the nature of a default rule.

[173] UNCITRAL Arbitration Rules, 2010, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf (accessed 22.01.2024).

The similarities and differences between arbitral rules and rules of contract law have significant implications. The similarities mean that various insights of the Default Rules Doctrine in designing default, mandatory and altering rules in contract law apply to designing arbitration rules too. To give an example, rules regarding disclosure and consequences of failure to disclose (such as the reputational impact of a court setting aside the appointment owing to deficient disclosure) operate as penalty default rules, that is, rules with informational effects.

The differences between these two types of norms, again, have significant implications. There is no need for contract law to be agreed expressly. The only exception is in international scenarios where parties choose the substantive contract law. Even in these situations, the law applies by default, lacking specific choice by the parties. In case of arbitral rules, there is a need of a specific choice by the parties.

There is another significant consequence of the difference between these two norms in contract law: in the context of mandatory rules, breach of such rules is met with sanctions which, at one end of the spectrum, could even mean criminal sanctions. But, with arbitration, at the most, the arbitral proceedings could be terminated or some other consequences which are not regarded in as much a serious manner as breach of mandatory rules of contract law. There are other possible differences between these two types of norms such as the relative number of mandatory rules. In arbitration, mandatory rules are at a minimum because it is a dispute resolution mechanism that emanates out of agreement between the parties.

In conclusion, there are significant similarities as well as differences between rules of contract law and arbitral rules. Arbitral rules, including institutional arbitration rules, operate lower than the level of contract law, at the level of agreements.

3.4. Jus Cogens- The Conceptual Counterpart of Mandatory Rules

"Jus cogens" in Latin means "compelling law". Jus cogens refers to the concept in international law which refers to norms that are so fundamental that it does not permit derogation. Jus cogens have been regarded as pre-emptory norms in international law. This concept owes its origin to civil law systems where a distinction between just cogens and jus dispositivum (default rules)(Zamir, 2022, 1). This could be looked as a functional counterpart of the concept of mandatory rules.

It would not be entirely correct to state that both jus cogens and mandatory rules are identical. Mandatory rules operate at the level of municipal law while jus cogens operates in international law. Further, violation of mandatory rules is usually met with sanctions- usually with the agreement being declared as void or, at times, even met with criminal sanctions. But violation of jus cogens may not at all times lead to sanctions on the State violating the norm. Also, jus cogens brings forth a lot of subjectivity (Shelton, 2021, 1), which is usually not the case with mandatory rules.

At the same time, there are substantial similarities between jus cogens and mandatory rules. Mandatory rules tend to invalidate agreements which violate such rules. Jus cogens has a similar effect. The Vienna Convention on the Law of Treaties, 1969 ("VCLT") provides, in Article 53, as given below:

"*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general*
international law. For the purposes of the present Convention, a peremptory norm of general
international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

As is apparent from the above quote, where a treaty is contrary to jus cogens, it is void. Article 53 explains what a pre-emptory norm is.

Importantly, the roots of the concept of mandatory rules and jus cogens are the same: "*jus publicum privatorum pactis mutari non potest*": a public right is unalterable by private persons (Villiger, 2009, 665).

However, there are no conceptual counterparts of default and altering rules in international law, although the concept of default rules has been used in international law.

3.5. Default Rules Doctrine in EU

The European Union (EU) has a well-entrenched jurisprudence on the Default Rules Doctrine (von Bar, 2009, 59, 72). This is apparent from a perusal of European Law level instruments and decisions by EU Courts

3.5.1. Draft Common Frame of Reference

It was felt in the European Union that there should be an optional instrument on European Contract Law, at the European level. It was not regarded as a replacement of national law but was intended to provide for an alternative instrument, which could be adopted by agreement (Terryn, 2010, 6). Accordingly, the scholars on contract law came up with the Principles, Definitions and Model Rules of European Private Law which was regarded as the Draft Common Frame of Reference delivered to the European Commission in late 2008. Since then the Draft Common Frame of Reference ("DCFR") has inspired a number of national instruments/ courts, including the Moldovan Civil Code (Pietrunko & Richter, 2019, 174-175). The DCFR has ten "books" dealing with various aspects of private law. Book I concerns general provisions, Book II pertains to contracts, Book III concerns obligations and

corresponding rights, and so on. The DCFR is a comprehensive work running to about 4795 pages.[174]

The DCFR extensively uses the Default Rules Doctrine. The term "default rules" has been used about 126 times. At the inception, while discussing the general principles, the DCFR noted that party autonomy could also be furthered by increasing the capabilities of parties to undertake certain things or acts, in addition to minimising mandatory rules (DCFR, 2009, 48). It states: "*People are provided with default rules (including default rules for a wide variety of specific contracts) which make it easier and less costly for them to enter into well-regulated legal relationships*." (DCFR, 2009, 48). Thus, it recognises that default rules serve the function of minimising transaction costs of parties in entering into agreements.

While dealing with service contracts, the introductory portion of the DCFR notes that there are default rules "*on the giving of warnings of impending changes known to one party, on co-operation, on directions by the client and on variation of the contract*." (DCFR, 2009, 59) Thus, the informational effect of default rules has been recognised. The DCFR also recognises the gap filling function of default rules: "*In a sense, many rules of contract law – for example, the remedies available for non-performance – are "default rules" that fill gaps in what the parties had agreed, thus helping to maintain an effective working relationship*." (DCFR, 2009, 62)

Likewise, the function of default rules in promoting efficiency has been recognised: "*It is an aid to efficiency to provide extensive default rules for common types of contracts and common types of contractual problem*." (DCFR, 2009, 75).

The DCFR does not only recognises the importance of default rules but also recognises the utility of mandatory rules in guarding against externalities: "*The only caveat is that the agreement should not impose costs on third parties (externalities). This is why in most systems certain contracts which are likely to have detrimental effects on third*

[174] https://www.law.kuleuven.be/personal/mstorme/european-private-law_en.pdf (accessed 01.02.2024).

persons are rendered void as a matter of public policy." (DCFR, 2009, 49). Accordingly, the DCFR recognises that freedom of contract is subject to mandatory rules (DCFR, 2009, 49). Hence, Article 102(2) of Book I states: "*(2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided*." (DCFR, 2009, 175).

Article 102(1) recognises the principle of freedom of contract, "*subject to any applicable mandatory rules*." (DCFR, 2009, 175). Article 103(3) even permits waiver in mandatory rules: "*A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware*." (DCFR, 2009, 175).

Thus, it can be concluded that the DCFR has been drafted reckoning the Default Rules Doctrine.

3.5.2. Default Rules Doctrine in EU Courts

Instances where the EU courts applied the Default Rules Doctrine are described below. The Opinion of the Advocate General dt. 02.03.2017 in Vinyls Italia SpA v. Mediterranea di Navigazione[175] concerned the issue relating to international insolvency law. The issue involved whether contracting parties could make the law of an EU State applicable in case a contracting party went insolvent even though such party's head office was based in another member state.[176] The Advocate General opined that there were limits to the choice of law and that mandatory provisions of a particular country to which the party is exclusively linked operate in parallel to the party chosen laws.[177]

[175] Case C-54/16, available at https://shorturl.at/dhk59 (accessed 29.08.2023)
[176] *Ibid*, Paras 3-5.
[177] *Ibid*, Paras 153.

In NG and OH v. SC Banca Transilvania SA[178], the ECJ recognised the distinction prevailing among States of the EU between mandatory rules and supplementary rules (default rules).[179] The latter, according to the court, were binding if parties had not derogated from.[180] Even then, those rules do not become mandatory rules.[181]

The Opinion of the Advocate General dt. 09.06.2022 in Rigall Arteria v Bank Handlowy, Case C-64/21[182] has a substantial discussion on the concept of mandatory rules and is therefore worth noting. The question involved in the opinion was whether Article 7(1)(b), Directive 86/653/EEC[183] was a default rule or a mandatory rule. If this provision was a default rule, parties could contract out the right of an agent to commission on repeat transactions.[184]

The ECJ accepted the Advocate General's opinion in its judgment and held that Article 7(1)(b) was not mandatory but supplementary[185] in nature and that therefore parties could derogate therefrom.[186] In other words, the ECJ recognised that this provision was an implicit default rule.

The Advocate General opined that mandatory rules in contract law were those which could not be contracted around and that such rules could be fully or partially mandatory (semi-mandatory)[187]: in the former case (fully mandatory), parties have no choice but to adhere to hem but in case of semi-mandatory rules, parties have a limited room to contract around them.[188]

---

[178] Case C-81/19, request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice (01.02.2019), https://shorturl.at/hqAD5 (accessed 29.08.2023).
[179] Case C-81/19, Para 30.
[180] *Ibid*
[181] *Ibid*
[182] https://shorturl.at/ekwIP (accessed 07.11.2023).
[183] https://shorturl.at/fquX7 (accessed 07.12.2023)
[184] *Ibid*, Para 3.
[185] "Supplementary" rules connotes default rules.
[186] Rigall Arteria v Bank Handlowy (13.10.2022), Case C-64/21, https://shorturl.at/puwBL accessed 29.08.2023).
[187] *Ibid*, Para 30.
[188] *Ibid*, Para 32.

As regards default rules, the Advocate General opined that there were classic default rules which operated to fill gaps in contracts[189] as well as other types of "non-mandatory rules"[190] such as "model rules"[191] that help in drafting contracts, model rules those offer a list of choices to the parties although they do not preclude other choices and model rules those limit party choice to those contemplated in the rules.[192] It was opined that the Directive in issue contained certain mandatory, semi-mandatory and non-mandatory rules. Interestingly, the Advocate General cited the paper of Zamir and Ayres (2020) on the typology of mandatory rules.

The Advocate General was of the view that the concerned provision was not a mandatory rule and that going by the legislative history, logic of the need for a Directive, and the context of Article 7(1)(b).[193] On that basis, the Attorney General concluded that the said provision could be contracted around or even contracted out by parties to an agency contract.[194] This discussion by the Advocate General employing the Default Rules Doctrine in detail goes to show the extent to which the theory is entrenched in the European legal system.

These illustrations show that various facets of the doctrine are embedded in the jurisprudence of the EU as well as its member States. This illustrative analysis does not even discuss the academic literature prevailing in the EU on the Default Rules Doctrine, which is substantially vast (see, for instance, Hesselink, 2005; Storme, 2007; Grigoleit, 2012; Gutman, 2014).

3.6. Default Rules Doctrine in USA

There is extensive literature on the Default Rules Doctrine centred in the academia in USA. A search in the database LexisAdvance reveals that from 1989 to 2023, more

[189] Rigall Arteria v Bank Handlowy (13.10.2022), Case C-64/21, https://shorturl.at/puwBL accessed 29.08.2023), Para 33.
[190] *Ibid*.
[191] *Ibid*.
[192] *Ibid*.
[193] *Ibid*, Paras 44- 94.
[194] *Ibid*., Para 95.

than 14,074 articles published in USA contain the term "default rules".[195] In 2021, for instance, there were 863 papers using the term "Default rules" at least once while in 2022, there were 546 instances. There were 211 instances in 2023. In 2020, there was a whopping 1144 references to "default rules". The search results are tabulated at **Appendix 3** and are graphically represented below:

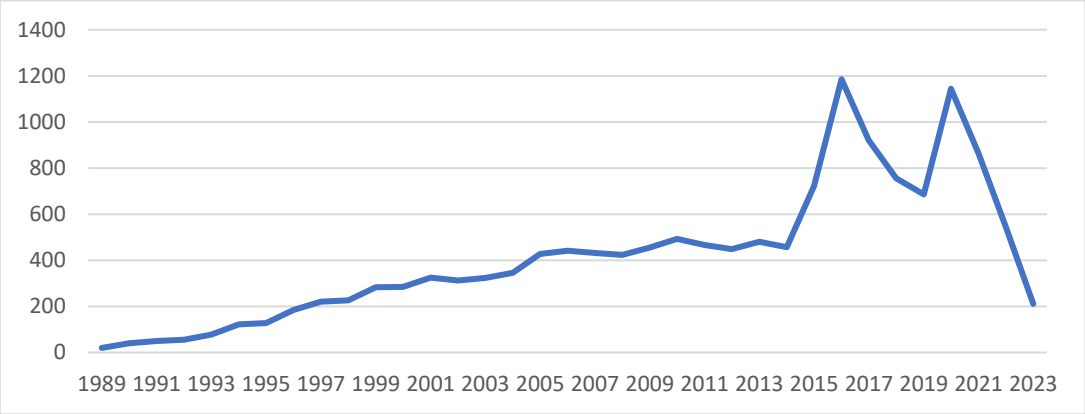

Figure 2 Search Results of "Default Rules" in US Secondary Materials

The leading work on the topic "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (Ayres and Gertner, 1989) has been cited at least 2812 times in various journals throughout the world.[196]

A search in the Lexis Advance legal database reveals that, as on 08.02.2024, the paper has been cited/ mentioned at least 1271 times in the "Secondary materials" database of USA in the said legal database and at least 38 times in similar database in UK as compared to just one in India and that too is an index of periodicals and not a substantive article.[197] The search results are tabulated in **Appendix 3**. Hence, the theory is well-entrenched in the academic literature in USA. But when it comes to courts in USA,

[195] Year-wise search was conducted in LexisAdvance database. For instance, for the year 2021, the search string "*"default rules" > 31/12/2020 < 01/01/2022*" was used in the database "US Secondary Database". The search was updated on 08.02.2024.

[196] See, Google Search Results as on 08.02.2024 for the paper, available at https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=%E2%80%9CFilling+Gaps+in+Incomplete+Contracts%3A+An+Economic+Theory+of+Default+Rules%E2%80%9D+&btnG= (accessed on 16.08.2023).

[197] Index to Periodicals, 32, Journal of Indian Law Institute (1990)

there is substantial discussion by courts on the Default Rules Doctrine and has been extensively cited by courts in USA. To illustrate, about 4311 judgments employ the term "default rules". About 17 judgments directly discuss default and mandatory rules.[198] Further, about 14 judgments cite Ayres and Gertner's paper "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (Ayres and Gertner, 1989).[199] A description of various insights in these judgments of the Default Rules Doctrine has been tabulated in **Appendix 3**.

[198] See, for instance, New Enter. Assocs. 14 v. Rich, 295 A.3d 520, 2023 Del. Ch. LEXIS 102, 2023 WL 3195927 (Del. Ch. May 2, 2023); Pagoudis v. Keidl, 2023 WI 27, 406 Wis. 2d 542, 988 N.W.2d 606, 2023 Wisc. LEXIS 27, 2023 WL 2763202 (Wis. April 4, 2023); Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 2021 Del. LEXIS 286 (Del. September 13, 2021); Marx v. Morris, 2019 WI 34, 386 Wis. 2d 122, 925 N.W.2d 112, 2019 Wisc. LEXIS 129, 2019 WL 1442285 (Wis. April 2, 2019); Harvey ex rel. Gladden v. Cumberland Trust and Inv. Co., 532 S.W.3d 243, 2017 Tenn. LEXIS 701, 2017 WL 4700834 (Tenn. October 20, 2017); Brakke v. Bell State Bank and Trust (In re Brakke), 2017 ND 34, 890 N.W.2d 549, 2017 N.D. LEXIS 34, 2017 WL 712774 (N.D. February 23, 2017); DeFelice v. Emp't Sec. Dep't, 187 Wn. App. 779, 351 P.3d 197, 2015 Wash. App. LEXIS 1078 (Wash. Ct. App. May 26, 2015); Yedidag v. Roswell Clinic Corp., 2015-NMSC-012, 346 P.3d 1136, 2015 N.M. LEXIS 51, 39 I.E.R. Cas. (BNA) 1356 (N.M. February 19, 2015); Noveletsky v. Metro. Life Ins. Co., 49 F. Supp. 3d 123, 2014 U.S. Dist. LEXIS 134460 (D. Me. September 24, 2014); In re McKinney, 67 A.3d 824, 2013 Pa. Super. LEXIS 736, 2013 PA Super 123, 2013 WL 2180015 (Pa. Super. Ct. May 21, 2013); In re McKinney, 67 A.3d 824, 2013 Pa. Super. LEXIS 736, 2013 PA Super 123, 2013 WL 2180015 (Pa. Super. Ct. May 21, 2013); Williams v. City of Cleveland, 848 F. Supp. 2d 646, 2012 U.S. Dist. LEXIS 8307, 2012 WL 245228 (N.D. Miss. January 25, 2012); Bobb v. Voorhies, 2010 U.S. Dist. LEXIS 4622, 2010 WL 273425 (S.D. Ohio January 21, 2010); Johnson v. Lewis, 645 F. Supp. 2d 578, 2009 U.S. Dist. LEXIS 69377 (N.D. Miss. July 20, 2009); Nanak Resorts, Inc. v. Haskins Gas Serv. (In re Rome Family Corp.), 407 B.R. 65, 2009 Bankr. LEXIS 1787, 51 Bankr. Ct. Dec. 251, 69 U.C.C. Rep. Serv. 2d (Callaghan) 436 (Bankr. D. Vt. June 24, 2009); Johnson v. Merchant, 628 F. Supp. 2d 695, 2009 U.S. Dist. LEXIS 52573 (N.D. Miss. June 22, 2009); AD Global Fund, LLC v. United States, 67 Fed. Cl. 657, 2005 U.S. Claims LEXIS 340, 96 A.F.T.R.2d (RIA) 2005-6172 (Fed. Cl. September 16, 2005).

[199] See, Girolametti v. Michael Horton Assocs., 332 Conn. 67, 208 A.3d 1223, 2019 Conn. LEXIS 172 (Conn. June 25, 2019); Brady v. Park, 2019 UT 16, 445 P.3d 395, 2019 Utah LEXIS 56, 2019 WL 2051350 (Utah May 8, 2019); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 203 L. Ed. 2d 636, 2019 U.S. LEXIS 2943, 103 Empl. Prac. Dec. (CCH) P46,261, 27 Fla. L. Weekly Fed. S 775, 2019 WL 1780275 (U.S. April 24, 2019); Heaton-Sides v. Snipes, 233 N.C. App. 1, 755 S.E.2d 648, 2014 N.C. App. LEXIS 262, 2014 WL 1016051 (N.C. Ct. App. March 18, 2014); Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Assoc. (In re Premier Entm't Biloxi LLC), 445 B.R. 582, 2010 Bankr. LEXIS 2994 (Bankr. S.D. Miss. September 3, 2010); Concord Real Estate CDO 2006-1 v. Bank of Am. N.A., 996 A.2d 324, 2010 Del. Ch. LEXIS 113, 2010 WL 1948225 (Del. Ch. May 14, 2010); City of Burlington v. Indem. Ins. Co. of N. Am., 332 F.3d 38, 2003 U.S. App. LEXIS 11482 (2d Cir. Vt. June 9, 2003); Duncan v. TheraTx, Inc., 775 A.2d 1019, 2001 Del. LEXIS 243 (Del. June 1, 2001); American National Fire Insurance Co. v. Kenealy, 72 F.3d 264, 1995 U.S. App. LEXIS 35178, 1996 AMC 584 (2d Cir. N.Y. December 13, 1995); Am. Airlines v. Wolens, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715, 1995 U.S. LEXIS 690, 63 U.S.L.W. 4066, 95 Cal. Daily Op. Service 419, 95 Daily Journal DAR 768, 8 Fla. L. Weekly Fed. S 526 (U.S. January 18, 1995)

At least six judgments in USA dealt with or cited penalty default rules.[200] To illustrate, in Duncan v. TheraTx, Inc.[201], the Supreme Court of Delaware opined that it was basic that default damages rules were to reflect a term in the contract which most parties would have preferred when signing the agreement, that is, a majoritarian default rule.[202] The court also recognised that while majoritarian rules were preferable, there could be circumstances where penalty defaults were useful. In doing so, the court cited Ayres and Gertner (1989) and Goetz and Scott (1983).

In Selvido v. Gillespie (In re Gillespie)[203], the court opined that the governing law on limited liability companies in North Carolina, USA, was similar to the law in most states in USA in that the legislative policy was to afford maximum effect to freedom of contracts and therefore most of the rules were default rules and that the members of such a company could alter the default rules through operating agreement.[204]

Rarely has the concept of "altering rules" been cited or used by courts over the world. In 2021, the US Court of Appeals for the Third Circuit cited the 2012 paper of **Ian Ayres** titled "**Regulating Opt-Out; An Economic Theory of Altering Rules**" published in 2012 (Ayres, 2012) in the case of Spyglass Media Grp., LLC v. Bruce Cohen Prods.[205] In this decision the court accepted the argument that a default rule could be contracted around by appropriate language, thus clearly recognising the concept of altering rules.[206]

---

[200] Stengart v. Loving Care Agency, Inc., 408 N.J. Super. 54, 973 A.2d 390, 2009 N.J. Super. LEXIS 143, 29 I.E.R. Cas. (BNA) 588, 106 Fair Empl. Prac. Cas. (BNA) 1177, 158 Lab. Cas. (CCH) P60,829 (App.Div. June 26, 2009); Randall v. Lady of Am. Franchise Corp., 532 F. Supp. 2d 1071, 2007 U.S. Dist. LEXIS 53606 (D. Minn. July 24, 2007); Duncan v. TheraTx, Inc., 775 A.2d 1019, 2001 Del. LEXIS 243 (Del. June 1, 2001); Sound Techniques, Inc. v. Hoffman, 50 Mass. App. Ct. 425, 737 N.E.2d 920, 2000 Mass. App. LEXIS 922 (Mass. App. Ct. November 3, 2000); Robinson v. Tripco Inv., Inc., 2000 UT App 200, 21 P.3d 219, 2000 Utah App. LEXIS 62, 398 Utah Adv. Rep. 26 (Utah Ct. App. June 29, 2000); Snyder v. Lovercheck, 992 P.2d 1079, 1999 Wyo. LEXIS 188 (Wyo. December 13, 1999)
[201] 775 A.2d 1019, 2001 Del. LEXIS 243 (Del. June 1, 2001)
[202] Duncan v. TheraTx, Inc., 775 A.2d 1019, 2001 Del. LEXIS 243 (Del. June 1, 2001), p. 1021-2022.
[203] 2012 Bankr. LEXIS 1261, 2012 WL 1021417 (Bankr. W.D.N.C. March 26, 2012)
[204] *Ibid*, Para 22.
[205] Spyglass Media Grp., LLC v. Bruce Cohen Prods., 997 F.3d 497 (2021).
[206] *Ibid*, Para 508-509.

The Final Award in the matter of Agency Within, Joseph Yakuel and Get Things Done v. Andrew Gluck (II) records the argument of one of the parties that the arbitration contained a repetition of the default rule that each party is to bear its own costs in litigation and that the indemnity clause in the agreement altering the default rule.[207]

Thus, it is seen that both in judiciary as well as in legal academia, there is a significant discourse on the Default Rules Doctrine. USA could be regarded as a leading jurisdiction on the Default Rules Doctrine.

3.7. Default Rules Doctrine in UK

Many laws in the UK concerning contract law have a strict demarcation as to what default and mandatory rules are. Even so, the English Unfair Contract Terms Act, 1977 (hereinafter "Unfair Contract Act") represents a significant effort in codifying mandatory rules in contract law. Section 3, Unfair Contract Act prohibits unreasonable contract terms contained in standard form template of one of the parties which are designed to exclude or restrict liability for breach of contract of the person who holds such a template.[208] Thus, the provision prevails over agreement between the parties.

The English Arbitration Act, 1996 was itself drafted identifying the mandatory provisions thereby clearly distinguishing from the non-mandatory provisions, which parties could derogate from. Schedule 1 to the Arbitration Act, 1996 listed 21 items which contained numerous provisions which applied compulsorily.[209] The effect of the mandatory provisions is contained in Section 4(1) of the said statute which states that those provisions applied notwithstanding any agreement to the contrary.[210] The Arbitration (Scotland) Act, 2010 contains a similar provision in Section 8, which lists out rules that could not "be modified or disapplied" by contracting parties.[211]

---

[207] Final Award dt. 30.09.2022 in Agency Within, Joseph Yakuel and Get Things Done v. Andrew Gluck (II), AAA Case No. 01-21-0002-6804, Para 20.
[208] https://www.legislation.gov.uk/ukpga/1977/50/data.pdf (accessed 22.01.2024).
[209] https://www.legislation.gov.uk/ukpga/1996/23/section/4 (accessed 29.08.2023)
[210] https://www.legislation.gov.uk/ukpga/1996/23/section/4 (accessed 29.08.2023)
[211] https://www.legislation.gov.uk/asp/2010/1/section/8 (accessed 22.01.2024).

On the other hand, Section 4(2) employed the phrase "non-mandatory provisions" to refer to default rules and provided that parties could make their own arrangements as regards such provisions but would apply in case the agreement was silent. This clear separation between mandatory and non-mandatory provisions and identification of the mandatory provisions afforded much needed clarity for parties and courts to understand which of the provisions of the statute were mandatory and which of those were default rules. Likewise, Section 9(1) of the Arbitration (Scotland) Act, 2010 regards those rules that are not mandatory as "default rules".[212] Section 9(2) explains "default rules" rules where "parties have not agreed to modify or disapply that rule…"[213]

Thus, the English Arbitration Act, 1996 is an illustration of a statute that has been drafted explicitly identifying the mandatory (and thereby the non-mandatory) rules and thus providing much needed clarity. Statutes relating to contract law should be drafted clearly identifying mandatory rules so that it would be easier for parties and courts to clearly know whether a clause was derogable or not. On the gap filling of the default rules contained in the said statute, the Departmental Advisory Committee in its 1996 Report observed (Saville, 1996, 281):

"*28… The Clause also makes clear that the other provisions of this Part can be changed or substituted by the parties, and exist as 'fall-back' rules that will apply if the parties do not make any such change or substitution, or do not provide for the particular matter in question. In this way, in the absence of any other contrary agreement, gaps in an arbitration agreement will be filled*."

Under English law, several courts, right from the English Commercial Court up to the Supreme Court, have employed the Default Rules Doctrine in the past, and that too, with respect to varied subject matter such as sale of goods, service contracts, etc.

[212] https://www.legislation.gov.uk/asp/2010/1/section/9 (accessed 22.01.2024).
[213] *Ibid*.

One of the recent cases that deals with the Default Rules Doctrine under English law is the noteworthy decision of Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb[214], where the UK Supreme Court had to decide on the issue relating to default rules that applied to determine the law of the arbitration agreement lacking explicit choice by the parties. The English Supreme Court held that where the parties had not spelt out the choice of the law in their agreement, the default rule is that the law of the contract would be the law of the arbitration agreement. The court laid down various default rules that were applicable for arriving at the law of the arbitration agreement in the absence of explicit choice.

The English Supreme Court also took note of Section 4(5), English Arbitration Act, 1996 ("EAA") which provided for the effect of choice of a foreign law on a non-compulsory provision of the EAA: the effect was to confer such foreign law the status of an agreement insofar as mandatory provisions of EAA were concerned.

The European Union's Draft Common Frame of Reference was drafted when UK was a part of the European Union. English jurists such as Hugh Beale and Stephen Swann were part of the editors of the DCFR.

It could, thus, be stated that UK also has an extensive application of the Default Rules Doctrine in contract law.

Courts in several other jurisdictions have referred to the Default Rules Doctrine.[215] One such jurisdiction is Singapore. In Founder Group (Hong Kong) Ltd v. Singapore JHC Co Pte Ltd.[216], the issue related to dismissal of a winding up petition. In providing the grounds for dismissal of the petition for winding up, the Singapore High Court held that the default rule of company law was that the minority shareholders were to submit to the will of majority shareholders, unless the company's constitutional documents

[214] [2020] UKSC 38
[215] See, for instance, Canada (Goldford, 2021- 2022, France (Goldford, 2022), Germany (Goldford, 2022), etc.
[216] [2023] SGHC 159

provide otherwise.[217] However, the ground of just and equitable ground for winding up a company, according to the court, was an exception to that default rule.[218]

3.8 Findings and Conclusion

The Default Rules Doctrine has been extensively used in international instruments, international tribunals and arbitral tribunals extensively. There is a clear-cut distinction between the default and mandatory rules in international contract law instruments such as the Convention on International Sale of Goods, 1980, the UNCITRAL Model Law on International Commercial Arbitration and the UNIDROIT's Principles of International Commercial Contracts. However, the concept of altering rules has not been prevalent in the international domain.

The concept of jus cogens in international law could be regarded as a conceptual counterpart of the concept of mandatory rules. However, there are also significant differences. The Default Rules Doctrine has been used in prominent jurisdictions in several jurisdiction such as the European Union, USA and UK. While the Default Rules Doctrine is prevalent in the EU and the UK, USA could be regarded as the leading jurisdiction on the Default Rules Doctrine, in view of extensive use both in the judiciary and in the legal academia.

[217] [2023] SGHC 159, Para 126.
[218] *Ibid*.

CHAPTER 4: DEFAULT RULES DOCTRINE IN INDIA: A JURISPRUDENTIAL STUDY

4.1. Introduction

This chapter surveys if and to what extent the Default Rules Doctrine is prevalent in India. In order to do so, it is important to provide context by analysing the evolution of Indian contract law. Hence, this chapter, firstly, analyses descriptively, the framework of contract law in India. It also explores the interconnectedness between English common law and Indian contract law. Later, it analyses the extent to which the DRD has fared in the Indian legal system, including in courts, in legal education and in academic writings. It then examines the judicial discourse on immutability of rules of contract law.

4.2. Framework of Contract Law in India

India's principal statute governing contracts is the Contract Act[219] which defines and amends specific parts of the law on contracts. It has eleven chapters. Chapters I to VI deal with contracts in general and apply to all kinds of contracts and the remaining chapters apply to specific species of contracts. The drafters of the statute initially intended to codify the entire law relating to contracts but later decided to only include specific aspects (Cunningham and Shepherd, 1878, ii).

4.2.1. Evolution of Law Prior to Enactment of Indian Contract Act, 1872

The Charter of 1726 established Courts of Justice in the presidency towns (Pollock and Mulla, 1909, 2). English law, as applicable to the Indian situation, was applied to Indians within the jurisdiction of the Supreme Courts of Judicature (within the

[219] Gouri Dutt v. Bandhu Pandey, AIR 1929 All 394; Union of India v. Stock Holders Syndicate, Poona, MANU/SC/0059/1976.

presidency towns). This led to "many inconveniences" (Pollock and Mulla, 1909, 2-4). To address this situation, the Statutes of 1781 (Calcutta) and 1797 (Madras and Bombay) empowered the courts to determine contractual matters as per the laws and usages of Hindus and Muslims (Pollock and Mulla, 1909, 2-4). Hence, English Law as applicable to the Indian situation was superseded by the contract laws of Hindus and Muslims. Islamic contract law applied if the contract was between two Muslims and Hindu contract law applied when both parties were Hindus. The law of the defendant was to be applied when one of the parties was a Hindu and the other was a Muslim (Pollock and Mulla, 1909, 2-4).

Both Hindus and Muslims in India had their set of laws of contracts. The Islamic contract law was comprehensive and dealt with commercial and proprietary contracts, including aspects relating to agency (vakalat), bailment (kafalat), indemnity (zamanat and tamin), etc (Pollock and Mulla, 1909, 2-4).

The Hindu law of contracts was also comprehensive in terms of scope but was scattered in its sources. During the British period, Jagannath Tarkapanchanan under the supervision of William Jones, compiled the Hindu law of contracts and succession in Sanskrit. This was translated into English by **HT Colebrooke** and the monumental work came to be titled "**Digest of Hindu Law on Contracts and Successions**".[220]

Notwithstanding the comprehensiveness of Tarkapanchanan and Colebrooke's work, it was hardly useful as a practical reference for a court, especially in commerce (Roy and Swamy, 2021, 125). It presented difficulty while applying in practical contexts. For instance, differing views were stated regarding the rate of interest (Roy and Swamy, 2021, 126). The code was also repugnant to the prevailing societal views because it excluded servile classes and women (Roy and Swamy, 2021, 126). Hence, the view was that the Hindu law of contract was not workable at a practical level (Roy and Swamy, 2021, 126). Despite its unworkability, usages such as *damdupat*, the *hundi* instrument

[220] Available at https://archive.org/details/in.ernet.dli.2015.142316 (accessed 30.12.2022).

and the Hindu joint family as an entity continue to be of relevance (Roy and Swamy, 2021, 127).

The prevailing view at that time seems to be that there was a consonance between the English, the Hindu and the Mohammedan systems of law insofar as many forms of contract were concerned (Macpherson, 1864, v; Macrae, 1874, 2). Interestingly, it appears that litigants, even Indians, mostly preferred application of the common law to disputes, especially in the port cities such as Bombay, Calcutta and Madras (Roy and Swamy, 2021, 127).

4.2.2 Prelude to the Contract Act

The law prior to the enactment of the Indian Contract Act in 1872 was to ensure proper compliance of agreements (Roy and Swamy, 2021, 129). It appears that criminal courts were corrupt, with the magistrate system favouring the more powerful and the richer party (Roy and Swamy, 2021, 130). Colonialization and control over the laws that the Britishers had in India was the norm and therefore agreements made by rich planters were enforced against poor peasants, who in many cases did not even understand the agreements they signed. Blank signatures were obtained on stamp papers by the planters from peasants (Roy and Swamy, 2021, 132). Planters combined contracts with debt whereby they would advance a sum of money to peasants but did not fully clear the credit account when cultivated crops came in. This made the relationship between the planter and the peasant a permanent one (Roy and Swamy, 2021, 132) and enabled the planter to exercise virtual control over the life of the peasant. At times, force was used to enforce those contracts (Roy and Swamy, 2021, 133). Also, breach of contract by the peasants were a criminal offence (Roy and Swamy, 2021, 132).

Continued oppression of peasants led to what is now called as “Blue Mutiny” (Roy and Swamy, 2021, 129- 134), where the peasants’ cause was taken up in the urban areas, especially in Bengal (Roy and Swamy, 2021, 133). At the same time, the Hindu and

Muslim contract laws were inadequate for commerce (Roy and Swamy, 2021, 132). It is in this background that the proposal for enacting a contract code was contemplated.[221]

4.2.3. The Contract Act and its Structure

4.2.3.1 Whether the Contract Act is a Complete Code and Exhaustive?

The Preamble to the Contract Act noted that it was "*expedient to define and amend certain parts of the law relating to contracts*". The Preamble clarifies that the Contract Act is not a comprehensive code on contract law. This is apparent from the structure of the said statute. As originally enacted, the Contract Act contained eleven chapters. Chapters I to VI dealt with the general law of contracts and Chapters VII to IX addressed special contract topics such as indemnity, guarantee, bailment, agency and partnership. Since then, chapters related to sale of goods and partnership have been enacted as separate statutes in the form of the Sale of Goods Act, 1930 and the Partnership Act, 1932 respectively.

The question as to whether the 1872 Act is a Code has implications on the comprehensiveness of the law. Right from its inception, it was recognised that the statute was not a complete code on the subject. The Contract Act as enacted did not address many contract law topics that were later dealt with under different statutes such as the Transfer of Property Act, etc. Some of the provisions, especially those relating to sale of goods were repealed and enacted as a separate statute.

The Contract Act did not altogether abolish the Hindu and Muslim law of contracts. By virtue of operation of Section 1, usages and customs were saved (Pollock and Mulla, 1909, 6). Even otherwise, in respect of particular instances, the Hindu and Muslim

[221] For a detailed description of the enactment of the Indian Contract Act, see, Roy and Swamy, 2021, 134-137.

contract laws were applied. As stated earlier, the rule of *Damdupat* continues to be used in courts even now.[222]

Even the specific contracts that the Contract Act dealt with (such as sale of goods, partnership, bailment, agency) were not considered to exhaustively define the law on the issue.[223] All the same, where the Contract Act exhaustively and imperatively addresses certain aspects of the law, the provisions are to be interpreted without reference to prior law on the subject.[224]

Section 1, Contract Act, titled "Savings" states:

"*Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act*."

To the extent relevant to the subject-matter dealt with here, Section 1 provides that the Contract Act would not affect "any incident of any contract" that is not "inconsistent with the provisions of" the 1872 Act (Srinivasan and Yadav, 2022). This meant that Contract Act did not affect any incident of a contract that was consistent with the said statute (Srinivasan and Yadav, 2022). This aspect was directly in issue in Bugwandas v. The Irrawaddy Flotilla Company[225] where it was argued that common law was the "custom of the realm".[226] Using this idea, the appellant relied on Section 1, the Contract Act to exclude English common law from the rigours, the Contract Act (Srinivasan and Yadav, 2022). This argument is interesting because if this reasoning is taken to its

[222] See, for instance, Himalaya Sahkari Awas Samiti Ltd. vs. U.P. Awas Vikas Parishad and Ors. (10.03.2022 - ALLHC) : MANU/UP/1537/2022, Para 12
[223] Bugwandas v. The Irrawaddy Flotilla Company, MANU/PR/0037/1891, Para 11; Promotha v. Prodyumno, AIR 1921 Cal 416; Jagjiwandas v King Hamilton Co., AIR 1931 Bom 337; Gajanan Moreshwar Parelkar vs. Moreshwar Madan Mantri MANU/MH/0039/1942, Para 3 and 4. See also, Law Commission of India, *Seventh Report on Partnership Act, 1932* 1 (1957), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080541-1.pdf (accessed 28.12.2022).
[224] Mohiri Bibee v. Dharmodas, 30 IA 114: 7 CWN 411 (PC).
[225] Bugwandas v. The Irrawaddy Flotilla Company, MANU/PR/0037/1891, Para 8.
[226] MANU/PR/0037/1891, Para 15.

logical end, then the whole of English common law would be saved notwithstanding express provisions in the Contract Act. This could not have been right since it undercuts the need for enactment of a statute on contract law. It would seem that the Privy Council did not find favour with that argument.

Another interesting aspect in the decision relevant to default rules is that the Privy Council recognised that the common carrier's liability as an insurer vis-à-vis the owner was an incident of the contract.[227] But the Privy Council recognised the existence of the requirement under the Savings clause to the effect that such incident should not be inconsistent with the provisions, the Contract Act.[228] The Privy Council held that since Section 152, the Contract Act allowed a special contract that could be inconsistent with the provision, such an incident of contract was legal.[229] The court concluded that the 1872 Act did not intend to deal with the law on bailment vis-à-vis common carriers although certain expressions used in Chapter IX on bailments were general in nature.[230]

Thus, the Privy Council recognised that an incident of contract valid and enforceable even if it is inconsistent with the Contract Act, if the Contract Act allowed such a contract. But there is a flaw in this reasoning by the Privy Council: if the Contract Act allowed such a contract, where is the question of any inconsistency?

After its enactment, courts considered how to proceed where the Contract Act did not deal exhaustively with an aspect. It held that were the Contract Act was not exhaustive, courts were to follow English common law and apply it.[231]

Another dimension of this is that the Contract does not even exhaustively deal with the areas covered by it. This has been affirmed in 1942 in Gajanan Moreshwar Parelkar v.

---

[227] Available at https://archive.org/details/IndianContractAct1872/page/n1/mode/2up (accessed 09.05.2023)
[228] MANU/PR/0037/1891, Para 16.
[229] *Ibid*.
[230] *Ibid*, Para 17.
[231] Keshavlal v Pratap, AIR 1932 Bom 168; Pratapsing v. Keshavlal, 39 CWN 440, 443-444.

Moreshwar Madan Mantri[232] and has been cited with approval in the 13th Report of the Law Commission.[233]

To illustrate this point, the Contract Act covers only an instance of hypothecation of moveable property, that is, pledge. But there are other forms of hypothecation that have been recognised through common law.[234]

While this decision concerns special contracts, whether the principle applies even to the general law of contracts is another question altogether. This was considered in Naresh Chandra Guha v. Ram Chandra Samanta[235], where the aforesaid principle was applied even in respect of Sections 64, 65 and 74, which are a part of the general law of contract.[236]

4.2.3.2 Relationship between English Common Law and the Contract Act.

A portion of Contract Act, such as compensation for breach[237], reflect common law, and several provisions deviate from the common law principles.[238]

Where the Contract Act is silent, courts have applied the common law principles with the objective of supplying the deficiencies in the said enactment.[239] However, the Law Commission found this approach unjustified and not conducive to certainty or

[232] MANU/MH/0039/1942
[233] Law Commission of India, Thirteenth Report (Indian Contract Act, 1872) 2 (1958), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080532.pdf (accessed 30.12.2022)(hereafter "*13th Report of Law Commission*").
[234] Md. Sultan v. Firm of Rampratap Kannyalal, MANU/AP/0090/1964, Para 7. See also, Tehilram v. D'Mello, MANU/MH/0058/1916; Jatindra Chandra v. Rangpur Tobacco Co. Ltd., MANU/WB/0081/1924, Co-operative Hindusthan Bank Ltd. v. Surendra Nath, MANU/WB/0173/1931, Peoples Bank v. F. F. Campbell and Co. Ltd., AIR 1939 Lah 398.
[235] Naresh Chandra Guha v. Ram Chandra Samanta, MANU/WB/0144/1951
[236] *Ibid*, Para 12.
[237] Section 73.
[238] See, Setalvad (2015, 207), citing several instances such as promisor's power to dispense with or remit performance by the promisee without any agreement, applicability of the provisions of restitution to the government, etc.
[239] See, Setalvad (2015, 207). Also see, Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri, MANU/MH/0039/1942, Para 7.

simplicity.[240] Therefore, the Law Commission advised that those principles of English common law, which had been employed by Indian courts for about a hundred years (prior to 1958) could be incorporated into the Contract Act.[241] This, according to the Commission, would avoid reference to English law.[242] Nevertheless, courts have continued to apply or support their reasoning with common law.[243] However, where statute exists, it depends on whether common law is sought to be replaced with statute in its entirety.[244] The operative principle is that common law, even if available, cannot supplant the statute.[245]

In sum, the Contract Act:

- does not address many aspects of contract law, such as insurance, carriers, etc.;
- does not exhaustively state the law on even those subjects that it dealt with;[246]
- does not affect common law ("unwritten law"), except to the extent addressed by the said Act;[247] and
- does not prevail over special law enacted.

This understanding is important because various rules in the Contract Act cannot be looked at in isolation where special laws are available.

[240] Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri, MANU/MH/0039/1942, Para 7.
[241] *Ibid*, Para 7.
[242] *13th Report of Law Commission*, p. 2.
[243] See, for instance, The All India Tea and Trading Company Limited v. The Loobah Company Limited MANU/WB/0758/2021, Para 21; Saurav Jyoti Baruah v. Oil and Natural Gas Corporation Ltd., MANU/GH/0555/2021, Para 16; BVM Finance Private Limited v. Vistra ITCL (India) Ltd. MANU/MH/1720/2020, Para 27.
[244] See, for instance, Akuate Internet Case, MANU/DE/2768/2013.
[245] Akuate Internet Case, MANU/DE/2768/2013, Para 60.
[246] Bugwandas v. The Irrawaddy Flotilla Company, MANU/PR/0037/1891, Para 11; Gajanan Moreshwar Parelkar v Moreshwar Madan Mantri MANU/MH/0039/1942, Para 3 and 4.
[247] See, for instance, Mathoora Kanto Shaw v. IGSNL, MANU/WB/0209/1883.

4.3. Default Rules and Statutory Rules in India

Several statutes in India have been drafted in terms of default rules and their effects. Some of the examples are discussed below:

4.3.1. The Arbitration and Conciliation Act, 1996

One of the earliest statutes which adopted the default rules perspective is the Arbitration Act. It gave effect to party autonomy by expressly recognising in most provisions the right of parties to alter the legal effect of the statute. The Arbitration Act as was enacted contained several default rules. Examples of those provisions included Sections 3(1), 11(1), 14(2), 15(3), 15(4), 17(1), 20(3), 21, 22(3), 23(3), 24(1), 25, 26(1), 26(2), 26(3), 28(1)(b)(ii), 29(1), 31(7)(a), 31(8), 33(4), and so on.

In order to clearly convey that party autonomy is the overarching principle, most of the provisions drafted were in the nature of default rules. Since then, the Arbitration Act has been amended thrice- 2015, 2018 and 2021. In this process, there has been a shift from default rules to immutable/ mandatory rules. To illustrate, Section 17(1) related to interim measures by an arbitral tribunal. Section 17(1) as was enacted as a default rule: this power of the tribunal was when the agreement is silent. Section 17(1), as originally enacted, specifically employed the phrase “unless otherwise agreed by the parties”. Section 17(1) was substituted with a new provision in 2015 where this phrase does not exist. The amended provision also equalises the power of the arbitral tribunal with that of a court, which is probably the reason for deletion of the phrase “unless otherwise agreed by the parties”.

The Arbitration Act, modelled from the UNCITRAL Model Law, is a conscious attempt to draft the rules of contract law in terms of default and mandatory rules. The Model Law, as originally published in 1985, contained several default rules, including Articles 11(3), 13(2), 17, 19(2), 20(1), 21, etc. A detailed tabulation of the default rules in the Model Law is contained in **Appendix 2** hereto.

The Explanatory Note to the Model Law published by the UNCITRAL Secretariat stated that parties had the autonomy to decide the procedure and that the Model Law allowed parties to "tailor" rules according to their will.[248] The Explanatory Note also explained the default rules methodology used: the Model Law contained special provisions, which afforded party autonomy and in case the agreement is silent, allowed to determine the procedure.[249]

4.3.2. Guidelines on Charging Infrastructure for Electric Vehicles, 2022

Recently, the Ministry of Power had come up with Guidelines on Charging Infrastructure for Electric Vehicles, 2022.[250] Annexure IV to the said Guidelines contain a "Model Revenue Sharing Agreement between Land-Owning Agency (LOA) and Charge Point Operator (CPO) for deployment of Public EV Charging Stations". Clause 24 of this Model Agreement provides for certain "Default Rules" regarding interpretation of the Agreement. For instance, Clause (i) of the Default Rules provision [Cl. 24(c)] states that references to a Person in the agreement is also a reference to that Person's successors and assigns/ transferees. Again, these are not default rules as is known in the Default Rules Doctrine but are general rules of interpretation provided in the model agreement.

4.3.3. Opt-Out and Opt-in Tax Regime

The effective use of broader notion of default rules, in the sense of those rules which can be contracted out/ opted-out has been in use recently in India. One of the prominent examples is the case of the opt-out of the new direct tax regime.

---

[248] Explanatory Note, UNCITRAL Secretariat on the Model Law, Para 31, https://shorturl.at/adQTW (accessed 30.05.2023).
[249] *Ibid*, Para 32.
[250] https://powermin.gov.in/sites/default/files/webform/notices/Final_Consolidated_EVCI_Guidelines_January_2022_with_ANNEXURES.pdf (accessed 21.12.2022).

Section 115BAC, Income Tax Act, 1961 was a provision introduced pursuant to the Finance Act, 2020, with effective from 01.04.2021. While the existing system of direct taxes provided for taxes on an individual along with several deductions being permitted, these deductions were sought to be considerably restricted with the enactment of Section 115BAC. But the new regime was to be at the option of such individual. In other words, this was an opt-in provision and those who had to go for the new tax regime had to opt-in into it.

This position has been changed with the enactment of the Finance Act, 2023. Section 52 thereof converts the opt-in provision into an opt-out provision through the enactment of a sub-section 1A to Section 115BAC, Income Tax Act, 1961. Sub-section 1A to Section 115BAC makes the new tax regime the default option with the possibility of opting out of the new tax regime under Section 115BAC(6), which provides for the mechanics of opting out of the new tax regime.[251] Satisfaction of these mechanics constitute the condition for opting out of the new tax regime, and are therefore altering rules, in a broader sense. The intent behind converting the new tax regime to the default tax regime is to encourage tax paying individuals to subscribe to the new tax regime.[252]

Technically, this is not a matter of contract law as the relationship is not between two contractual parties but between an individual and the State. Nevertheless, the principle that legal rules can be used to achieve the desired behaviour is illustrated using this opt-out regime.[253]

But for these, there have been no conscious attempts to draft statutes in terms of default, mandatory and altering rules in India, although statutes in the last two decades clearly state when a rule could be contracted around. To illustrate, Section 23(4), Limited Liability Partnership Act, 2008 (LLP Act") deals with the mutual rights and obligations of partners to a limited liability partnership. It states that in the absence of an agreement

[251] For details, see the Finance Act, 2023,
[252] See, Nirmala Sitharaman, Budget 2023-2024: Speech of Ministry of Finance (01.02.2023), Para 152, accessed https://www.indiabudget.gov.in/doc/budget_speech.docx
[253] For more on use of such rules, see, Rachlinski (2023).

on an aspect covered by the First Schedule to the said statute, *inter se* rights/ duties of partners, and those of the partners vis-à-vis the LLP would be governed by the First Schedule.[254] Thus, the statutes attempt to clearly state the default rules, but no comprehensive attempts have been made out to demarcate what default, mandatory and altering rules are in a statute.

4.4. Judicial Approaches to the Default Rules Doctrine in India

This section provides an overview of how the Default Rules Doctrine has been dealt with by courts in India.

4.4.1 Default Rules Doctrine in Indian Courts

The Default Rules Doctrine is a typical example of this dialogue between legal academia and law practice. A comparison of the use of the Default Rules Doctrine in judgments in some jurisdictions such as Australia, Hong Kong, Malaysia, New Zealand and Singapore make this position clear[255]:

Table 6 Hits on "Default Rule" in LexisNexis Database for Various Jurisdictions

S. No.	Jurisdiction	Hits of "Default Rule"
1.	Australia	154
2.	Hong Kong	81
3.	Malaysia	77
4.	New Zealand	143
5.	Singapore	12

[254] https://www.indiacode.nic.in/bitstream/123456789/2023/1/A2009-06.pdf (accessed 23.01.2023).
[255] The search results are as of 09.05.2021 from Westlaw

The position with regard to USA, UK and India were also obtained from LexisNexis and are tabulated as below[256]:

Table 7 Judgments referring to search phrase "default rules"

No. of judgments referring to the search phrase "default rules"			
Search Phrase	**USA**	**UK**	**India**
"Default rules"	3400	58	1

As is apparent from the aforesaid table, the Default Rules Doctrine has not permeated the Indian judicial landscape. Neither the practitioners nor judges analyse legal rules from the perspective of the theory.

4.4.2. Default Rules Doctrine in Dyna Technologies v. Crompton Greaves

Default rules was used expressly in the sense of the theory only in 2019 in Dyna Technologies v. Crompton Greaves (Srinivasan and Yadav, 2022, 205).[257]

Crompton Greaves and Dyna Technologies entered into a construction contract wherein Dyna Technologies undertook to construct certain ponds, etc. for Crompton Greaves. After a few months into the contract, Crompton Greaves terminated the contract, for which Dyna Technologies claimed compensation. Among other claims, the arbitral tribunal awarded Dyna Technologies about Rupees twenty seven lakhs towards unproductive or idle machinery. This was challenged before the court by Crompton Greaves.

The Single Judge of the High Court upheld this portion of the award. On appeal, the Division Bench set aside that portion of the arbitral award awarding the claim towards

[256] Search was undertaken through LexisNexis database, as on 28.02.2023.
[257] Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., MANU/SC/1765/2019

unproductive machinery. The justification given by the High Court in its decision was that the arbitral tribunal did not support its decision on the said claim with sufficient reasons, in light of the clause in the contract prohibiting claims on account of premature termination.

Dyna Technologies appealed to the apex court and argued that the High Court could not have substituted its own views for that of the tribunal considering the limited scope of a court hearing a petition challenging an award. Crompton Greaves argued that the arbitral tribunal could not have gone beyond the contract and awarded compensation on account unproductive use of machinery.

The court examined Section 31(3), Arbitration Act, which pertained to unreasoned arbitral awards. The court cited the default rule in the Model Law, which provided that an arbitral award should state reasons "unless the parties have agreed otherwise", and held that this rule, which was a default rule, was adopted in the Arbitration Act (Srinivasan and Yadav, 2022). While construing this provision, the court held, the legislative intent in providing for a default rule had to be understood.[258]

While noting that Section 31(3) did not necessitate a detailed award, the court held that, in appropriate cases, courts could imply intelligible and adequate reasons in the award, from a fair perusal thereof. The reasoning, to the court, had to be intelligible, adequate and proper.[259]

On facts, the court made a finding that the award was not clear and had mixed up the facts with contentions, with no clear-cut demarcation. Without supplying the rationale, the tribunal concluded that Dyna Technologies was entitled to compensation on account of unproductive work. Having held so, the court noted that the litigation had taken about quarter of a century to complete and therefore ordered Crompton Greaves to pay Rs. 30 lakhs as full and final settlement of the case.[260]

[258] *Ibid*, Para 29.
[259] Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., MANU/SC/1765/2019, Paras 35-36.
[260] *Ibid*, Para 44.

Thus, this was perhaps the first case where the concept of default rules was employed by an Indian Court in an explicit manner.

4.4.3. Subsequent Decisions

Several decisions quote Dyna Technologies v. Crompton Greaves Ltd. on the principle that India too adopts the default rule provided in Article 31(2) of the Model Law.[261]

ONGC v. Afcons Gunanusa JV[262] provides another illustration of default rules. One of the parties before the Supreme Court argued that since Section 10 (sole arbitrator as the default number of arbitrators) was a default rule, the Fourth Schedule was applied to a sole arbitrator.[263] However, the court held that the wordings of the Fourth Schedule militated against such an interpretation since it referred to the fee payable to each of the three arbitrators.[264]

There are many decisions which employ the term "default rules" but with different connotations.[265]

---

[261] See, for instance, Steel Authority of India Limited v. HTC Engineering (1958) Private Limited, MANU/WB/2408/2023; H.P. Power Corporation Limited v. Hindustan Construction Company Limited, MANU/HP/1945/2023; NHAI v. Consulting Engineering Group Ltd. (08.05.2023 - DELHC) : MANU/DE/2962/2023; Roshan Real Estate Pvt. Ltd. v. Union of India (22.02.2023 - DELHC): MANU/DE/1434/2023; Mas Developers Pvt. Ltd. v. Magus Consortium Orchid Avenue (P) Ltd. (07.02.2023 - DELHC) : MANU/DE/1157/2023; Mittal Pigments Pvt. Ltd. v. Gail Gas Limited (01.02.2023 - DELHC) : MANU/DE/1000/2023.

[262] MANU/SC/1075/2022

[263] *Ibid*, Para 37(xii).

[264] *Ibid*, Para 213.

[265] See, for instance, Innodata India Pvt. Ltd. v. Commissioner of Central Tax, GST and Central Excise, MANU/CN/0001/2024 (taxing statute); Rare Asset Reconstruction Limited v. Sarga Hotel Private Limited, MANU/NC/5155/2023 (insolvency); NHAI v. Trichy Thanjavur Expressway Ltd., MANU/DE/5469/2023 (remission as the normal rule).

4.5. The Conceptual Distinction between Immutable and Mutable Rules in India

The fact that there is hardly any comprehensive or in-depth research in Indian law from the perspective of the Default Rules Doctrine does not mean that such conceptual distinction between default, mandatory and altering rules did not exist at all or that the idea of default rules itself was unknown in Indian law (Srinivasan and Yadav, 2022, 206). Although it is clear that the Default Rules Doctrine and the range of implications that it brings forth have not been analysed hitherto in the Indian legal context, a facet of the doctrine, *albeit* basic, that contract law allows parties to derogate from a number of legal provisions is very much known to Indian law.

There is a catena of cases where this position has been extensively dealt with by Indian courts. The nomenclature has, of course, not been in terms of "default" and "mandatory" rules but in terms of non-imperative and imperative/ immutable provisions (Vardhan, 2017, s 1.5.6; Srinivasan and Yadav, 2022, 205). This distinction is fairly well-entrenched in Indian law.[266]

In the former case, parties cannot contract around the provisions[267], while in the latter cases, parties can. The below survey of decisions is indicative of the well-established distinction in India between imperative and non-imperative legal provisions:

[266] See, for instance, IREO Grace Realtech Pvt. Ltd. v. Abhishek Khanna 2021 SCC OnLine SC 14; Taj Mahal Hotel v. United India Insurance Co. Ltd., (2020) 2 SCC 224; Energy Watchdog v. Central Electricity Regulatory Commission (2017) 14 SCC 80 (Supreme Court); Hindustan Corporation (Hyderabad) Pvt. Ltd. v. United India Fire and General Insurance Co. Ltd., Hyderabad, AIR 1997 AP 347: MANU/AP/0051/1997; Mahendrakumar Chandulal v. Central Bank of India, (1984) 1 GLR 237: MANU/GJ/0121/1983 (Gujarat High Court); Hind Construction Contractors v. State of Maharashtra, (1979) 2 SCC 70: MANU/SC/0031/1979; *Summan Singh*, AIR 1952 PandH 172: MANU/PH/0066/1952; K.R. Chitguppi and Co. v. Vinayak Kashinath Khadilkar, AIR 1921 Bom 164: MANU/MH/0014/1920; K.V.S. Sheik v. The B.I.S.N. Co., (1908) 18 MLJ 497: MANU/TN/0073/1908; Bugwandas v. The Irrawaddy Flotilla Company, (1891) ILR 18 PC 620: MANU/PR/0037/1891.

[267] See, for instance, Taj Mahal Hotel v. United India Insurance Co. Ltd., (2020) 2 SCC 224, Para 36.

Mathoora Kanto Shaw vs. The India General Steam Navigation Co. Limited

One of the earliest decisions dealing with the distinction between imperative and non-imperative provisions of Contract law is Mathoora Kanto Shaw v. IGSNL (*Mathoora Kanto Shaw*).[268]

The case related to several drums of jute that were shipped at Kaligunge for being carried to Calcutta. The goods were lost during transit by the carrier and there was no act of god or act of enemies. The carrier employed due care of the goods bailed to them to the extent a "person of ordinary prudence" would do so in such circumstances. The issue was whether the carrier was liable to compensate the plaintiff for Rs. 296, the value of 72 drums of jute that were lost. If the Contract Act applied, the requirements under Sections 151 and 152, the Contract Act would have exempted the carrier from any liability while if the Contract Act was held to have not altered the existing English common law on liability of common carriers as modified by the Carriers Act, 1865, the defendants were liable.

Richard Garth, C.J., Mitter, J., and H. Prinsep, J. had rendered separate but concurring views while William Fraser McDonell, J. agreed to the conclusion reached in the matter. The issue was if the Contract Act modified the law relating to the law of carriers in India.

Richard Garth, CJ, observed that the law that was then prevailing in India as regards liability of common carriers for goods was the common law as altered by the Carriers Act, 1865. To him, common carriers were entrusted with goods such that breach of that trust an easy matter and consequently, the duty to carry the goods within reasonable time and safely has been entrusted to him irrespective of any contract, as a matter of custom of the realm. In the ten years since the Contract Act was enacted, it was never considered that the Contract Act modified the law on common carriers in India.

[268] MANU/WB/0209/1883

Construing Section 1, Contract Act, the Chief Justice stated that the Contract Act laid down the general rules of contract law absent special contract or usage that was contrary to those general rules. He stated that where there was no such special contract or usage, the general provisions, the Contract Act prevailed but where there was a special contract or usage, the special contract/ usage prevailed. This extensive construction of the general contract law provisions is further reiterated when the Chief Justice observed: "*But it could never have been intended to restrain free liberty of contract as between man and man, or to invalidate usages or customs which may prevail in any particular trade or business*."[269]

The Chief Justice echoed similar views by citing the example of sale of goods predominantly (delivery of goods, resale, and lien), which is a law relating to special contracts. Interestingly, the Chief Justice also gave the example of the provisions on appropriation of payment, which form a part of the general law on contracts. Therefore, the Chief Justice was not only opining on the Contract Act relating to special contracts but even on those dealing with general contracts. Having so stated, the Chief Justice unequivocally decided that these rules were binding only when there was no contrary agreement and that if a person engaged in a trade to choose to contract contrary to these rules, it was not the intention of the said law to prevent them from doing so.[270]

On customs, the Chief Justice was of the view that they introduce special terms into all contracts of a particular trade and alter the existing law and that the Contract Act could not have invalidated customs.[271] Continuing with the same line of reasoning, the Chief Justice concluded that the law that was prevailing then was a custom of the trade.[272] But what if there was a contradiction between a custom and a contract? The Chief Justice sought to answer this by holding that the custom operated even if there was a contract to the contrary.[273]

---

[269] Available at https://archive.org/stream/in.ernet.dli.2015.125174/2015.125174.The-Indian-Contract-Act-1872-Vol1_djvu.txt (09.05.2023). Also see, MANU/WB/0209/1883, Para 5.
[270] MANU/WB/0209/1883, Para 6.
[271] Available at https://archive.org/stream/in.ernet.dli.2015.125174/2015.125174.The-Indian-Contract-Act-1872-Vol1_djvu.txt (accessed 09.05.2023).
[272] MANU/WB/0209/1883, Para 6.
[273] *Ibid*, Para 7.

Justices Mitter and Princep did not state the law radically in those terms that the Chief Justice did. They simply construed Sections 1, 151 and 152 and held the defendants liable for having failed to take due care.

Mitter, J.'s decision has an interesting angle regarding altering rules. He compared the provisions in question with Section 10, the Indian Railway Act, 1879::

"*Every agreement, purporting to limit the obligation imposed on a carrier by railway by Sections 152 and 151 of the Indian Contract Act in the case of loss, destruction or deterioration or damage to property shall be void unless it is signed by the party sending it and is in a form approved by Government*."

While discussing the nature of Section 10, Mitter, J. observed that the said provision did not declare the measure of liability- it was not a substantive provision laying down the liability. Rather, the provision prescribed the specific mode through which the carrier could reduce the liability below a certain degree.[274] This rule then is nothing but an altering rule.

K.V.S. Sheik v. The B.I.S.N. Co.

Another decision of similar vintage is that of K.V.S. Sheik v. The B.I.S.N. Co.[275] ("Mahamad Ravuther"). The decision, especially the opinion of Chettur Sankaran Nair, J., is cited even today.[276]

It had to be decided whether the defendants were liable for loss of 246 bags of rice carried by the them from Rangoon to Tuticorin under a bill of lading. The municipal authorities destroyed these goods because they were damaged owing to being drenched

[274] MANU/WB/0209/1883, Para 12-13.
[275] (1908) 18 MLJ 497: MANU/TN/0073/1908
[276] See, for instance, Taj Mahal Hotel v. United India Insurance Co. Ltd., MANU/SC/1566/2019, Para 27 and 28 (holding that Sankaran Nair, J.'s views occupy the field in respect of common carriers and liability of hotels for customers' vehicles parked in hotel premises).

in the rains in the Tuticorin port. The question was whether the carrier was liable for negligence for unloading the goods or not.

The Full Bench gave three separate opinions, each of them differing on some or the other respect with the other. Arnold White, CJ. held that while a common carrier in principle could exclude liability under Section 151, such contracting out of liability should be on clear and express terms. White, CJ., found that the concerned contract did not so contract out liability. On the other hand, Wallis, J. held that the concerned contract did contract out the carrier of liability and therefore the owner was not liable. But Sankaran Nair, J. agreed with White, CJ. on the conclusion that the carrier was liable. But on the question as to whether the carrier's liability could be contracted out, Sankaran Nair, J. held that the carrier's liability could not be contracted out, owing to the manner in which Section 151, the Contract Act was worded. Sankaran Nair, J. further held that where the Contract Act permitted derogation from the statute, it explicitly stated so.

Sankaran Nair, J. referred to *Mathoora Kanto Shaw* and held that the Calcutta High Court did not consider the issue as to whether the clause in question was illegal or not.[277] Further, Sankaran Nair, J. asked an important question: if English law allowed such contractual stipulations exempting the carrier from all liability even in case of negligence, why should Indian law allow the same if the law in India is different?[278] Sankaran Nair, J. accordingly held: "*No words can take the case out of the operation of the rule of law or exempt the party from liability for damages*."[279]

The view of the Chief Justice in *Mathoora Kanto Shaw* that parties had the free liberty to contract notwithstanding statutory law is questionable. Surely if the Contract Act did not intend to restrain the free liberty of persons to contract, why was it enacted in the first place? It could not have been more than a Model Law in that case with no legal effect. The purport of the opinion of the Chief Justice was to make the entire Contract

[277] K.V.S. Sheik Mahamad Ravuther v. The B.I.S.N. Co, MANU/TN/0073/1908, Para 31.
[278] *Ibid*, Para 33.
[279] *Ibid*.

Act a set of default rules, which parties could derogate from in an unrestrained manner. This could never have been the objective of the enactment.

The entire set of decisions arose because the English law on carriers imposed the liability on the ship owner for negligence of its servants. Section 152, the Contract Act stated that the bailee (in this case the ship owner) is not responsible for loss of the goods if he took care of the goods akin to a man with ordinary prudence, who would exercise similar care and of his own goods.[280] Section 152 also contained the phrase "in the absence of any special contract", which meant that the consignor and the ship owner could agree to alter Section 152. However, a similar phrase was not used in Section 151, Contract Act. So, whether the Contract Act altered the position in English law as it stood prior to 1872.

R. Chitguppi and Co. v. Vinayak Kashinath Khadilkar

R. Chitguppi and Co. v. Vinayak Kashinath Khadilkar[281] ("*Chitguppi*") decided by the Bombay High Court dealt with what we now call as default rules. Here, a contract of sub-agency was signed between plaintiffs and defendant no. 1 in October 1909, wherein defendant no. 1, the sub-agent, was to sell goods of the plaintiffs for a price. The sub-agent was to get a commission at a fixed rate.

Defendant no. 2, Vinayak Kashinath Khadilkar, wrote a letter of guarantee and indemnity undertaking to indemnify the plaintiffs against all losses, damages and expenses whatsoever the plaintiffs might suffer by reason or in consequence of any default on the part of the sub-agent. It was also agreed that plaintiffs could refuse further credit or supply of goods to the sub-agent or grant any time or indulgence to sub-agent, without notice to defendant no. 2 and that defendant no. 2 will be jointly and severally liable along with defendant no.1. Thereafter, the terms of sub-agency regarding commission of the sub-agent were varied in 1910 without notice to defendant no.2.

[280] Available at https://archive.org/details/IndianContractAct1872/page/n1/mode/2up (accessed 09.05.2023)
[281] MANU/MH/0014/1920

Certain claims arose and the plaintiff sued the defendants. The lower court disallowed the plaintiff's claim against defendant no.2 because of by virtue of Section 133, the Contract Act, there was a variation in contractual terms between the principal debtor (defendant no.1) and the beneficiary (plaintiffs) in the absence of any notice to the surety (defendant no.2) which discharged the surety. The plaintiffs therefore appealed against the decision as regards defendant 2., but to no avail.

The issue before the court was if the above variation discharged the surety from all subsequent liability. The appellants-plaintiffs argued that the surety's letter of guarantee and indemnity waived in anticipation such variation in terms of the contract. However, the respondent-defendant no.2 argued that such a consent in anticipation of the variation was not contemplated in Section 133, the Contract Act.

The Bombay High Court through LA Shah, J. held that there was no express provision in the letter of guarantee and indemnity that the surety would be disentitled from claiming the advantage of the legal consequences of a variation in the terms of the sub-agency agreement.[282] But such consent in anticipation of the variation without knowing the nature of variation was, according to the court, not contemplated in Section 133, Contract Act.[283]

On facts, the variation was held to be of one of the principal terms in the contract: a general clause in the letter or indemnity or guarantee waiving all rights under statutes cannot be taken to be implying a consent for variation under Section 133. The High Court clarified that it was not that a surety could never anticipate a variation and consent to it prior to the variation. However, no consent, whether general or particular, was provided to the sub-agency agreement's variations. On that basis, the court upheld the decision of the lower courts in absolving defendant no.2 of liability.[284]

[282] MANU/MH/0014/1920, Paras 3 and 4.
[283] *Ibid*.
[284] *Ibid*, Para 5.

In a separate decision, MHW Hayward, J. agreed with LA Shah, J. but made certain pertinent observations, summarised below[285]:

- The surety and not the court judges the materiality of the variation. If his consent is not obtained, Section 133 comes into play.
- It has been argued that Section 1, Contract Act states that it would not affect an incident of a contract which is in consonance with the said Act and that the guarantee- indemnity letter provides that complete liberty was provided by it to make changes despite Section 133.
- The concerned provisions in the letter of the guarantee and indemnity were not in consonance with the Contract Act. When it was the intent that parties could derogate from the statute, the Act allowed to do so by introducing phrases such as "*in the absence of any contract to the contrary*" such as in Section 146 and other sections in Contract Act.

Thus, Hayward, J.'s view was that parties could derogate from the relevant provision, the Contract Act where such provision expressly allowed so through the appropriate language.[286]

Thus, we see diametrically different set of views emerging in these decisions in the pre-independence period. On the one hand, there is *Mathoora Kanto Shaw* where a Full Bench of the Calcutta High Court kept party autonomy paramount and even above the mandatory provisions, the Contract Act, while *Chitguppi* was a decision where court held that where contract law allowed parties to derogate from certain provisions, it stated so explicitly. Sankaran Nair, J.'s view in Mahamad Ravuther's case also seem to support the view of Hayward, J. in *Chitguppi.* In other words, these pre-independence decisions more-or-less did not recognise implicit default rules.

S. Summan Singh v. National City Bank of New York, Bombay

[285] MANU/MH/0014/1920, Para 6.
[286] *Ibid*, Para 6.

S. Summan Singh v. National City Bank[287] ("*Summan Singh*"), a decision rendered within a few years after independence, is notable in the context of the current discussion. It explicitly recognised (in respect of provisions other than bailment) that parties could exclude the Contract Act only when it explicitly stated so. The case involved wrongful transfer of money from Panama by National City Bank of New York (NCBNY) through Punjab National Bank (PNB). The transfer was from the account of one Summan Singh to one Pritam Singh. The money had been wrongly received by another Pritam Singh. Therefore, Summan Singh sued the banks.

The National City Bank (NCBNY), the first defendant, argued that they had carried out the Plaintiff's directions and that the plaintiff had acted in a negligent manner by not communicating to the defendant immediately about not receiving the money and not informing the complete details of the intended payee. Another contention that the bank raised was that it was exempted under the exemption clause from any mistake, fault or negligence or by such acts of its sub-agent. Defendant no. 2, the Punjab National Bank (PNB), contended that it had verified the complete details and made necessary payments.

The trial court held that there was no contractual privity between plaintiff and defendant no. 2, who was merely a sub-agent. Further, in view of the exemption clause in the agreement between the plaintiff and the first defendant, the suit was dismissed.

Summan Singh appealed. The High Court had to decide whether there was privity of contract and whether the exemption clause in the contract operated in contracting out Section 192, the Contract Act. It is pertinent to note that Section 192, the Contract Act did not explicitly allow parties to contract out the provision.

The High Court held that there was no contractual privity between the plaintiff and defendant no. 2, who was at the most a sub-agent, and not liable to the plaintiff. The

[287] AIR 1952 PandH 172: MANU/PH/0066/1952

court relied upon an admission to that effect in the advocate notice issued on behalf of the plaintiff to the defendants before commencement of the suit.

As regards the liability of defendant no. 1, the High Court opined that the words of the exemption clause were clear and there was no ambiguity: they exempted the bank for acts of its sub-agent.

On the issue relating to whether Section 192 could be contracted out, the court cited various decisions rendered in the context of bailment which upheld contractual clauses contracting out Section 151, the Contract Act. On that basis, the court upheld the contractual provision. Thus, it could be seen that even within a few years after independence, Indian law recognised that parties could contract out provisions of contract Act, even where there was no explicit stipulation to that effect in the text of the statute.

However, this was not the end of the debate regarding contracting out the duty of care under Section 151, Contract Act. More than thirty years after *Summan Singh*, the Gujarat High Court's construction of Section 151, Contract Act rendered nugatory precedents that were rendered almost a century ago. This judgment is discussed below.

Mahendrakumar Chandulal v. Central Bank of India

In Mahendrakumar Chandulal v. Central Bank of India[288], Mahendrakumar Chandulal, the appellant, opened a pledge account with the Central Bank of India and pledged bales of cloth. These were kept in a godown of Central Bank and were in its direct control and supervision. The keys were with the bank. When Central Bank had to operate the godown, it did so in the presence of an agent of Mahendrakumar Chandulal.

[288] (1984) 1 GLR 237: MANU/GJ/0121/1983

After some time, when the agent of the appellant went to take delivery of a few bales, there were four bales missing and so the appellant sued the bank. The trial court dismissed the suit. On appeal, the question was whether the bank was liable.

The court interpreted Sections 151 and 152, Contract Act and held that while Section 152 explicitly allowed parties to enter into a special contract derogating from that provision, Section 151 did not.[289] Consequently, it held that the phrase "in the absence of any special contract" meant that parties could agree for a more onerous obligation on the part of the bailee and not that they could agree to exempt the bailee from any liability at all.[290] The High Court devoted a substantial number of paragraphs analysing precedents so as to distinguish the case before the Court.

Thus, the court was only in favour of limited derogation from the Contract Act, when the specific provision permitted so. The alternative view is that the Gujarat High Court so held only in the context of Sections 151 and 152 taken together.

Hindustan Corporation (Hyderabad) Pvt. Ltd. v. United India Fire and General Insurance Co. Ltd.

Another decision dealing with the question as to whether parties could contract out a rule in contract law was dealt with by the Andhra Pradesh High Court in Hindustan Corporation v. United India.[291]

The 2nd respondent entrusted 41 bales of sheep skin to be carried by Hindustan Corporation (Hyderabad) Pvt. Ltd., the appellant from Hyderabad to Chennai. The recipient found that several sheep skin were wet and damaged. The recipient raised a claim the insurance policy issued by the 1st respondent, United India Fire and General Insurance Co. Ltd., which was assessed at about Rs. 16,000/-. The 1st respondent

[289] MANU/GJ/0121/1983, Para 12
[290] MANU/GJ/0121/1983, Para 13
[291] AIR 1997 AP 347: MANU/AP/0051/1997

subrogated its rights to the 2nd respondent insurer, which claimed compensation from the appellant for negligence which led to the damage of the goods

The trial court found negligence of the appellant and the 2nd respondent held the former liable for half of the losses and decreed the suit partially. Appeal filed was rejected by a Single Bench of the Andhra Pradesh High Court on the ground, *inter alia*, that the appellant was liable for breach of contract to deliver goods by a common carrier under Section 8, the Carriers Act, 1865. The single Judge stated that since the negligence was caused to the goods in transit, the appellant was liable.

The appellant filed an intra-court appeal (letters patent appeal) and submitted that it was not liable since the consignment notes stated that goods were at the owner's risk.

The Division Bench of the Andhra Pradesh High Court had to decide two broad issues: first is relevant for the present purposes, being whether liability for negligence could be contracted out and the second aspect was regarding the subrogation of the rights of the insured by the insurer.

The court took note of Sections 6 and 8 of the Carriers Act, 1865, which dealt with the issues before it. According to the court, Section 6 allowed limitation of its liability by carrier through a specific agreement in respect of the owner's goods and Section 8 limited such contracting out of liability through a non-obstante clause.[292] The court also took note of Section 9 which cast the burden on the carrier to establish the absence of negligence and held that the purport of the Section 8 was to state that the carrier could not contract out liability for negligence.[293] Consequently, the liability in Section 8 was held to be absolute and could not be wriggled out of the carrier's burden in Section 8.[294]

[292] MANU/AP/0051/1997, Para 10.
[293] *Ibid*, Para 12.
[294] *Ibid*, Para 12.

Energy Watchdog v. CERC

Energy Watchdog is an important decision on the construction of force majeure and change of law clauses. With regard to the current work, it also deals with default rules in the Contract Act.

Facts: In February 2006, Gujarat Urja Vikas Nigam Limited (GUVNL) invited proposals for long term power supply. The bidders were to quote their tariff and were allowed to quote the tariff with considerable flexibility: they could quote any tariff, be it escalable or otherwise, party escalable tariff or otherwise. A consortium led by Adani Enterprises submitted its bid in January 2007 for a levelized tariff, which did not contain an escalable component. Adani Enterprises had made its arrangements for coal both domestic and international. Based on its bid, the Adani Consortium was selected as the successful bidder. In 2010 and 2011, Indonesia amended its law regarding coal, by which the export price of coal was aligned to the prices in international market, as opposed to the then prevailing price.

In 2012, Adani invoked the Central Electricity Regulatory Commission (CERC) under Section 79, Electricity Act, 2003[295] ("Electricity Act or "2003 Act"") stating that the Indonesian change in law resulted in discharge of the Adani Consortium from performance of the Power Purchase Agreement signed between GUVNL and the consortium. The ground for discharge, according to the Adani Consortium, was frustration. Adani also stated that the Indonesian regulation also had the effect of change in law, which required a mechanism to be evolved to restore the Adani Consortium to the economic condition that existed prior to the occurrence of the circumstance which was a change of law.

Procedural History: There were issues relating to jurisdiction that were raised but these are not relevant for the topic and therefore are excluded. On merits, the CERC, in its order in April 2013, rejected the claim the petition on grounds of force majeure and

[295] Section 79 of the Electricity Act, 2003 deals with the functions of the Central Electricity Regulatory Commission.

change of law. At the same time, the CERC held that it was exercising its jurisdiction under Section 79 of the 2003 Act and held that it had the jurisdiction to redress grievances of generating companies in the larger public interest and ordered constitution of a Committee to examine the difficulties faced by the Consortium for finding an acceptable solution to the situation.

On appeal, the Appellate Tribunal for Electricity (APTEL) held in April 2016 that force majeure was established on facts and overturned the decision of the CERC. The APTEL also held that once there was a Power Purchase Agreement (PPA), the CERC could not exercise its power under Section 79 of the Act. The APTEL also held that the provision in the PPA regarding change in law was not applicable to change of foreign law. Accordingly, the APTEL remanded the matter to the CERC to examine the effects of the force majeure circumstances in order to grant compensatory tariff to Adani Consortium. The CERC, in its order in December 2016, determined the compensatory tariff on account of force majeure declared by the APTEL.

Decision of the SC: On the issue of force majeure, the Court held that "force majeure" was governed by the Contract Act. At the same time, if there was an express or implied clause on force majeure in a contract, as was in the PPA in this case, Chapter III, the Contract Act regarding contingent contracts applied. This included Section 32 of the said Chapter. If there was a force majeure event yeond the contract, Section 56 governed the scenario.

The court held that the position preceding Taylor v. Caldwell[296] was that an agreement had to be performed even if had become impossible to perform owing to fault of neither of the parties: it was only in the decision of Taylor v. Caldwell that this rigidity was loosened. In this decision, it was held that if the events occurring during performance of the contract made it impossible of performance, such contract need not be performed. The Supreme Court held that this position was reiterated in the Indian cases such as

[296] MANU/UKWQ/0001/1863

Satyabrata Ghose v. Mugneeram Bangur and Co.[297] and Naihati Jute Mills Ltd. v. Hyaliram Jagannath.[298]

At the same time, the Court held that the doctrine of frustration was to be confined within narrow limits and could not be applied where the performance through alternative mode became much more expensive. The Supreme Court cited the example of Tsakiroglou and Co. Ltd. v. Noblee Thorl GmbH[299] where the contractor was liable for performance of shipping of groundnuts from Hamburg to Sudan even when the Suez Canal closed, requiring the shipment to cover three times the original distance and therefore more expensive.

In the doctrine of frustration, a multi-factorial approach had to be, according to the court taken and factors to be considered included contractual terms, context, "knowledge of the parties, their expectations, assumptions and contemplations", objectively assessable risks at the time of contracting, nature of the supervening event, parties' calculations, reasonable and objectively ascertainable, as to future performance in the light of the supervening event and the changed circumstances. In circumstances where allocation or assumption of risk is not clear, the "radically different" test was relevant. Based on its assessment, the Supreme Court refused to hold that the contract was frustrated since:

- There was no change in the fundamental basis of PPAs,
- The PPAs did not require coal to be sourced only from Indonesia and at a specific price.
- As per the PPA, the Price of coal is for the power plant to bear.
- The requirement of appending the fuel supply agreement to the PPA is only for indicating that there was raw material for the power plant.

The Court considered that since the power plants knew1 at the time of submission of their bids providing zero variable tariff that there could be a risk of an unexpected

[297] MANU/SC/0131/1953 : 1954 SCR 310
[298] MANU/SC/0348/1967 : 1968 (1) SCR 821
[299] 1961 (2) All ER 179

increase in coal price. Hence, they could not be absolved from performing their contract on this count. The Court clarified that merely because the bidder quoted non-escalable tariff did not mean that they could never raise the plea of frustration, which the generator could have been otherwise entitled to. At the same time, the court opined that this was a factor to be considered.

Interestingly, the court held that mere presence of a force majeure clause did not exhaust the possibility of unforeseen events occurring but the generator's argument was that as long as the performance was hindered by an unforeseen event, the force majeure clause applied. The court stated that force majeure clauses had to be narrowly construed and in the present context it required something that partly prevented performance of the contractual obligation. The rise in price of coal was excluded by the contractual clause in the PPA (Clause 12.4).

The court also rejected the contention regarding applicability of change of law clause as the clause in the PPA covered change of Indian law and not Indonesian law. At the same time, where Indian coal was to be used, the court held that any change in Indian law affecting the economic position, was to be resolved by applying the change of law clause.

Accordingly, the court remanded it to CERC to look at the matter afresh considering the Supreme Court's decision on the relief to be granted to the power generators.

The Supreme Court's conclusions as regards applicability of Chapter III, the Contract Act on contingent contracts to a contract containing a force majeure clause is interesting. Going by the court's decision, where there is a force majeure clause, Chapter III on contingent contracts applied but in the absence of such as clause Section 56 applied. The mere possibility of a force majeure clause does not, for the court, exhaust the possibility of unforeseen events occurring. How this aspect can be reconciled with the view that Chapter III would apply where a clause exists is a matter that requires further analysis, not within the scope of this research. At the same time,

this issue could be resolved by viewing Section 56 as a default rule which could be contracted around by parties.

Taj Mahal Hotel vs. United India Insurance Co. Ltd.

Taj Mahal Hotel v. United India Insurance Co. Ltd.[300] is also an interesting case on immutable and mutable rules and is worth discussing in detail.

Facts: Owner of a car parked his car in the hotel. The car was stolen from hotel premises. Respondent No. 1, the insurer with whom the owner had insured the car, paid the claim by the car owner for the stolen car, and further to subrogation, the insurer (along with the owner) approached the State Dispute Redressal Commission established under the consumer protection law ("State Commission") seeking payment of the car and compensation for deficiency in service.

Procedural History: The State Commission allowed the complaint and asked the hotel to pay the value of the car with interest to the insurer. On appeal to the National Consumer Dispute Redressal Commission ("National Commission"), the Commission dismissed it. Hence, appealed to the apex court.

Decision: On the question as to liability of the hotel for theft of car taken for valet parking under the law of bailment, the Supreme Court traced the history of the liability, which had received ample attention in common law jurisdictions. The court held that at common law, the innkeepers were liable strictly for losses/ damage to the guest's horse or carriage within the premises of the inn, exceptions being act of God, act of public enemy, fault or negligence of the guest.[301]

When modern automobiles became the norm, the common law rule of strict liability of innkeepers were extended to such transportation and it was held that the liability applied

[300] MANU/SC/1566/2019
[301] Dickerson v. Rogers, 4 Humph 179 (1843).

even to automobiles kept in the space near the hotel when the porter gave directions to do so.[302] The liability of innkeeper over her guests' automobiles existed even if the parking space was provided free of charge.[303]

The Supreme Court referred to the English Law Reform Commission's recommendations in 1954 that liability was to be imposed on the innkeeper only for negligence and the enactment of the (English) Hotel Proprietors Act, 1956, which remained the position in the United Kingdom. Thus, the court took note of the English position that while strict liability was imposed on the hotel for the guest's property such liability was excluded in the case of guest's automobiles. The Court also noted that in Singapore, the Innkeeper's Act, 1921 excluded car or carriage from strict liability and so did several states in Australia. At the same time, some states in the United States of America such as Oklahoma and Utah applied the rule of strict liability.

The Supreme Court also found that many states in USA and some common law countries adopted what is known as the "prima facie liability rule" under which the hotel was presumed to be liable for loss/ damage to the guest's vehicle but the hotel could exclude liability by establishing that such loss was not due to its fault or negligence. The court held that there were no instances of Indian courts applying the rule of strict liability on a hotel owner.

Having analysed the position, it considered the rule of strict liability as unduly burdensome on the hotels and emerged when travel and tourism were rare. From a tourism economics perspective, the court noted the trend of several jurisdictions of moving away from strict liability. The Court also noted the socio-economic conditions in India where imposition of strict liability on hotel owners was not in proper. In addition, the court also noted that guests could visit hotels not only for staying but for other purposes as well and in those situations, imposing strict liability without

[302] Aria v. Bridge House Hotel (Staines) Ltd., (1927) 137 LT 2994
[303] Williams v. Linnitt, 1 ALL E.R. 278 (Eng. 1951)

negligence would lead to grave injustice. The owner had the wherewithal to explain that it had exercised due care.

On the other hand, the court also noted that visitors parking their cars in the hotel could not be left to the mercy of the hoteliers and that a balance has to be struck. Accordingly, it applied the *prima facie* liability rule in the said circumstances and noted that where a relationship of bailment is established, whether through parking or handing over of vehicle for valet parking, the hotel would, prima facie, be liable for loss or damage to the vehicle of its guest. In such cases, according to the court, the parking token was evidence of bailment of goods and an obligation by the bailee to park the car and return it in suitable condition when the car owner directs. This would be applicable even when the bailment is gratuitous, that is, when the hotel offers complimentary valet or parking services.

Once the bailment is established, the question is the extent of care to be taken the hotel to a guest's vehicle. The court held that as regards five star hotels, the responsibility or the duty of care is much higher, in that the hotel is liable so as to reasonably prevent loss/ theft of guests' goods. It is not sufficient merely to engage a security guard to take responsibility but additional steps were to be deployed to protect against likely wrongful loss or damage, such as keeping car keys outside the reach of the outsiders, maintaining parking spaces with CCTC cameras installed, etc. The court also clarified that the parking fee charged was irrelevant since the duty of care was irrespective of the consideration or the lack of it.

The court clarified that section 152, Contract Act excluded a bailee's liability for damage of the goods if she could establish she took reasonable care.

As regards liability of common carriers, the court affirmed that Sankaran Nair, J.'s views in Mahamad Ravuther's case[304] held the field: common carrier's liability was absolute and could not be contracted out by virtue of Section 152, Contract Act,

[304] MANU/TN/0073/1908

according to the court.[305] This is especially considering that the hotel is well-placed to make sure of the safe custody of the vehicle. If this is allowed to be excluded by contract, the protection would become illusory. Therefore, although Section 152, the Contract Act employed the phrase "in the absence of any special contract", this did not mean that the bailee could reduce its duty to care under Section 151. This only meant that the bailee could agree to a higher protection than as guaranteed in Section 151 but not a lower standard. Such an interpretation flowed from a literal reading of Section 152. The court held in this regard:

"*It is important to clarify that though courts may have construed the phrase 'in the absence of any special contract' in Section 152 to mean that a bailee can reduce his liability Under Section 151, such an interpretation is incorrect. The words 'in the absence of any special contract' in Section 152 clearly indicate that it is open to the bailee to accept a higher standard of liability than Section 151 under contract, and not otherwise*."

At the same time, the court clarified that the hotel would not be liable in all cases- in case of negligence due to third parties, the bailor's own negligence or unforeseen circumstances beyond the bailee's control, where such circumstances could not be foreseen with ordinary diligence, would exclude liability of the bailee.

Applying the law discussed to facts, the court held that while robbery by force was beyond bailee's control, a simple theft of a vehicle without involving any force meant that it was the bailee's burden to explain that the loss was not attributable to the bailee's neglect or want of car.

It is significant that the Supreme Court upheld the views of Sankaran Nair, J. in K.V.S. Sheik v. The B.I.S.N. Co.[306] on the interpretation of Section 152, Contract Act. This is despite the existence of a contrary view for a considerable number of decades that

[305] Nath Bros. v. Best Roadways Ltd. MANU/SC/0200/2000
[306] (1908) 18 MLJ 497: MANU/TN/0073/1908

Section 152 permitted the parties to reduce the liability of the bailee or even contract it out under Section 151.[307]

4.6. Jurisprudential Analysis of Decisions on Distinction between Immutable/ Mandatory and Mutable/ Default Rules

A perusal of the aforesaid decisions lead to the inference that Indian courts have taken three distinct approaches on the distinction between immutable and mutable provisions

i. **Explicit Default Rules Alone Recognised**: Only when the Act expressly provides that a provision could be contracted around can it be contracted around.[308] This approach entailed a strict construction of the rules of Contract Act and allows contracting out or around when expressly provided in the Contract Act. Examples of such provisions, which are in force, are, include Sections 163, 165, 170, 171, 174, 202, 219, 221, and 230.

ii. **Judicially Recognised Restrictions even in Explicit Default Rules**: Even if the Act expressly provides that a provision could be contracted around, such contracting around is limited.[309]

iii. **Implicit Default Rules have been Recognised**: Even if a provision is not expressly drafted as allowing contracting around, parties could do so in specific situations and except when law prohibits it or it is against public policy.[310]

---

[307] See, for instance, Law Commission of India, 13th Report: Contract Act, 1872 (1958), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080532.pdf (accessed 29.12.2022); Fut Chong vs. Maung Po Cho (06.03.1929 - RANGOON) : MANU/RA/0097/1929; B.I.S.N. Co. Ltd. v. Ali Bhai Mahomed, 1920 SCC OnLine LB 17: AIR 1920 Lower Burma 139: [1920] 10 L.B.R. 292: 62 I.C. 378 (F.B.); Mahamad Ravuther, MANU/TN/0073/1908.

[308] See, for instance, The Official Assignee v. Madholal Sindhu, MANU/MH/0052/1946, Para 57; UOI v. Pearl Hosiery Mills, MANU/PH/0085/1961, para 25.

[309] See, for instance, Mahamad Ravuther, MANU/TN/0073/1908, per Sankaran Nair, J.; Park Street Properties Private Limited v. Dipak Kumar Singh and Anr., MANU/SC/0960/2016, Para 12

[310] See, for instance, *Summan Singh*, MANU/PH/0066/1952; Lachoo Mal v. Radhey Shyam, MANU/SC/0715/1971; City bank N. A. New Delhi v. Juggilal Kamalapat, MANU/DE/0004/1982; T. Raju Setty v. Bank of Baroda, MANU/KA/0013/1992; Sita Ram Gupta v. Punjab National Bank and Ors., MANU/SC/7385/2008; HB Basavaraj v Canara Bank Corporation MANU/SC/1785/2009.

These three approaches have been typified in several Indian decisions at various points of time. Indian law has over the past 150 years has dealt in detail with the imperative and non-imperative provisions of contract law.

Mere recognition of explicit default rules cannot be the only justification for disregarding implicit default rules in the Contract Act. There are umpteen judgments which recognise contract law provisions as default rules even when they do not expressly provide for contracting around.[311] Therefore, the first approach which merely relies on the text of the statute is not a correct approach. Another aspect that supports this conclusion is that legislations such as the Contract Act, the Transfer of Property Act, etc. are several decades old and therefore the question as to whether a rule is a default rule or otherwise cannot be simply looked at based on decisions that were rendered, say, in 1900. Their relevance to the present circumstances has to be explored. Unlike international instruments such as the CISG or PICC 2016 where there is a marked distinction between default and mandatory rules, these statutes do not have such clear-cut distinctions.

Further, the test regarding determination of whether a rule is an implicit default rule or a mandatory rule devised by courts in India is public policy.[312] As recently as in PTC India Financial Services Limited vs. Venkateswarlu Kari[313], the apex court observed:

"*Where the Contract Act prescribes a particular term that is binding, the statutory mandate must be followed by the parties. Neither party can contract out of it.*

[311] See, for instance, T Raju Shetty v. Bank of Baroda, MANU/KA/0013/1992 (Sections 133 to 135, 139 and 141, Contract Act); The Bank of Bengal v. M. Pogose, MANU/WB/0055/1877 (Section 132, Contract Act); Sita Ram Gupta v. Punjab National Bank and Ors., MANU/SC/7385/2008 (Section 130); Raigad Concrete Industries v ICICI Bank, 2009 SCC OnLine Bom 727 (Section 125); Maharashtra State Electricity Board v. Sterilite Industries (India), MANU/SC/0627/2001 (Section 73 para 1)

[312] See, for instance, Lachoo Mal v. Radhey Shyam, MANU/SC/0715/1971; City bank N. A. New Delhi v. Juggilal Kamalapat Jute Mills Co. Ltd., Kanpur MANU/DE/0004/1982; T. Raju Setty v. Bank of Baroda, MANU/KA/0013/1992; Sita Ram Gupta v. Punjab National Bank and Ors., MANU/SC/7385/2008; HB Basavaraj v Canara Bank Corporation MANU/SC/1785/2009; All India Power Engineer Federation v. Sasan Power Ltd, MANU/SC/1567/2016, Para 20; Vikraman Nair v Aishwarya, 2018 (4) KLJ 528; Rajesh R. Nair v. Meera Babu, 2013 (1) KLT 899; xxx v. yyy, Order dt. 03.02.2023 in RPFC No. 327/2022, Kerala High Court; MBL Infrastructures Limited v. Delhi Metro Rail Corporation, MANU/DE/8454/2023, Para 15.

[313] MANU/SC/0629/2022 (hereafter "PTC India Financial Services Limited")

Otherwise, the legislative command that the statute imposes would be violated with immunity by merely incorporating waiver as a contractual term, depriving the frailer party of the benefit of the legal protection. A condition prescribed to protect and benefit the public cannot be dispensed with when it lays down a Rule of public policy."[314]

This test is inadequate in justifying interference to party autonomy where the transaction involved is between two parties and the transaction is such that it does not affect the society at large. For instance, take the mandatory requirement of reasonable notice under Section 176, Contract Act before the pawnee sells goods pawned on default of the pawnor. It would be stretching the limits of "public policy" too much to call for interference in an agreement wherein a pawnor and a pawnee agree that the pawnee need not give any notice to the pawnor for sale of pledged goods because the transaction does not really affect public at large or is not of such nature that public interest can be readily inferred to have been affected due to such an agreement.

The object of the notice requirement is to protect the pawnor's redemption rights over goods pledged before it is sold (Vardhan, 2019, 1577). This chance is given, perhaps, to prevent the pawnor from being divested and/ or arm-twisted into divesting with her property that is pledged with the pawnee. The provision really creates a balance: on the one hand, it allows the pawnor to redeem the goods sold by paying back the debt, and, in doing so, does not make the pawnee worse off: all the pawnee needs to do is give reasonable notice of sale. So, what this provision really does is to protect against an internality: the possibility of the pawnor being divested of the property wrongly. This is a typical example of an internality: an adverse effect produced by a contractual set-up on a contracting party (Zamir and Ayres, 2020, 287).

It is the Default Rules Doctrine, specifically, the insight that mandatory rules target internalities and externalities, that can explain comprehensively and justify mandatory

[314] PTC India Financial Services Limited, MANU/SC/0629/2022, Para 7.9.

rules. The public Policy test is not adequate to fully explain and justify mandatory rules and doing so would stretch the semantic content of public policy too far.[315]

Another test employed by Indian courts is to differentiate between contract law rules meant for the benefit of persons and those which require agreements to be made in a specific manner/ proscribe certain terms.[316] According to courts, the former category could be waived while the latter category, could not be. Although this is a better test, it does not fully explain/ justify construing certain rules as mandatory rules in contract law because it does not deal with a situation that happens subsequent to formation of contract. For instance, Section 176 contains the mandatory notice requirement prior to sale by the pawnee. A literal reading of the provision will not signify proscription of a term waiving off the requirement. It is only an understanding of the idea that mandatory rules are meant to address the problems of internalities and externalities that will give a complete picture on the issue.

The second approach, albeit rare, is that even where the provisions of law allow contracting around, courts still limit the liberty to contract around to only certain situations. Examples of this approach are Section 152, Contract Act (regarding liability for bailee for loss caused to the goods bailed) and Section 106, Transfer of Property Act (regarding notice to terminate tenancy). Courts have given the justification of public policy, but the justification is inadequate because the liberty to contract around is, in reality, constricted to protect against an internality or an externality.

Where there are no clear-cut recent precedents on the question whether a particular rule is could be contracted around or not, the better test is whether the rule proposed to be a mandatory rule protects against an internality or an externality.

Party sophistication may also play a marked role in classifying the application of a rule as a default rule in specific contexts. Since mandatory rules may be intended protect

[315] For a semantic analysis of the public policy doctrine in India, see, Srinivasan (2008, 6 -13).
[316] PTC India case, MANU/SC/0629/2022, Para 7.10.

against internalities, sophisticated parties may be willing to contract around a rule. In such cases, the judicial system must be responsive to make a proper choice because attributing weight to sophistication is a means to further competing values of contract law (Miller, 2010; Miller, 2013, 660).[317] However, courts should be careful in employing these criteria because the "bargaining power" criteria used in the context of government contracts is unsophisticated. Courts should provide proper criteria to identify whether a transaction is between sophisticated parties (Miller, 2010, 496). There is a possibility of courts misbranding agreements involving unsophisticated parties as sophisticated (Miller, 2010, 496). This would contribute immensely to predictability of law (Miller, 2010, 536).

4.7. Default Rules Doctrine and Indian Legal Academia

Legal education forms the first step where law students study legal theories and concepts. The manner in which legal academics in India has dealt with the theory will provide insights on how far it has been absorbed into the legal system.

Literature on the Default Rules Doctrine in India is not extensive. The classical Indian commentary on the Contract Act, "Pollock and Mulla's Indian Contract Act, 1872" (Vardhan, 2018), does not list out "default rules" in the index (Srinivasan and Yadav, 2022, 205). Other prominent commentaries in India on contract law also do not devote a section on default rules.[318] Books in India dealing with economic analysis of law do not address the Default Rules Doctrine (Gopalakrishnan, 2016; Nagar *et al*, 2017; Nagar and Thakker, 2022). This is not surprising considering that the main contract law statute in operation, the Contract Act predates the concept by at least a century.

[317] For a contrary view, that party sophistication should be irrelevant to design a rule as a default rule, see Beh (2003) and Doneff (2010). While in specific contexts such as insurance, consumer rights, etc., party sophistication may not play a role, there could be others such as commercial contracts, where party sophistication has a significant role to play and it would be unjust to refuse to enforce commercial contracts which have been concluded after negotiations between parties on the ground that the transaction contracts around a mandatory rule intended to protect a party against an internality.

[318] See, for instance, RK Bangia, Contract-I (8th ed. 2021); Halsbury's Laws of India: Vol. 9: Contracts (2nd ed. 2015);.PC Markanda, The Law of Contract Vol. I (2013); AC Moitra, The Law of Contract and Specific Relief (6th ed.. 2012); Rajesh Kapoor, Avtar Singh's Law of Contract and Specific Relief (2021).

Scholarly writings in India on the DRD is considerably scarce (see, for instance, Varottil, 2009, 14; Srinivasan, 2010; Dasgupta, 2010; Varottil, 2011, 144; Kamlanaath and Peddeda, 2012, 686; Guha and Kannan, 2017, 14; Garg and Hablani, 2018; Gautam, 2018; Sukul and Bansal, 2021, 276-279). One of the earliest references to the theory was in an article titled "**A Cautionary Tale on the Transplant Effect on Indian Corporate Governance**" by **Umakanth Varottil** (2009) where references were made to default rules and mandatory rules but there was no substantial discussion on the theory (Srinivasan and Yadav, 2022). While discussing difference models of corporate governance, Varottil made note of the outsider model of corporate governance, which is characterised by a greater emphasis on default rules as compared to mandatory rules (Varottil, 2009, 14). In a footnote, Varottil also took note of the concept of information forcing rules, which, according to him, were default rules that compelled those with superior information to divulge information to their contractual counterparts so as to eliminate or minimise issues relating to information asymmetry (Varottil, 2009, 14).[319] This was in the context of the legal regime on capital markets being in the nature of information forcing rules. This analysis by Varottil was descriptive in nature.

There have been a few works citing the default rules (Varottil, 2009, 14; Srinivasan, 2010; Dasgupta, 2010; Varottil, 2011, 144; Kamlanaath and Peddeda, 2012, 686; Guha and Kannan, 2017, 14; Garg and Hablani, 2018; Gautam, 2018; Sukul and Bansal, 2021, 276-279) but not in terms of substantial analyses or a critique of the existing contract law doctrines, except for three works, one, by the Government[320], two, by Lovely Dasgupta (Dasgupta, 2010) and three, by Sukriti Jha and Saara Mehta (2018).

As compared to the Indian scenario, the prevailing academic writings in USA reveals that copious amounts of literature are available on the Default Rules Doctrine.

[319] Foot note 55 in Varottil (2009).
[320] Economic Survey of India (2018-19), Chapters 1 and 2 (2019), https://www.indiabudget.gov.in/budget2019-20/economicsurvey/doc/vol1chapter/echap01_vol1.pdf (accessed 21 December 2022).

As recently as in October 2022, the European Court of Justice in Rigall Arteria v Bank Handlowy (C-64/21)[321] extensively cited the Default Rules Doctrine.

As opposed to the American, the EU and the English position, the Indian position is characterised by sparse writings, some of which are discussed below:

4.7.1. Default Rules in the Economic Survey of 2018-19

The Economic Survey of 2018-19 published along with the yearly Budget of the country discussed extensively about default rules. Chapter 1 titled "**Shifting Gears: Private Investment as the Key Driver of Growth, Jobs, Exports and Demand**" noted the application of principles of behavioural economics to law, including using default rules.[322] Default rules was regarded as a means to nudge people towards behavioural change.[323] Chapter 2 titled "**Policy for Homo Sapiens, Not Homo Economicus: Leveraging the Behavioural Economics of "Nudge**"" contemplated that default rules should be leveraged such as like making the opt-out of subsidy as a default rule.[324] In addition, the use of default rules has also been recognised in smart insurance plans[325], auto-enrolment in savings plans[326], insurance, organ donation, etc.[327] The Economic Survey's use of default rules have however failed to percolate into the legal industry in India.

[321] [2023] 2 C.M.L.R. 12, Paras AG 30- AG 38.
[322] Economic Survey of India (2018-19), Chapter 1: Shifting Gears: Private Investment as the Key Driver of Growth, Jobs, Exports and Demand, p. 15 (2019), https://www.indiabudget.gov.in/budget2019-20/economicsurvey/doc/vol1chapter/echap01_vol1.pdf (accessed 21 December 2022).
[323] *Ibid*, p. 15.
[324] Economic Survey of India (2018-19), Chapter 2: Policy for Homo Sapiens, Not Homo Economicus: Leveraging the Behavioural Economics of "Nudge", p. 43, 50 (2019), https://www.indiabudget.gov.in/budget2019-20/economicsurvey/doc/vol1chapter/echap02_vol1.pdf (accessed 21 December 2022)("*Economic Survey 2018-19 Chapter 2*").
[325] *Economic Survey 2018-19 Chapter 2*, p. 48.
[326] *Ibid*, p. 51-52.
[327] *Ibid*, p. 41.

4.7.2. Default Rules in Contract Act

Dasgupta's blog post titled "**Default Rules in the Indian Contract Act**" (Dasgupta, 2010) dealt with identifying default rules in the Contract Act. Dasgupta acknowledged the difficulty in identifying default rules from the statute and recommended that one had to "navigate minutely" through various provisions of the Act to identify them. Dasgupta was the first to classify the general provisions of Contract Act in accordance with whether they were mandatory rules or default rules. This analysis is presented below in the form of a table:

Table 8 Classification by Dasgupta of Default Rules in General Contract Law

Sections of Contract Act (general)	**Whether Default/ Mandatory?**
1-36 (elaboration of Section 10)	Mandatory rules
40, 42, 43 and 45	Default rules
46-50 and 55	Default rules
53, 64, 65 and 75	Mandatory rules
56	Default rule
62, 63	Default rule
68-72	Mandatory rules (quasi-contractual)
74	Mandatory

Dasgupta also gave two guidelines for identifying a default rule. The first was to read the concerned section and ask the question: whether it was possible to enter into an agreement without complying the requirements in the said section. If the answer was in the negative, then the rule was mandatory in nature and not a default rule which could be contracted around (Dasgupta, 2010).

The second guideline was to think about the object of a provision and then ask its purpose. If it was to act as a guideline for contract formation/ drafting, but was not to

affect the efficacy of the contract even if such guideline is not adhered to, the provision is a default rule (Dasgupta, 2010).

While concluding, Dasgupta noted that identifying default rules was a process and that process consisted of repeatedly perusing through the bare text of the provisions in addition to being conversant with the fundamentals in order that the objectives of the provisions that are contained in the general provisions, the Contract Act (Dasgupta, 2010).

4.7.3. Default Rules in "Contra Proferentem: A Necessary Evil"

Another noteworthy writing on the Default Rules Doctrine in India is by Sukriti Jha and Saara Mehta (2018, 64-65, 69-73). The authors argued that the *contra proferentem* rule had been argued as being an information forcing default rule (Jha and Mehta, 2018, 64-65, 69-73) but cast doubts on the proposition. While acknowledging that it functioned as penalty default rule but questioned as to "*whether it can be used as a default rule needs to be proved.*" (Jha and Mehta, 2018, 71)

The authors acknowledged that the *contra proferentem* rule should not be confounded with the rules relating to disclosure of information which pertained to party conduct or the quality of goods and did not pertain to the meaning of contractual terms (Jha and Mehta, 2018, 71).

This paper is an exception to the lack of discourse in India on the DRD. The authors of the paper analyse the *contra proferentem* doctrine in terms of a default rule, including as an information forcing penalty rule (Jha and Mehta, 2018, 71). The authors criticise the notion that the *contra proferentem* rule was in the nature of a default rule and argue that "*[u]nder no circumstances should it be allowed to become the default rule of contract interpretation*" (Jha and Mehta, 2018, 77).

In addition to the above stated writings, the doctrine was taught in a contract law drafting course by this author.[328]

4.7.4. Default Rules Doctrine in Indian Legal Education: A Summary

Law schools predominantly follow the syllabus prescribed by the University Grants Commission in law. Autonomous institutions have discretion in framing their syllabus. However, the syllabus set accords more or less in line with the Curriculum Development Committee of the University Grants Commission (2001).[329]

Even with the existing, *albeit*, minimal academic literature on the subject in India, there are some fundamental problems with the literature on the Default Rules Doctrine. Some academic writings designate rules relating to default by a debtor as a "default rule" (Jha and Mehta, 2018, 77; Sukul and Bansal, 2021, 276-279) that is a rule to connote the failure to pay by a debtor. This is a problem of nomenclature and since the Default Rules Doctrine has specific connotation of the terms default rules, altering rules and mandatory rules, using the same name to denote another thing would be to create unnecessary confusion.

Similar lack of clarity in usage has been observed in other jurisdictions as well (Ayres and Fox, 2019, 290). Even the recent AI based tools seem to get the terminology of "default rules" in contract law as rules that apply in default of a party, and not in the sense the Default Rules Doctrine describes. When queried on the meaning of "default rules", the output in ChatGPT read: "*Default rules in contract law refer to the legal rules that apply when one party fails to perform their obligations under a contract*."[330]

---

[328] EBC Learning, Contract Drafting Essentials, Course Outline, https://ebclearning.com/courses/course-v1:EBC+CS11+2018/aboutt (accessed 14.06.2022)(Srinivasan and Yadav, 2022). Also available at https://www.deepdyve.com/lp/sage/default-rules-theory-implications-on-teaching-contract-law-in-india-ffObutOd4c (09.05.2023)

[329] https://www.ugc.gov.in/oldpdf/modelcurriculum/law.pdf (accessed 03.09.2023).

[330] See, for instance, the output in ChatGPT (https://chat.openai.com/chat) on 28.01.2023, on the question as to what default rules are, in contract law. The output can be accessed from https://drive.google.com/file/d/1AsAc32Dee825B89Raa5LQI0yO4HIrqPb/view?usp=sharing (accessed 28.01.2023). Since then ChatGPT has "learnt" a bit more about the doctrine.

4.8. Findings and Conclusion

When it comes to India, there is a lack of coherence or clarity on whether a rule is a default or mandatory rule. A perusal of the decisions examined in this chapter suggests that there have been three approaches as regards contracting out or around rules of the Contract Act.

- Only when the rule expressly states so, could that rule be altered. The first approach entailed a strict reading of the Act and allows contracting out or around when expressly provided in the Contract Act. Examples of such provisions, which are in force, are, include Sections 163, 165, 170, 171, 174, 202, 219, 221, and 230.
- Even if the Act expressly provides that a provision could be contracted around, such contracting around is limited.
- Even if a provision is not expressly drafted as allowing contracting around, parties could do so in specific situations and except when law prohibits/ invalidates it for concerns of public policy.

These three approaches have been typified in several decisions of the courts since the enactment of the 1872 Act at various points of time. Indian law has over the past 150 years has dealt in detail with the imperative and non-imperative provisions of contract law. Even as early as in 1883, Mitter, J. discussed the idea that Section 152 prescribed how the default rule could be modified, which is nothing but an altering rule.

At the same time, as noted above, the Default Rules Doctrine has not been taken up in a systematic or comprehensive manner in India. This is true with regard to legal education, legislative design, law practice or in adjudication. The judicial, legislative and academic legal discourse in India is characterised by absence of any substantial discussion or analysis of the Default Rules Doctrine or its application to analysing or

critiquing contract law. Even with the evolution of the distinction between imperative and non-imperative provisions, the decisions have not had a consistency.

Importantly, the "public policy" test cannot adequately explain or justify mandatory rules which seek to protect a contracting party against internalities, especially where no specifically identified public interest is involved. It is the insight of the Default Rules Doctrine that mandatory rules are enacted to protect against both internalities and externalities that is capable of adequately explaining and justifying mandatory rules. While this insight of the DRD may seem almost intuitive, yet this attained critical mass even in contemporary legal discourse, be it in judicial decisions, reports or secondary literature. Hence, the Default Rules Doctrine has not been dealt with in a systematic manner in India.

The academic literature with sporadic references has not been taken up in law practice, whether in contracting practices, legislative design or in adjudication. Likewise, although the Economic Survey of 2018-19 makes several references to the potential of the use of default rules, there is no evidence that these tools of rule-design have permeated into law-making in areas of contract law, although there are various illustrations of the use of default regimes being applied in regulation.

As against the expected trend that laws would move from mandatory to default rules, there has been a shift to higher quantum of regulation. This is typified by the Arbitration Act where there an increasing regulation of arbitration and the consequent reduction of default rules.

There were no terminological parallels to the default-mandatory dichotomy in the early 1980s in the West (Ayres, 2012, 2035). Apart from having a mutable-immutable dichotomy referenced peripherally, Indian contract law does not have a systematic analysis of the said dichotomy.

CHAPTER 5: DEFAULT RULES DOCTRINE: CLASSIFICATION OF GENERAL CONTRACT LAW INTO DEFAULT, MANDATORY & ALTERING RULES

5.1. Introduction

Chapter 5 noted that the preliminary task of a systematic analysis of contract law through the DRD is to classify existing rules into the triumvirate. Another purpose would be served by classifying the rules is to examine the practical utility of the doctrine.

Such an endeavour, however, is riddled with challenges. For one, given the multifarious situations that can arise, the question is whether the rules contained in contract law can be exhaustively stated, let alone classified? While rules may apply in an all-or-nothing fashion, judges could go beyond the rules and apply other principles as well (Dworkin, 1967, 30).

Another issue is the basic problem with viewing default, mandatory and altering rules as water-tight compartments (Zamir, 2021; Zamir and Ayres, 2020, 320ff; Coyle, 2016, 595ff). There is considerable overlap between sticky default rules and mandatory rules. The same goes with penalty default rules as well. Nevertheless, it is important to identify, to the extent feasible, default, mandatory and altering rules in a practical way. The first step in applying the theory would lie in identifying the triumvirate from a set of rules. Hence, while not attempting a comprehensive attempt at deriving all default, mandatory and altering rules in contract law, this chapter identifies several default, mandatory and altering rules in two statutes: one, the Contract Act and, two, the Specific Relief Act ("Basic Contract Statutes").

5.2. Identifying Default, Mandatory and Altering Rules in Indian Contract Law

As noted in Chapter 1, one of the objectives of this research is to contextualise the concepts of default, mandatory and altering rules in terms of Indian law by classifying the statutory provisions in these two statutes into default, mandatory and altering rules.

To elaborate on the point regarding the exercise of exhaustively classifying the general rules of contract law, default standards that may exist within a rule, created by judge-made law, over time, in built into a particular rule. Therefore, to exhaustively state all the rules (in a broader sense) may be a difficult, if not impossible, task. A reflection of the law on a particular subject may not be possible by merely reading a particular statutory provision. This can be demonstrated with an illustration. Section 19, Contract Act deals with the legal effect of lack of free consent in which case the agreement is voidable at the victim's option. But there are situations where the victim is not held to be justified in holding such a contract as void: when third parties acquire rights in a *bona fide* manner, for a value.[331] This rule regarding the effect of third parties on voidability of agreements is not reflected explicitly in Section 19. Nevertheless, it is regarded as a part of the law on the subject (Vardhan, 2018, 467).

Therefore, this chapter explores, but not exhaustively classifies, the default, mandatory and altering rules in these two statutes.

As regards the general portions in the Contract Act, there is literature directly on point. Dasgupta, in a blog post in 2010, identifies the default rules in General Contract Law (Dasgupta, 2010). This has been discussed in depth in the previous chapter. With respect to General Contract Law, Dasgupta identified Sections 40, 42, 43, 45-50, 55, 56, 62 and 63, the Contract Act, as containing default rules. In other words, about 14 of the first 75 sections contained in the Contract Act were classified as default rules.

[331] Shiromani Sugar Mills Ltd. vs. Debi Prasad (20.02.1950 - ALLHC) : MANU/UP/0207/1950

Analysing whether a particular rule could be contracted around is a complicated task (Burnham, 2016, § 4.4). Dasgupta also proposed two guidelines ("Initial Position") for identifying a default rule:

- Read the concerned section and ask the question: whether it was possible to enter into an agreement without complying the requirements in the said section. If the answer was in the negative, then the rule was mandatory in nature and not a default rule which could be contracted around (Burnham, 2016, § 4.4).
- Think about the object of a provision. If it was to act as a guideline for contract formation/ drafting, but will not affect the efficacy of the contract even if such guideline is not adhered to, the provision is a default rule (Burnham, 2016, § 4.4).

In this regard, it has also been argued that each type of contracting around has specific signification and the below table illustrates various usages conveying the default nature of a rule[332]:

Table 9 Illustrations of Usages Conveying a Default Rule

Section of Contract Act	**Usage**
37 para 2, 42, 43 Para 2, 45	"*unless a contrary intention appears*"
43, Para 1	"*in the absence of express agreement to the contrary*"
128	"*unless it is otherwise provided by the contract*"
171	"*unless there is an express contract to that effect*"
165	"*in the absence of any agreement to the contrary*"
170, 171,	"*in the absence of a contract to the contrary*"
146, 163	"*in the absence of any contract to the contrary*"
137	"*in the absence of any provision… to the contrary*"

[332] Email dated 18.01.2023 from Prof. Dr. Nilima Bhadbhade to the author (cited with permission).

While the Initial Position provides a broad overview of the typology of rules, it is not exhaustive of the default rules contained in Sections 1 - 75, Contract Act. The sections that Dasgupta identifies as default or mandatory contain elements of other set of rules. Further, Dasgupta does not mention about altering rules and justifiably so, considering that the purpose of her work was to address default rules. At that time (2010), altering rules had not been subject to a systematic analysis. [333]

A section of a statute may contain more than one type of rule. To illustrate, earlier, in chapter 2, while discussing altering rules, the examples of Sections 171 and 202, Contract Act were noted.[334] The former section contained a default rule that no person, other than those listed in that section, would have such a right. It also contained an altering rule allowing parties to empower a person to a contract the right of general lien based on express agreement. Similarly, Section 202, the Contract Act contained a default rule that the principal could not put an end to an agency to the prejudice of such interest where the agent has an interest.[335] It also allowed the parties to contract around this default through an express agreement. These illustrations go to show that a section-wise classification into default, mandatory and altering rules may not be the correct approach.

Also, while default and altering rules may be conceptually different, a rule may contain both default and altering rules but may not be drafted into different provisions. Sections 171 and 202 are examples of this phenomenon. Both these provisions do not have sub-sections but are drafted as single paragraphs.

Another problem with the two-pronged guideline by Dasgupta in identifying the default rules is that one may not easily understand the nature of a provision by merely reading the provision, examining if it was possible to enter into an agreement without

[333] It became so after 2012 (Ayres, 2012).
[334] See, Chapter 2.
[335] https://archive.org/stream/in.ernet.dli.2015.125174/2015.125174.The-Indian-Contract-Act-1872-Vol1_djvu.txt (accessed 09.05.2023).

complying the section's requirements or ask if the contract would be efficacious of the guideline provided in the contract was adhered to. A typical example is an implied default rule.

There is another issue that is yet to be highlighted in literature in India on the DRD: the extent to which a default rule could be altered is also important in understanding the rule. To illustrate, it may be possible to contract around the general damages provision in Section 73, the Contract Act by agreeing for liquidated damages, which is recognised in Section 74. However, it is doubtable if the right to claim damages could be altogether emasculated through an agreement. In this case, contracting around is possible but contracting out may not be legally permissible.[336]

The Contract Act contains specific language used to signify when rules are mandatory. But there are implicit default rules too: even if a provision, such as those tabulated above, does not explicitly provide for contracting around or contracting contrary to the rule, a rule may be a default rule. Section 133, the Contract Act is a typical example of an implicit default rule.[337] When holding so, courts have adopted a test as to whether contracting around would be against public policy.[338] Courts have held it in terms of waiver of contractual rights but the better approach is to call such a rule as a default rule.[339] Courts have cited the Latin maxim, "*Cuilibet licet juri pro se introducto renunciare*"[340], which means, "*one may waive or renounce the benefit of a principle or rule of law that exists only for his protection*" (Rapalje and Lawrence, 1997, 326).

As would be apparent, there is a contrast between one set of judgments which give a textual and literal take to the Contract Act by holding that when law allows contracting

[336] See, for instance, MBL Infrastructures Limited v. Delhi Metro Rail Corporation, MANU/DE/8454/2023, Para 44 (holding contracting out Section 73 as against void and unenforceable).
[337] See, for instance, HB Basavaraj v. Canara Bank Corporation MANU/SC/1785/2009, holding that Section 133 could be contracted around by the parties.
[338] See, for instance, HB Basavaraj v. Canara Bank Corporation MANU/SC/1785/2009.
[339] See, Halsbury's Laws of England, Vol. 8, 3rd ed., p. 143 (§248 "Contracting Out"), relied on in Lachoo Mal v. Radhey Shyam, MANU/SC/0715/1971, Para 6; HB Basavaraj v Canara Bank Corporation MANU/SC/1785/2009, Para 6.
[340] Lachoo Mal v. Radhey Shyam, MANU/SC/0715/1971, Para 6

around (including contracting out), parties could contract around the statutory rule[341] and the other set of judgments which holds that even if the provision does not explicitly set out that parties could contract around a rule, parties could still contract around the rule, unless there are public policy issues purported to be involved.[342] Jurisdictions such as England and Wales, Australia, Canada and New Zealand also rely on the justification of public policy, which may need revisitng.[343]

Even in the above table, there is a difference between "in the absence of any agreement to the contrary" and "unless it is otherwise provided by the contract". Taken in a literal sense the former allows contracting contrary to the rule, while the latter recognises that parties could contract around the rule in various degrees.

5.3. Structure, the Contract Act

The Contract Act, in its general portions, provides a broad framework of contract law. These aspects are covered from the preliminary parts of the statute till Chapter VI. Therefore, it is not designed to deal with the nitty-gritties of various contractual relationships between the parties. The details of specific contracts are addressed in many cases in terms of special contract statutes. The Contract Act also deals with certain special contracts (Chapters VIII to X) as would be dealt with later in this chapter.

5.4. Preliminary Chapter, the Contract Act

The clause on the Short Title. It reads: "*This Act may be called the Indian Contract Act, 1872.*" Use of "may" indicates the non-mandatory nature of the rule. One could refer to the work as the "Contract Act" or by any other means. In fact, when a new law is passed repealing a legislation already in place, it is common in courts to call the recent

[341] See, for instance, PTC India Financial Services Limited, MANU/SC/0629/2022; Mahamad Ravuther, MANU/TN/0073/1908
[342] See, for instance, HB Basavaraj v Canara Bank Corporation MANU/SC/1785/2009; Lachoo Mal v. Radhey Shyam, MANU/SC/0715/1971.
[343] Price v Spoor [2021] HCA 20, Para 13.

statute as the "New Act" and the repealed one as the "Old Act".[344] Therefore, the Short Title clause is not a mandatory rule.

All the same, when the concerned statute is to be referred to by another statute or delegated legislation, it is done through reference to the official short title and not a title referenced for the sake of convenience. To that extent, it is mandatory for drafters to the use the official Short Title. For obvious reasons, the short title is not an altering rule.

In the 2nd Chapter, the possibility of rule types other than the triumvirate of default, mandatory and altering rules were discussed. So, the rule declaring the short title does not strictly fall within the parameters of the triumvirate. These are formal portions of a legislative instrument. Whether these constitute "rules" in a substantive sense is debatable, although from a formal perspective, they constitute a rule. So, we could regard them as formal rules, which may not strictly fall within the three types of rules. On the other hand, the provision regarding territorial extent (as applicable to the whole of India) could be argued to be a default rule in that parties can make it applicable even to an agreement entered into outside India. Even if the contract is entered into in India, if it is between an Indian party and a foreign national, that contract need not be governed by Indian law if those parties agree for, say, Egyptian law. Further, two Indian parties can choose to apply, say, English Contract Law by agreeing to arbitrate in, say, London (this position is as per recent case law).[345]

Next in the preliminary chapter comes the rules on territorial extent and commencement of the statute. Section 1 declares the territorial extent, the Contract Act as being applicable to India. Can parties limit the territorial extent of the Act? If they can, directly or indirectly, then this provision is not a mandatory rule, although Dasgupta classifies the whole of Section 1 as such (Dasgupta, 2010).

[344] A search in the Manupatra database (courts and tribunals) provides 9361 results for the expression "Old Act" and 11134 result for "New Act", as on 18.07.2022.
[345] ASL Wind Solutions (P) Ltd. v. GE Power Conversion (India)(P) Ltd., 2021 SCC OnLine SC 331, Paras 81- 83.

Consider for example, an Indian party and a Japanese party, who are negotiating an agreement for performing certain services in India. The Indian party insists on New Delhi being the place of arbitration and the Japanese party reluctantly agrees to it but in turn wants Japanese law to govern their agreement. This is valid as Section 28(1)(b) [concerns international commercial arbitrations as defined in Section 2(1)(f) of the said Act] empowers the tribunal to " *decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute*;".[346] Where the Japanese and the Indian parties agree that India would be the place of arbitration, this means that the procedural law would be Indian law. If the agreement provides for Japanese law to govern the agreement, then the Japanese law and not Indian law would the law applicable to the substance of the dispute. The effect of such an agreement would be that the performance of the contract would be governed by Japanese substantive law. The Contract Act, being a part of the Indian substantive law of contract, would not govern the performance of the contract.[347] This legal position is recognised even by a three judge Bench of the Supreme Court of India in Bharat Aluminium v. Kaiser Aluminium[348] in the following manner:

"*5. Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract-(1) proper law of contract, (2) proper law of arbitration agreement and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law*."[349]

Conversely, in an agreement between an English party and an Indian party, even if performance of the contract is in London, English laws could permit the law governing the agreement to be Indian law, and not English law, if the agreement so provides. Thus, we have an instance where the Indian substantive laws, including the Contract Act,

[346] Also see, www.jkja.nic.in (accessed 09.05.2023)
[347] See, NTPC v. The Singer Company and Ors. (07.05.1992 - SC) : MANU/SC/0146/1993, Para 24.
[348] MANU/SC/0090/2016 ("BALCO")
[349] BALCO, MANU/SC/0090/2016.

apply beyond the Indian territory and Section 1, the Contract Act is contracted around by parties.

Thus, determination of whether a rule is a mandatory or a default rule may not be straightforward in all situations and therefore, the Initial Position cannot be taken as the decisive test for finding out if a rule is a default rule or not.[350]

As the aforesaid discussion indicated, a mere reading and re-reading of the section may not be sufficient to determine if the provision regarding territorial extent is a default or a mandatory rule.

Section 2, Contract Act defines terms such as proposal, acceptance, promise, promisor, promisee, consideration, agreement, contract, void agreement, voidable agreement, and void contract. These are declarations as to the terms defined in the Contract Act. The second chapter contemplated the idea of declaratory rules, which cannot strictly be called as mandatory, default or altering rules. In that sense, they are declaratory because they define and declare.

5.5. Provisions relating to Contract Formation

Dasgupta classified contract formation rules (Sections 1 to 36) as mandatory (Dasgupta, 2010). Eric Posner in an article published in 2006 too classified rules of contract formation as mandatory rules and criticised Ian Ayres and Robert Gertner's article published in 1989 for classifying them as default rules (Posner, 2006). He argued that rules relating to contract formulation were not default rules (Posner, 2006. 565). The marker phrase "unless otherwise agreed" is not attached to rules regarding contract formation, while such phrase or its variants applied to default rules (Posner, 2006. 566). Posner also cited Ayres and Gertner's paper published in 1999 where they classified an agreement tainted by mistake of fact (which was void) as a penalty default rule rather

[350] Ayres and Gertner argue that "*seemingly immutable rules can be circumvented at a cost*" and that "*… lawmakers… seem to allow ostensibly immutable rules to be negated if the private parties structure the transaction properly.*" (Ayres and Gertner, 1989, 121)

than a mandatory rule (Ayres and Gertner, 1999, 1591, 1609-1610) and criticised them because the rules regarding mistake doctrine resulted in avoidance of the agreement and did not operate like a "typical" default rule (Posner, 2006. 577).

Ayres replied to this criticism in an article in 2006 where he argued that fine-tuned distinctions on what were "contractual" and what was a default rule or not was not appropriate when the objective of the analysis was to examine if law-makers should deploy default rules (Ayres, 2006, 591). Ayres found fault with Posner for unduly restricting default rules only to those that fill gaps in contracts (Posner, 2006). Ayres presented the following arguments to rebut Posner's contention that contract formation rules could not operate as (penalty) default rules:

- Penalty defaults operated on pre-contractual behaviour since it is the prospective contracting parties "aversion" for such information forcing rule resulting in them making an offer in a particular manner[351] (Ayres, 2006, 595).
- The objective of the mistake doctrine inhibits not only faulty contract formation but also ensues change in contract price[352] (Ayres, 2006, 595).

The larger point that Ayres made was that there was no need to see default rules in a restrictive fashion and that what is material is that when private parties displace the default rule, those rules produce informational effects (Ayres, 2006, 595) and that while designing rules, lawmakers should be conscious of the informational effects that displacement would produce (Ayres, 2006, 592). This was written by Ayres in 2006 and since then considerable literature has come out analysing in detail altering rules and mandatory rules, in addition to default rules.

Ayres' rebuttal does not help us directly on the exercise of classification of Chapter I, Contract Act (Sections 3 to 9). For the time being, the Initial Position of classifying the contract formation rules in Sections 3 to 9 as mandatory rules may be taken as correct.

[351] https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1206&context=lr (accessed 01.02.2024).
[352] *Ibid*.

Section 3, Contract Act pertains to communication, acceptance and revocation of proposal and is summarised below:

Table 10 Summary of Section 3, the Contract Act

Act/ Omission	Deemed by Act/ Omission by Whom	Subject of Communication
Communication of proposal	Proposing party	Proposal
Acceptance of proposal	Accepting Party	Acceptance
Revocation of proposal	Revoking Party	Revocation

In effect, Section 3 states when communication, acceptance and revocation of proposals "are deemed to be made". This provision contains the phrase "are deemed to be made" thereby conveying a mandatory nature of the provision. The provision does not contain a default rule.

Section 4 states, firstly, that "*communication of a proposal is complete when it comes to the knowledge of the person to whom*" the proposal is communicated.[353] Secondly, acceptance communication as regards the proposer happens when such acceptance is posted or put in transmission so as to be out of her control.[354] Acceptance communicated under this provision as regards the acceptor when the proposer gets to know about it.[355]

Insofar as it relates to acceptance, ordinarily, acceptance must be communicated.[356] However, law recognises acceptance without communication in exceptional cases (Vardhan, 2018, 13). Some examples of such exceptional circumstances include offer made to the whole world, where acceptance is not communicated in terms of a separate

[353] https://shorturl.at/opABF (accessed 08.05.2023).
[354] *Ibid*.
[355] *Ibid*.
[356] Bhagwandas v. Giridharlal MANU/SC/0065/1965, Paras 5 ,6 and 10.

acceptance but by performance itself. Take the case of an open offer of prize for something done such as locating lost goods[357] or attempting a medicine.[358]

These seemingly mandatory rules in Section 4 can be altered: take the case of a tendering process where the terms of the notice inviting tender provides that bids cannot be withdrawn by telegram. Although the bidder revoked his proposal (bid) through a telegram, and which came to be read by the acceptor, the revocation was not held valid.[359]

Bidding processes contract around several provisions regarding formation of contracts. Parties can contract around the rule regarding revocation of offer: if a party inviting bids states in the instruction to bidders that the bidder shall not withdraw its offer, such a condition could be binding and could be met with sanctions such as forfeiture of earnest money or temporary banning or other disability. Such a term in the instruction to bidders contracts around Para 1 of Section 5.[360] In a tendering process providing for forfeiture of earnest money in case of withdrawal of offer by the bidder, even if acceptance is not completely conveyed as against the proposer, such a condition is not void because it has the effect of contracting around Section 5, Para 1.[361]

Describing the legal position of Para 1 of Section 5 in terms of a default rule may be more elegant analytically rather than simply recognising offers cannot be revoked without consequence as an exception to Section 5, Para 1, whose analytical basis hangs in the air and whose justification is based on expediency.

---

[357] William v. Carwardine, 4 B and A 621, cited with approval in Bhagwandas v. Girdharilal, MANU/SC/0065/1965, Para 25.
[358] Carlill v. Carbolic Smoke Ball Co. (1893) 1 Q.B.D. 256, cited with approval in Bhagwandas Kedia vs. Girdharilal Parshottamdas and Co., MANU/SC/0065/1965, Para 25.
[359] M. Lachia Setty and Sons Ltd. and Ors. vs. Coffee Board, Bangalore (09.10.1980 - SC) : MANU/SC/0095/1980
[360] https://shorturl.at/opABF (accessed 08.05.2023)
[361] NTPC. v. Ashok Kumar, MANU/SC/0143/2015; State of Haryana v. Malik Traders, MANU/SC/0945/2011; National Highway Authority of India v. Ganga Enterprises, MANU/SC/0665/2003; Chetanram Ramgopal v. Chief Engineer, PWD, Rajasthan, MANU/RH/0267/1999; *Per contra*, see, Sitaram Agrawal v. Union of India, MANU/BH/0350/1995; Abdul Salam Choudhary v. State of Assam, MANU/GH/0002/1991; Rajendra Kumar Verma v. State of Madhya Pradesh, MANU/MP/0038/1972.

Another instance of a seemingly mandatory rule is the requirement of absolute and unconditional acceptance in Section 7(1) to enable a proposal become a promise. A well-recognised exception is the rule regarding immaterial or minor differences. Where there are minor differences between the offer and acceptance, contract formation would nevertheless have taken place. D. Wren International Ltd. v. EIL.[362] is an example of this legal position.

Section 9 is in the nature of a declaratory provision. It declares what an express promise is.[363] If the proposal or acceptance is in any mode other than in words, it is an implied promise. It really does not make any sense for the parties to agree otherwise. Therefore, this provision is a declaratory rule. The Law Commission of India stated: "*The section assumes the existence of the rule, but does not lay it down. As it stands at present, it is merely a defining section. We suggest that it should categorically state the rule*."[364]

Therefore, it is possible to contract around many of these provisions although they are seemingly mandatory in nature.

5.6. Provisions relating to Void and Voidable Contracts

Sections 10 to 30, Contract Act concern void contracts and void agreements. Section 10 is the fundamental rule dealing with when agreements become contracts and is general in nature. Hence, it may be considered to be mandatory in nature. All the same, law recognises certain exceptions to the 2nd Para of Section 10, to the effect that Section 10 would not affect any other law mandating a contract to be in written form. Article 299, Constitution of India requires compliance of formalities for a government contract. Even so, courts have recognised promissory estoppel as an exception to this rule. In Motilalal Padampat Sugar Mills Co. Ltd. v. Uttar Pradesh[365], it was held:

[362] MANU/WB/0053/1996
[363] https://shorturl.at/opABF (accessed 08.05.2023)
[364] *13th Report of Law Commission*, Para 33.
[365] AIR 1979 SC 621: MANU/SC/0336/1978

"*36. The law may, therefore, now be taken to be settled as a result of this decision that where the Government makes a promise knowing or intending that it would be acted on by the promises and, in fact, the promise, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promises, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution*."

Even where formalities as provided in Article 299 have not been complied with, promises made have been held to be enforceable.[366]

Section 11 prescribes who is competent to contract. Section 10 provided that "*agreements are contracts if they are made by the free consent of parties competent to contract…*". Section 11 deals with persons competent to contract. It states that every major who is not of sound mind and not disqualified from contracting is competent to contract.[367] Again, this is mandatory in purport. A contract with a minor, for instance, is void *ab initio*.[368]

Despite the mandatory nature of the provision, there are some exceptions. Parties can contract around this provision in certain situations. Assume a person issues a promissory note for a minor beneficiary. The minor could sue on such note.[369] The agreement effected by a guardian for the benefit of a minor is valid and enforceable in favour of the minor.[370] Likewise, Section 30, Partnership Act, 1932 recognises a similar right Sometimes where an agreement is in place where a minor is entitled to its benefits, the agreement is usually signed by the guardian of the minor. This rule then works in

[366] See for instance, Chintpurni Medical College and Hospital v. State of Punjab, MANU/SC/0679/2018; UoI v. Godfrey Philips India Ltd., MANU/SC/0036/1986; (where courts have applied the promissory estoppel doctrine to enforce promises)
[367] https://shorturl.at/opABF (accessed 08.05.2023)
[368] Mohori Bibee v. Dharmodas Ghose, MANU/PR/0049/1903
[369] Rungarazu Sathrurazu v. Maddura Basappa, MANU/TN/0014/1913; Muniya Konan v. Perumal MANU/TN/0001/1911.
[370] Manik Chand v. Ramachandra, MANU/SC/0097/1980, Paras 3 and 4.

the nature of an altering rule: to make a valid agreement in favour of a minor, the agreement may have to be signed by the guardian of the minor.

Section 13 defines consent. It is difficult to classify definitional provisions into the triumvirate's framework. Definitions may fall into another category which could be called as declaratory provisions. So are the definitions contained in Sections 14 to 18.

Sections 19 and 19A deal with the consequences of agreements obtained without free consent as defined in Sections 14 to 18. Para 1 to Section 19A allows the promisee to treat the contract as voidable where there was no free consent. These are mandatory. So are Sections 20 to 22 which operate in the absence of consent.

Section 23 prescribes when consideration or object of an agreement is not lawful and is therefore the quintessential mandatory rule. If one classifies a rule as a default rule, contracting around may be possible to the extent permitted by it. However, if it is a mandatory rule, contracting around it would mean that such an act contravenes Section 23. Therefore, Section 23 is in the nature of a general rule addressing the effect of contracting around a mandatory rule.

However, even in such cases, consistent with the caveat at the beginning of this chapter that classifying the rules into water-tight compartments of mandatory, default and altering rules may not be possible, collateral transactions and severability entail enforcement of portion of those agreements. In Canbank Financial Services Ltd. v. The Custodian[371], the court stated that if a transaction is partly lawful and partly unlawful, and if the unlawful part could be severed, the lawful part of the transaction could be enforced.[372] Section 24, which follows Section 23, is also in the nature of a mandatory rule: it presupposes that the agreement in question is indivisible (Vardhan, 2018, 602).

[371] MANU/SC/0724/2004.
[372] MANU/SC/0724/2004, Para 80.

Section 25 makes void an agreement without consideration. It recognises certain exceptions.[373] However, the rule is mandatory and all parties need to agree on some consideration, even if inadequate.

Section 26 makes void agreements in restraint of marriage, is also a mandatory rule: it does not allow contracting around it. Note that this rule is applicable in case of agreements. Interestingly, the Law Commission has recommended that partial restraints should not be made void, unless such partial restraint is unreasonable. In other words, if the Law Commission's recommendations are implemented, either legislatively or judicially, the bar in Section 26 could be contracted around through the use of partial restraints.

Section 27 declares as void restraint of profession, trade or business of any kind as void.[374] If implemented literally, this is a mandatory rule. However, over the years, courts have admitted exceptions to this rule, thereby allowing parties to contract around it, albeit partially. Indian law recognises that post contractual covenants are void (Vardhan, 2018, 630-631). But restrictions during the subsistence of the contract did not fall foul of Section 27.[375] Even in respect of post-employment constraints, where a reasonable term restricts an employee from disclosing trade secrets or confidential information after ceasing of employments, such a term could be enforced on the ground that the employee owes a duty of fidelity to the previous employer.[376] The test is that whatever the employee has in his memory could be used but the employee cannot copy information verbatim such as list of clients/ customers, etc. to the detriment of her employer.[377]

Similarly, franchise and exclusive dealing agreements are regarded as not prohibited by the provision (Vardhan, 2018, 646). So are negative covenants in publishing

[373] See, Section 25(1) to (3) and Explanation 1 thereto.
[374] https://shorturl.at/opABF (accessed 08.05.2023)
[375] Stellar Information Technology Private Ltd. vs. Rakesh Kumar, MANU/DE/2238/2016; Wipro Limited v. Beckman, MANU/DE/2671/2006; Gujarat Bottling Co. Ltd. v. Coca Cola Company, MANU/SC/0472/1995; Niranjan v. Century Spinning, MANU/SC/0364/1967
[376] Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh, MANU/MH/0955/2010.
[377] *Ibid*, Para 40.

agreements restraining authors during the subsistence of the agreement from publishing or causing to publish work on the same subject that could have the effect of conflicting with the copyrighted work authored by the author.[378]

Thus, notwithstanding the unbound language of Section 27 ("of any kind"), courts have judicially recognised that parties could contract around the provision in a limited fashion. To a limited extent, Section 27 does not operate as a mandatory rule.

Section 28 makes void agreements constricting a person from approaching ordinary tribunals for enforcing contractual rights, or places time limits for doing so thereby preventing the other party from enforcing her rights.[379] The section recognises exceptions.

An agreement between parties conferring sole jurisdiction on one of the courts having the power to decide has not been construed as an absolute restraint.[380] An agreement wherein parties agree not to go for appeal been held validated, when it has been made in furtherance of a compromise or a settlement.[381] This is a deviation against the express provisions of a rule but has been recognised as an unenumerated exception. Therefore, to that limited extent, Section 28 is not a mandatory rule.

Section 29 makes uncertain agreements as void.[382] Even if an agreement whose meaning is not certain does not mean that such agreement is void. The agreement's meaning should not be something which is capable of being made certain (Vardhan, 2018, 677- 678). This is a mandatory rule.

---

[378] The Chancellor v. Orient Longman, MANU/DE/2021/2002
[379] https://shorturl.at/opABF (accessed 08.05.2023)
[380] World Sport Group (Mauritius) Ltd. vs. MSM Satellite (Singapore) Pte. Ltd. (24.01.2014 - SC) : MANU/SC/0054/2014
[381] Kedarnath Gangagopal Misra vs. Sitaram Narayan Moharil (02.02.1968 - BOMHC) : MANU/MH/0084/1969; Anantdas v. Ashburner and Co. MANU/UP/0035/1876 (Full Bench).
[382] https://shorturl.at/opABF (accessed 08.05.2023)

Section 30 makes void wagering agreements and therefore such agreements could not be enforced through suits.[383] But Section 18A of the Securities Contracts (Regulation) Act, 1956[384] permits trading in derivatives and financial instruments, and as such those agreements are valid since they have been expressly permitted by law(Vardhan, 2018, 708), although such agreements were once held void as wagering agreements.[385] Thus, the Securities Contracts (Regulation) Act, 1956 permits certain types of agreements that may, technically, be considered as wagering agreements. Hence, Para 1 of Section 30 is not a purely mandatory rule. Parties can contract around it in respect of transactions permitted by the Securities Contracts (Regulation) Act, 1956.

Likewise, Section 30 makes wagering agreements void but not collateral agreements on the ground that wagering agreements may be void but are not illegal.[386] Therefore, to the extent it enforces collateral transactions, Section 30 is a default rule.

5.7. Provisions relating to Contingent Contracts

Section 31 defines a contingent contract and is a declaratory rule. Section 32 states that such contracts "*to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void*." This provision deals with a situation where parties' agreement that the performance under the agreement would be on the happening of a situation in future that is uncertain. The effect of the severability clause in an agreement typically providing for the same effect would also result in the lawful

[383] https://shorturl.at/opABF (accessed 08.05.2023)
[384] Section 18A of the Securities Contracts (Regulation) Act, 1956 states: "*Contracts in derivatives.—Notwithstanding anything contained in any other law for the lime being in force, contracts in derivative shall be legal and valid if such contracts are--*
(a) traded on a recognised stock exchange;
(b) settled on the clearing house of the recognised stock exchange; or in accordance with the rules and bye-laws of such stock exchange.]
(c) between such parties and on such terms as the Central Government may, by notification in the Official Gazette, specify." Available at https://www.sebi.gov.in/acts/contractact.pdf (accessed 25.01.2024).
[385] Rajshree Sugars and Chemicals Limited v. AXIS Bank Limited, MANU/TN/0893/2008, Para 56.
[386] Gherulal Parakh v. Mahadeodas Maiya, MANU/SC/0024/1959, Para 40. Also see, Shibho Mal v. Lachman Das, MANU/UP/0045/1901.

part being enforced. Section 32 declares when a contingent contract is enforceable and when it is void and is therefore a mandatory rule.

Section 33 concerns contingent contracts where the uncertain future situation does not take place.[387] Such contracts "*can be enforced when the happening of that event becomes impossible, and not before*."[388] This, again, is a mandatory rule because it deals with enforceability. Section 34 deals with when an agreement becomes enforceable legally and is a mandatory rule. Section 35 has two Paras and deal with situations when contingent contracts would be enforceable and would be void and are mandatory.

Section 36 deals with agreements (not contracts) which are contingent on impossible events are void. These do not even mature into contracts, that is, agreements enforceable by law. Therefore, Section 36 is a mandatory rule.

5.8. Provisions on Contract Performance

Chapter IV, the Contract Act is a lengthy chapter divided into six sub-chapters. Dasgupta argues that rules, the Contract Act regarding performance (Chapter IV) "appear to be flexible", thereby implying they are default rules.

Chapter IV begins with the sub-chapter titled "Contracts which must be performed" (sections 37 to 45) and ends with the sub-chapter "Contracts which need not be performed".

From text of Section 37, there are two paras. The first para states that "*parties to a contract must either perform or offer to perform their respective promises*."[389] The second para concerns the status of promise owing to death of promisor.[390] The second para is an explicit default rule (Srinivasan and Yadav, 2022).

---

[387] Gherulal Parakh v. Mahadeodas Maiya, MANU/SC/0024/1959, Para 40. Also see, Shibho Mal v. Lachman Das, MANU/UP/0045/1901..
[388] *Ibid*.
[389] https://shorturl.at/opABF (accessed 08.05.2023).
[390] *Ibid.*

The first para in Section 37 is important because it binds the promisor in a contract to her promises. This is perhaps the foundational provision in contract law.

As regards performance, the question is whether substantial performance of a contract could constitute performance of the contract in its entirety. In respect of contracts providing for lump sum price, the default rule is for completion of the contract in its entirety as per the contract and not substantial performance thereof. (Vardhan, 2018, 747-748). There is sound rationale in having this as the default rule considering that it provides strong incentives to the promisor to complete the contract (Vardhan, 2018, 748). Also, the losses that the promisee might suffer owing to the failure to complete the contract cannot be something which can be compensated (Vardhan, 2018, 748).

Again, it may be recollected that Dasgupta classified the rules of performance to be flexible but a look at Section 38 conveys the meaning that the provision is mandatory in nature. Para 2 of Section 38, for instance, states that an offer to perform "*must fulfil*" the conditions mentioned therein. While Section 37 gives an option for a party to either perform ("*must perform*") or offer to perform, Section 38 deals with how an offer to perform should be made.

Section 39 is, again, in the nature of a default rule: it concerns the situation where promisee expresses its intent not to perform the contract and so the promisee can end the contract.[391] An exception to the above entitlement of the promisee is where the promisee had signified her acquiescence for not putting an end to the contract and such signification could either be by words or be by conduct. Parties could agree, for instance, that a refusal to perform the promise in part (as opposed) to promise in its entirety, could be a ground for exercise of right of termination by the promisee.

Sections 40 to 45 relate to the sub-chapter "By whom contracts must be performed" and mostly contain default rules. However, there are a few notable provisions.

[391] https://shorturl.at/opABF (accessed 08.05.2023).

Section 43 contains three paragraphs. Paragraph 1 thereof is an explicit default rule. Since Para 1 requires the default to be altered through an explicit agreement to the contrary, Para 1 of Section 43 is an altering rule: it provides how to alter the default.

Paragraph 2 allows a joint promisor to compel equal contribution from other joint promisors, "*unless a contrary intention appears from the contract*."[392] Contradistinguished from Para 1, Para 2 does not contain a special altering rule requiring a contract to the contrary be made explicitly.

Para 3 does not explicitly provide that parties could agree to the contrary or contract around the rule, explicitly or otherwise. Given sufficient indications in Paras 1 and 2 of Section 43 conveying the default nature of the rule, one might conclude that the rule would be a mandatory rule, in the absence of such an indication in Para 3. However, it is possible for parties to agree that the losses contemplated in Para 3 of Section 43 would be borne in proportion to their original contribution as opposed to equal shares contemplated in the provision.[393]

Under Section 44, a joint promisor is not discharged merely when the opposite party releases a joint promisor. Consistent with the Initial Position, this provision is a default rule. The Contract Act itself allows deviation of this general principle in a guarantee[394], where release of the principal debtor could amount to releasing the surety.[395]

Section 46 is a typical default rule. It is explicitly designed to fill a gap: where promisor is obligated under the contract to perform without demand therefor from the promisee, the person making the promise should obligated to perform the promise within a reasonable time, where no time is specified. Parties can always contract around this

[392] https://shorturl.at/opABF (accessed 08.05.2023)
[393] Padmanabha Kakkothaya v. Keshava Derinjithaya, MANU/TN/0030/1951
[394] Section 135, Contract Act.
[395] See, for instance, M. Venkataramanaiah v. Margadarsi Chit Fund Limited, MANU/AP/0935/2008

default by addressing the time aspect in their contract. Consistent with the Initial Position, this is a default rule.[396]

Again, this sub-chapter reflects the Initial Position that performance related provisions are predominantly default rules. Section 52 is an interesting provision because it contains an altering rule: the rule makes the default position applicable when the order of performance is not "expressly" stated, . The rule requiring express fixation in the contract of order of performance to contract around the default is the altering rule here.

Section 55 has three paragraphs and consists of default rules. Although Para 1 of Section 55 is a default rule, courts have made it a sticky default rule in a way: it is difficult in a contract for Para 1 of Section 55 to apply. In the last few years, there has been a slight shift where courts have recognised the need for revisiting the presumptions that time are not of essence.[397] In Saradamani case, the Supreme Court held:

"*24. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable)… This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now*."[398]

[396] Also see, Section 47, which is also a default rule.
[397] See, for instance, C. Haridasan v. Anappath Parakkattu Vasudeva Kurup, MANU/SC/0031/2023; Desh Raj v. Rohtash Sinha, AIR 2023 SC 163 (holding time as essential in an agreement to sell immovable property).
[398] Saradamani, MANU/SC/0717/2011, Para 24.

Nevertheless, courts sometime continue to be entrenched in the sticky default rule paradigm.[399]

Recently, the Delhi High Court in MBL Infrastructures Limited v. Delhi Metro Rail Corporation[400] held:

"*16. Provisions of the contract which will set at naught the legislative intendment, the Contract Act, I would hold the same to be void being against public interest and public policy. Such clauses are also void because it would defeat the provisions of law which is surely not in public interest to ensure smooth operation of commercial relations. I therefore hold that the contractual clauses such as Clauses 11A to 11C, on their interpretation to disentitle the aggrieved party to the benefits of Sections 55 and 73, would be void being violative of Section 23, the Contract Act*."[401]

Thus, this decision talks about emasculation of Section 55 in its entirety.

Section 56 operates as a default rule but it is doubtful if the provision can be totally taken out through a contract to the contrary.[402]

Section 57, although classified under performance, deal with certain situations where a part of the agreement is void. Take an agreement containing two sets of reciprocal promises. Consider that the first set of promises are legal and the second set is illegal. Section 57 states that the first set of promises is a contract while the second set is void. Note that for this rule to apply there should be at least two sets of reciprocal promises. This is a mandatory rule. So is Section 58, which concerns alternative promises where a part of it is legal and the other is not: what is enforceable is the legal branch and not the illegal branch.

---

[399] See, for instance, Welspun Speciality, MANU/SC/1059/2021.
[400] MANU/DE/8454/2023
[401] *Ibid*, Para 16.
[402] See, Energy Watchdog v. Central Electricity Regulatory Commission (11.04.2017 - SC) : MANU/SC/0408/2017; Alopi Parshad and Sons Ltd. vs. Union of India, MANU/SC/0057/1960, Para 22.

Section 59, the Contract Act deals with how payments towards discharge of several debts are to be appropriated. In a situation where a debtor makes payment and expressly or impliedly makes it known to the creditor, to whom the debtor owes several debts, that the said payment is in discharge of a particular debt, the creditor should so apply if she wishes to accept the payment. Section 60 applies in a situation where the debtor omits to intimate how the money is to be appropriated: where there is no indication on the manner of appropriation, the opposite party is free to appropriate it to any debt owed by the debtor even if the recovery is barred by limitation law.[403] Section 61 concerns a situation where neither party appropriates payments.[404] Courts have recognised that these provisions are default rules.[405]

Section 62 relates to the effect of novation, rescission and alteration of contract. Section 63 recognises that promisee may not require performance of the contract, either in full or in part. Dasgupta classifies these provisions as default rules since they are at parties' discretion (Dasgupta, 2010). Although Section 62 does not demand performance of the original contract, yet, there could be a situation where the parties agree that some term of the original contract could continue to apply.[406]

Section 64 to 66 deal with voidable contracts and therefore they are more towards the mandatory rules spectrum. Section 64 lays down the consequences of rescission of a voidable contract. Section 65 requires a person "*who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it*".[407] Section 66 relates to the mode of communicating or revoking the rescission of a voidable contract and as such are mandatory rules. These provisions come within the ambit of provisions relating to performance but are towards the mandatory rules spectrum.

---

[403] https://shorturl.at/opABF (accessed 08.05.2023)
[404] *Ibid*.
[405] Leela Hotels Ltd. vs. Housing and Urban Development Corporation Ltd., MANU/SC/1335/2011, Para 22; Dharam Deo Pandey vs. Ramanuj Pandey, MANU/BH/0201/1937, Para 7.
[406] See, for instance, Nalini Singh Associates vs. Prime Time - IP Media Services Ltd., MANU/DE/2496/2008, Para 19.
[407] https://shorturl.at/opABF (accessed 08.05.2023)

Section 67 pertains to the "*effect of neglect of promisee to afford promisor reasonable facilities for performance*".[408] A perusal of the rule may lead to the conclusion that this rule too is more towards the mandatory rules spectrum. However, consider this scenario: a construction contract provides that the owner shall provide electricity and water facilities to the contractor, and that in case the owner does not provide those facilities, the contractor would be entitled to reimbursement of costs of procuring those facilities. In this scenario, refusal by owner to provide water and electricity facilities would not excuse the contractor from non-performance because the contract creates a fall-back option for the contractor, in case of refusal by the owner. Hence, one would not be too wrong to classify this provision as a default rule.

5.9. Provisions relating to Quasi-Contracts

Chapter V, Contract Act is titled "Of Certain Relations Resembling those Created by Contract".[409] It deliberately does not employ the oft-used phrase "quasi-contracts" to signal that the language used in the Contract Act should be construed uninfluenced by English law.[410] Sections 68 to 72 deal with these types of relations resembling contracts. The basis of liability is independent of a consensus between parties- it is a duty cast in terms of law (Vardhan, 2018, 1051-1052). Dasgupta classifies these provisions as mandatory rules (Dasgupta, 2010).

Section 68 of the Act deals with a "*claim for necessaries supplied to person incapable of contracting, or on his account*".[411] Here, the right of the supplier is only for a reimbursement for the necessaries supplied and not for the payment of an agreed price (Vardhan, 2018, 1053-1054). Hence, the possibility of parties contracting out this provision does not exist. Also, Section 68 is based, partially, on the idea that the necessaries are supplied to a person incapable of contracting, such as a minor, a

[408] https://shorturl.at/opABF (accessed 08.05.2023)
[409] *Ibid*.
[410] West Bengal v. BK Mondal, MANU/SC/0114/1961
[411] https://shorturl.at/opABF (accessed 08.05.2023)

mentally challenged person, etc. While contracting out may not be possible, can such person who supplied necessaries be entitled to be compensated (not merely reimbursed) for her efforts? Commentary suggests that such a person may not be entitled to despite an agreement (Vardhan, 2018, 1053-1054). It is another thing that the person who is entitled to be reimbursed may not want to.

The illustration to the provision clearly conveys the idea. A zamindar, A, grants his land on lease to B. Since A did not pay the land revenue, the government advertises to sell the land. B pays off the land revenue arrears. By operation of this section, B can legally get the amount expended reimbursed from A. The phrase "person who is interested" would not only cover actual losses but also loss or inconvenience apprehended (Vardhan, 2018, 1060).

The section also covers a case of attachment of plaintiff's property due to the opposite party's failure to pay land revenue arrears and the plaintiff discharges the arrears in order to secure her property.[412] However, a plaintiff who pays voluntarily without any interest involved cannot claim benefit of this provision.[413]

Section 70 relates to a situation one lawfully does or deliver a thing without the intent to do so in a gratuitous manner and the beneficiary enjoys the thing so done, the beneficiary is bound to make good the former for the thing so done or delivered.[414] Again, it applies where there is no contract (Vardhan, 2018, 1082)[415] or even if an agreement is invalid[416] and cannot be used to circumvent contractual rights.[417]

[412] See, for instance, Heerachand v. Saraswathy Ammal (2000) 3 CTC 694; Tulsa Kunwar v. Jageshwar Prasad, (1906) 28 All 563: MANU/UP/0117/1906.
[413] Ram Tuhul Singh v. Biseswar Lall Sahoo, MANU/PR/0009/1875, Para 17.
[414] https://shorturl.at/opABF (accessed 08.05.2023)
[415] See, K.S. Satyanarayana V. V.R. Narayana Rao, MANU/SC/0422/1999 : (1999) 6 SCC 104: AIR 1999 SC 2544; Haji Adam Sait Dharmasthapanam vs. Hameed (1985) KLT 169; Mulamchand V. State of M.P. (MANU/SC/0009/1968 : AIR 1968 SC 1218.
[416] Orissa Industrial Infrastructure Development Corporation v. MESCO Kalinga Steel Ltd. (14.02.2017 - SC) : MANU/SC/0154/2017
[417] T.K. Viswambaran vs. State of Kerala, MANU/KE/1650/2015, Para 16.

Unlike Sections 68 to 70, Section 71 is couched in terms of a duty. It casts the duty on the finder of goods, which he takes into his custody, owes the same duty towards the goods as a bailee of the goods owes towards such goods.[418] Again, if the person is contractually liable to take responsibility over the goods, Section 71 cannot apply. At the same, consider this scenario: there is an open offer where the owner of lost goods, say, of a crate of books, advertises of his lost goods and states in the open advertisement that anyone who finds the lost books would be entitled to be compensated for his efforts.[419] Consider that the advertisement also states that even if in the process of delivering the goods there is some damage for the goods, that was not a problem. This can possibly be construed as an act of contracting around the default that the responsibility of the finder of lost goods is akin to the responsibility of a bailee.

Section 72 concerns a situation where money is paid or a thing is delivered to a person owing to coercion or by mistake.[420] As per Section 72, she is obligated to return the goods so delivered or repay the amount paid. This is a statutory duty in Section 72 (Vardhan, 2018, 1110). The question is whether this is a mandatory rule? In other words, can parties contract around this provision? Let us take a case where the baker who has delivered a cake to a wrong address and by the time the person in that wrong address figures out who the baker is, the cake is likely to be in a condition which makes its return irrelevant. So, the baker lets that person keep it but seeks half the price, which the person agrees to. The person to whom the goods were delivered by mistake neither returns the goods nor pays back the price but agrees with the baker to pay half the price. This is an agreement contracting around the rule.

The above illustrations point out the idea that classifying a rule as a default/ mandatory/ altering rule is not straightforward, reiterating the point made in Chapter 2 that these concepts are not water-tight compartments having clear-cut distinctions. Although

[418] https://shorturl.at/opABF (accessed 08.05.2023)
[419] Assume that an open offer has been made similar to the one made in Carbolic Smoke Ball Co Case., [1892] EWCA Civ 1 (CA).
[420] https://shorturl.at/opABF (accessed 08.05.2023)

Dasgupta classifies these as mandatory rules, the aforesaid illustrations, especially those of Sections 71 and 72 do not point to such a picture.

5.10. Provisions relating to Remedies

Sections 73 to 75, the Contract Act are remedies provided for the breach of contract. Broadly, Section 73 provides damages assessed after the breach, Section 74 pertains to liquidated damages and Section 75 relates to compensation to a party which rightfully rescinds a contract.

Dasgupta classifies Section 74 as a mandatory rule (Dasgupta, 2010).

The first two paragraphs of Section 73 deal with compensation for loss due to a contractual breach. The third paragraph of the section concerns compensation for the failure by the promisor to discharge an obligation resembling contractual obligations. The explanation relates to the first paragraph, on a literal reading.

Paragraph 1 of Section 73 states that where the promisor breaches a contract, the promisee would be entitled to receive from the promisor compensation for loss caused by that breach, or which the parties at the time of contract as likely to result from the contractual breach.[421] A close look at Paragraph 1 will reveal that parties could contract around the rule and agree that the compensation could be something broader: loss or damage which is "*likely to result from the breach*". This knowledge contemplated by the second leg of Para 1 to Section 73 could be by agreement as well.

The lack of a default rules centric approach has made courts conclude that if parties had agreed for a special method of quantification of damages (which is not liquidated damages) such agreement is not covered under Section 73. For instance, in Maharashtra State Electricity Board v. Sterilite Industries (India)[422], the court held: "*13. If as construed by the arbitrators that clause 14(ii) excludes applicability of Section 73 of*

[421] https://shorturl.at/opABF (accessed 08.05.2023)
[422] MANU/SC/0627/2001, Para 13.

the Indian Contract Act and the proposition of law stated by the arbitrators is correct, then Section 73 is not attracted to the case." Conceptually, however, Para 1 to Section 73 provides for a default rule and parties can alter it: this is permitted by the provision itself explicitly. The long and short of it is Para 1 of Section 73 is a default rule.

But what is the extent of the default nature of the rule. For instance, can parties contract out Section 73 itself thereby totally excluding compensation for breach? There are two levels at which such clauses could operate: in the first level, the agreement could provide that no damages would be payable in case of specific breaches. In the second level, the agreement could contain an omnibus clause prohibiting award of damages, irrespective of any breach. In the first instance, there are two contrary judgments of courts. On the one hand, there are the judgment of the Supreme Court in Ramalinga Reddy case[423] and Ramnath International Case[424], where a clause prohibiting a claim for compensation for certain delays attributable to the owner but only allowing for extension of time was found enforceable.[425] On the other hand, there are judgments such as Asian Techs v. UoI[426] and Simplex Concrete Piles (India) Ltd. vs. Union of India[427], where the courts have held such clauses to be unenforceable.

Justifying the non-enforceability of such provisions, the Delhi High Court held in Simplex Concrete Piles (India) Ltd. v. Union of India:

"*If Sections 73 and 55 are not allowed to prevail, then, in my opinion, parties would in fact not even enter into contracts because commercial contracts are entered into for the purpose of profits and benefits and which elements will be non-existent if deliberate breaches without any consequences on the guilty party are permitted. If there has to be no benefit and commercial gain out of a contract, because, the same can be broken at*

[423] MANU/SC/1814/1994
[424] MANU/SC/8802/2006
[425] See also, C and C Constructions Ltd. vs. Ircon International Ltd. (01.03.2021 - DELHC) : MANU/DE/0400/2021; Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Pvt. Ltd., MANU/SC/0828/2010; Steel Authority of India Limited v. J.C. Budharaja, MANU / SC / 0542 / 1999
[426] MANU/SC/1620/2009
[427] MANU/DE/4538/2010

will without any consequences on the guilty party, the entire sub-stratum of contractual relations will stand imploded and exploded. It is inconceivable that in contracts performance is at the will of a person without any threat or fear of any consequences of a breach of contract. Putting it differently, the entire commercial world will be in complete turmoil if the effect of Sections 55 and 73, the Contract Act are taken away."[428]

The debate still continues and is yet to be determined finally. Nevertheless, it is a possible argument that contractual clauses restricting damages in specific instances may be valid. On the other hand, the enforceability of an omnibus clause is doubtable, as was held in MBL Infrastructures Limited v. Delhi Metro Rail Corporation.[429] This decision of the Delhi High Court should not be taken to prohibit an LD clause which takes away the applicability of Section 73.

Para 1 of Section 73 would be a default rule. There are case-laws which recognise this legal position, while there are contrary judgments as well.

Para 2 of Section 73 prohibits compensation indirect and remote loss. This is in the nature of a default rule because Para 1 of Section 73 allows parties to agree to special damages. It is a penalty default rule owing to its informational effects (Ayres and Gertner, 1989, 102-103; Geis, 2006, 1110 and 1119). In the absence of a special provision, however, a party is not allowed to recover remote and indirect losses.

Para 3 operates in a space where parties are not subjected to any agreement and therefore, inherently, there is no agreement and the possibility of contracting around (default rule) is not there.

Section 73 contains an explanation: it provides that while estimating the loss, the ways that existed to remedy the loss or damage caused owing to the breach is has to be considered.[430] The words used in the explanation are "must be" conveying mandatory

[428] MANU/DE/4538/2010, Para 14.
[429] MANU/DE/8454/2023, Para 44.
[430] https://shorturl.at/opABF (accessed 08.05.2023)

nature. In addition, given the mandatory nature of the explanation, it is doubtable if the provision could be construed as a default rule.

Section 73 is not a mandatory rule because parties could alter the rule and provide for party-based assessment of damages rather than through an *ex post* determination. This is recognised in Section 74 which recognises agreement between parties determining damages prior to occurrence of breach.

Section 74, Para 1 states that where there is an agreement between parties determining LD, the breaching promisor is liable to the pay the promisee compensation that is reasonable but that does not go beyond what is named in the said clause.[431] The next chapter discusses the notion that Section 73 is a default rule because it also provides for parties to determine the damages under Section 74, thereby contracting around the need for court determined damages.

Para 1 of Section 74 is followed by an explanation which clarifies that a contractual provision for increase of the rate of interest from the default date could be a penalty.[432] If so, the promisee would only be entitled to reasonable compensation.

Dasgupta rightly classified this rule as a mandatory rule. The ceiling of compensation that can be awarded is the amount named in the contract.[433]

Section 74 contains an exception: where a bail-bond is given under any law, such person will be liable to pay the whole sum in the bond, and not merely "reasonable compensation". This is an exception to Para 1 of Section 74.

Section 75 concerns entitlement for compensation where a contract is rescinded in a proper manner. Such compensation is payable for damages suffered because of rightful rescission. This position is similar to Para 1 of Section 73 in relation to the triumvirate.

---

[431] https://shorturl.at/opABF (accessed 08.05.2023)
[432] *Ibid.*
[433] Fateh Chand case, MANU/SC/0258/1963, Para 15.

5.11. Provisions relating to Indemnity

Section 124 concerns the definition of an indemnity contract and as such it declares what a contract of indemnity is, and does not fall into any of the three classifications of rules of contract law.

Section 125 describes the scope of recovery of an indemnified from an indemnifier. The below table summarises the legal position on the scope of such recovery:

Table 11 Scope of Recovery in S. 125, Contract Act

S. 125	Particulars
(a)	Damages that the indemnified is made to pay in a suit, to which the indemnity is applicable
(b)	Costs in relation to a suit
(c)	Sums paid under terms of compromise

There are some conditionalities attached to Sections 125(b) and (c).

As regards the nature of the provision, courts have held that the provision could be altered by agreement. For instance, in Raigad Concrete Industries v ICICI Bank[434], the Bombay High Court permitted an agreement between indemnified and the indemnifier which may subject the transaction to any condition as may be imposed in the agreement.[435] Besides, it has been clarified in numerous judgments that Sections 124 and 125 are not comprehensively cover the complete law on indemnity.[436] Therefore, Section 125 could be considered as a default rule.

[434] 2009 SCC OnLine Bom 727
[435] *Ibid*, Para 9.
[436] See, for instance, Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri, AIR 1942 Bom 302.

5.12. Provisions relating to Guarantees

As has been previously noted the provisions relating to bank guarantees contain a substantial amount of default rules. Nevertheless, this portion of Chapter 5 takes up each section *in seriatim*.

Section 126 and 129 contain definitions of state that a guarantee could be oral or in writing and therefore are in the nature of declaratory provisions. Section 127 should be read in conjunction with Section 2(d), which defines "consideration". Section 127 deals with a special case of consideration for contract of guarantees. No separate consideration is required to flow to the surety from the creditor but it is sufficient if the creditor does or promises to do something for the sake of the debtor. Strictly speaking, it is not a provision that contains a rule but declares a specie of the genus "consideration" insofar as it is applicable to a contract of guarantee.

While it is mandatory for consideration to exist in a contract of guarantee, this section is not specifically a mandatory rule. But it is theoretically possible that a part of the consideration might flow directly from the creditor to the surety in terms of a fee payable for the issuance of a bank guarantee. Therefore, this provision cannot be construed as laying down a mandatory rule. It might be a construed as a declaratory rule because it declares what consideration is from for the purposes of a contract of guarantee.

Section 128 is an explicit default rule because it employs the phrase "*unless it is otherwise provided by the contract*." The effect of this phrase has been recognised in various judicial decisions too.[437]

Section 130 deals with the mechanics of revoking a continuing guarantee: it provides that a surety could revoke a continuing guarantee at any time but in respect of future transactions. The mode of revocation contemplated by Section 130 is through a notice

[437] See, for instance, T. Raju Setty vs. Bank of Baroda, MANU/KA/0013/1992, Para 11.

provided to the creditor. This provision has been regarded as a default rule by Indian courts, in that, it could be contracted around to provide that a surety cannot revoke a continuing guarantee merely by giving notice, that is, at the convenience of the guarantor.[438] The courts have, instead of using the language of "contracting around", have used it in terms of "waiver".[439]

Section 131 explicitly uses the phrase "in the absence of any contract to the contrary" and is therefore a default rule.

Like most provisions in Chapter VIII, there is hardly any concern of internality or externality in Section 132. Therefore, it is difficult to construe it as a mandatory rule. Decided cases make the provision inapplicable to specific situations, leading to considering this provision as a default rule.[440]

It has already been discussed that Sections 133, 134 and 135, the Contract Act are default rules. So are Sections 139 and 141. Interestingly, T. Raju Setty vs. Bank of Baroda[441], the point for consideration of the Karnataka High Court was: if the rights of surety in the entire Chapter VIII, the Contract Act could be given up.[442] The Karnataka High Court noted the discordance in the views of various High Courts in that while Section 128 allowed contracting out the provision, other rules in the said Chapter specifying surety's rights did not explicitly allow contracting out (or contracting around). The High Court noted that all the provisions in Chapter VIII were interconnected and that therefore these have to be understood together and not separately.[443] These sections do not have sub-sections and their headings are tabulated below:

---

[438] Sita Ram Gupta v. Punjab National Bank and Ors., MANU/SC/7385/2008, Paras 7 and 8; H.B. Basavaraj (Dead) by Lrs. and Ors. v. Canara Bank and Ors., MANU/SC/1785/2009, Para 6 and 7.
[439] Sita Ram Gupta vs. Punjab National Bank and Ors., MANU/SC/7385/2008, Paras 7 and 8; H.B. Basavaraj (Dead) by Lrs. and Ors. v. Canara Bank and Ors., MANU/SC/1785/2009, Para 6 and 7.
[440] The Bank of Bengal v. M. Pogose, MANU/WB/0055/1877, Para 6.
[441] MANU/KA/0013/1992
[442] *Ibid*, Para 8.
[443] *Ibid*, Para 9.

Table 12 Default Rules as recognised in judicial decisions[444]

Section	Section Heading
133	"*Discharge of surety by variance in terms of contract*"[445]
134	"*Discharge of surety by release or discharge of principal debtor*"[446]
135	"*Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor*"[447]
139	"*Discharge of surety by creditor's act or omission impairing surety's eventual remedy*"[448]
141	"*Surety's right to benefit of creditor's securities*"[449]

Section 136 relates to the surety's liability would not be rendered nugatory as a consequence of contract with another person to grant time to the principal debtor, as opposed to such contract with the principal debtor. This consequence is encapsulated in Section 135. Since Section 135 in itself is a default rule, it follows that Section 136 also amounts to a default rule.

Section 137 employs the phrase "*in the absence of any provision in the guarantee to the contrary*" and is therefore an explicit default rule.

Section 138 is a specific application of Section 44, Contract Act. Like the latter, Section 138 is not subjected to any concern of externality or internality and therefore, consistent with various decisions on Chapter VIII, this can be considered as default rule.

In H.B. Basavaraj (Dead) v. Canara Bank[450], the Supreme Court read *T Raju Setty* as having held that the surety could waive all its rights conferred in Chapter VIII, the

[444] See, for instance, T Raju Shetty v. Bank of Baroda, MANU/KA/0013/1992; Corporation Bank v Mohandas Baliga, MANU/KA/0296/1992.
[445] https://shorturl.at/opABF (accessed 25.01.2024)
[446] *Ibid*
[447] *Ibid*
[448] *Ibid*
[449] *Ibid*
[450] MANU/SC/1785/2009

Contract Act.[451] By necessary implication, this means that a surety could waive of its rights in Sections 140, 145 and 147, even when these provisions do not explicitly state so. In other words, Sections 140, 145 and 147 (Vardhan, 2019, 1465) could be considered as default rules.

Sections 142 and 143 deal with situations were invalidity of guarantees and by their very nature, they are mandatory provisions that could not be contracted around. Section 142 is where the guarantee was issued owing to misrepresentation by the creditor and Section 143 pertains to creditor obtaining a guarantee through concealment of a material circumstance.[452] Section 144 relates to guarantee issued on the condition that another would join as co-surety: it states that unless the co-surety joins, the guarantee issued on that condition will not be valid. This too would be considered as a mandatory rule because it cannot admit an agreement to the contract this around because the condition in the guarantee would then cease to exist.

Section 146 expressly uses the term "in the absence of any contract to the contrary" and is therefore a default rule (Vardhan, 2019, 1471).

5.13. Bailment

Section 148 defines "bailment", "bailor" and "bailee" and is a declaratory rule. Section 149 deals with the mode of delivery in bailment. This does not address any externality or internality and therefore parties could contract around this provision so as to constitute delivery for the purposes of bailment. Under this provision, the bailee need not physically possess thing bailed. For instance, where the bailor holds goods pledged to her by the bailee, it would amount to a case of constructive delivery (Vardhan, 2019, 1491).[453]

[451] MANU/SC/1785/2009, Para 6.
[452] https://shorturl.at/opABF#search=COntract%20Act%201872 (accessed 19.12.2023).
[453] This illustration is based on facts in Bank of Chittoor Ltd. v. P Narasimhulu Naidu, MANU/AP/0113/1966, Para 14. *Per contra*, the position in Pakistan which has identical provision is that there is a requirement of actual physical possession. See, Trading Corporation of Pakistan (Pvt.) Ltd. v. Punjab Trading Agency, LEX/SKPK/0209/2016, Para 27 (High Court of Sind).

Section 150 is a protection afforded to the bailee against an internality. Adverse results that this provision seeks to guard against is the harm that may be caused owing to the goods bailed to the bailee. It imposes the duty on the bailor to make disclosures. The problem of dearth of recent case law in this area on whether Section 150, Para 1 could be contracted out can be addressed through analogy in Section 57, Easements Act, 1882, where licensor is duty-bound to disclose defects.[454] The requirement in Section 57 has been regarded as mandatory and which could not be contracted around.[455] Para 2 of Section 150 is information forcing and is a solution to possible information asymmetry. The responsibility is on the bailor if she breaches Para 1 of Section 150. Therefore, the entirety of Section 150 is and should be regarded as mandatory.

The law regarding Sections 151 and 152 have been discussed extensively in Chapter 4: Although Section 152 seems to be a default rule, it validates a contract where bailee could be made responsible for a standard of care higher than as prescribed in Section 151 but the provision does not allow contracting parties to lower those standards.[456]

Section 153 states that if the bailee acts contrary to the conditions of bailment, the bailment is voidable at the bailor's option. Nothing prohibits an agreement that only for material violation of the bailment conditions could the bailor treat the bailment as voidable or for default events that could not lead to treating the agreement as voidable. However, the degree of contracting around could not include contracting out the provision considering that it protects the bailor against bailee acting contrary to the bailment conditions.

---

[454] Section 57 states: "*The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware*." https://www.indiacode.nic.in/bitstream/123456789/2349/1/A1882-05.pdf (accessed 23.12.2023).

[455] See, for instance, India Tourism Development Corp. Ltd. v. Bougainvillea Multipex and Entertainment Centre Pvt. Ltd., Delhi High Court: O.M.P. (COMM.) 402/2018: 01.04.2022, Para 30, affirmed in India Tourism Development Corporation Limited v. Bougainvillea Multiplex Entertainment Centre Pvt. Ltd., MANU/DE/2063/2022 and Tourism Development Corporation Limited v. Bougainvillea Multiplex Entertainment Centre Pvt. Ltd., Special Leave to Appeal (C) No.13630/2022, Order dt. 16.08.2022, Supreme Court of India.

[456] Taj Mahal Hotel v. United India Insurance Co. Ltd., (2020) 2 SCC 224.

Section 154 entitles the bailor for compensation for damage of goods due to unauthorised use. This is to protect the bailor against such use. There is nothing which prohibits the parties from agreeing for liquidated damages, in line with Section 74. To that extent, this provision could be contracted around but it is doubtful if this entitles the parties from contracting out the rule.

Sections 155, 156 and 157 are akin to explicit default rules: they speak of "*consent of the bailor*"[457]. Such consent could be expressed in the agreement itself.

The manner in which Section 158 suggests that it operates outside of contract. So, it is expected that the provision is mandatory.

Section 159, which deals with return of goods gratuitously bailed, states that the bailor can demand the goods bailed gratuitously at any time even if it is for a specific purpose or time. This has been regarded as subject to an agreement which provides that if it is for a specific time the bailor could not demand it till that time period is completed (Vardhan, 2019, 1522).

Section 160 states that after the time period completes or the purpose was accomplished the person to whom goods are bailed is to return the goods as per instructions of the bailor without demand. However, there is nothing that prohibits an agreement that provides that bailor has to make a demand or that the bailee has to give notice to the bailee of purpose accomplishment, etc.

Section 161 deals with the responsibility of the bailee when the goods bailed are not returned. It is possible that parties by contract regulate the responsibility of the bailee but it may not be possible to take away the right as such.

[457] https://shorturl.at/opABF (accessed 30.12.2023).

Section 162 concerns gratuitous bailment where the bailor or the bailee dies. In such a case, the bailment is terminated. This provision may be intended to protect either party's legal heirs. However, it is possible for the contract or bailment to regulate what happens in case of death or the bailor or the bailee. Again, Section 164 could be regulated but it is difficult to construe it to contract the provision out.

Section 166 is intended to protect the bailee against bailment by the bailor without proper title. The bailee acting in good faith cannot be made liable. Inherently, the provision is something which cannot be contracted around and is mandatory. Section 167 pertains to third parties' rights over the thing bailed. So, it is inherently mandatory. So are Sections 168 and 169.

Sections 163, 165, 170, and 171 are explicit default rules because they employ the expressions "in the absence of any contract to the contrary" or "in the absence of any agreement to the contrary".[458] As noted earlier, Section 171 is an altering rule.

5.12. Pledge

Section 172 defines the terms "pledge", "pawnor" and "pawnee" and is therefore in the nature of a declaratory rule. Section 173 concerns right of retention of goods by pawnee. In addition to doing so for securing moneys due, pawnee could exercise such right for following purposes:

- Interest due on debt;
- expenditure (required) by the pawnee for possession/ preservation of the goods that the pawnor pledged.

There is nothing that prohibits a pawnor and a pawnee from restricting or expanding the right of the pawnee by contract. "May", here, supports this construction/ Therefore, Section 173 is a default rule.

[458] https://shorturl.at/opABF (accessed 30.12.2023).

Subject to an agreement, Section 174 prohibits the pawnee from retaining goods pawned in respect or debts/ promises which are beyond the pledge. Therefore, this is an explicit default rule.

Section 175 also is a default rule: nothing prohibits parties from agreeing that the pawnee is not entitled to extraordinary expenses for preservation of goods. Such an agreement may never be made but even if it is made, no internality or externality is protected against in this provision.

Section 176 entitles the right to the pawnor to bring a suit against the pawnor for default and allows retention of goods pawned goods as collateral security. It also empowers the pawnee to sell the goods pledged further to default by the pawnor but prior to such intended sale there should be reasonable notice of sale to the pawnor. Note that the sale contemplated is not the actual sale; otherwise no reasonable notice is possible but only intended sale (Vardhan, 2019, 1574).

The requirement of notice has been regarded as mandatory, intended to protect the pawnor, and is therefore a mandatory rule[459] and an agreement providing otherwise is void.[460] The intent behind the notice requirement is to protect the pawnor against the internality that the pawnee might arm-twist the pawnor into selling a thing of value, which would deny the pawnor his ownership rights and interests over the goods pawned. Therefore, a procedural requirement of notice has been laid down in Section 176. The same justification applies to the well-established rule that prohibits self-sale by pawnee on default by the pawnor.[461]

Unlike what Dasgupta (2010) contended, mere reading of the bare text of the statute may not be sufficient to infer as to whether a rule is a default or a mandatory rule. It

[459] See, for instance, The Official Assignee v. Madholal Sindhu, MANU/MH/0052/1946; Tapanga Light Foundry v. SBI, Khurda, MANU/OR/0047/1987.
[460] See, for instance, Vimal Chandra Grover vs. Bank of India (26.04.2000 - SC) : MANU/SC/0316/2000
[461] See, for instance, Ramdeyal Prasad v. Sayed Hasan, MANU/BH/0102/1943; PTC India Financial Services Limited v. Venkateswarlu Kari, MANU/SC/0629/2022, Paras 8.1 to 8.4.

may be necessary to look at the precedents on the topic. The preceding three sections were regarded as default rules and yet, there is a mandatory rule in Section 176.

Section 177 recognises the "absolute right of the pawnor" to get back the pledged property[462] and is therefore a mandatory rule.

Section 178 permits a mercantile agent who possesses "the goods or documents of title to goods" of the owner to validly pledge it to a "good faith" pawnee, without knowledge of lack of authority. The rule is, in one part, a default, and in another part, mandatory. An agency agreement could explicitly disentitle the mercantile agent from pledging the goods. To that extent, this rule could be considered as a default rule. This rule protects the good faith pawnee against externality.

However, if a pawnee, who is considered to be a sophisticated party, such as a bank, does not due adequate due diligence and would be regarded as having acted negligently, and resultingly, not in good faith.[463]

Section 178A deals with a situation where a good faith pawnee acquires title to goods obtained by the pawnor, who obtains goods under a voidable contract that is yet to be rescinded at the time of pledge.[464] The condition is that the good faith pawnee should not have been aware of the problems with pawnor's title. This is in the nature of a mandatory rule as there is no scope for contracting around the provision. Section 179 can be considered as a generalisation of scenarios where the pawnor's interest is less than that of an owner, that is, a limited interest, whereas Sections 178 and 178A are species of the genus (Vardhan, 2019, 1592).[465]

[462] Lallan Prasad v. Rahmat Ali and Ors., MANU/SC/0070/1966, Para 16; PTC India Financial Services Limited, MANU/SC/0629/2022, Para 5.1 and 12.6;
[463] Indian Bank Ltd. v. Anomula Seshagiri Rao and Sons Co., MANU/AP/0089/1971, Para 12.
[464] https://shorturl.at/opABF (accessed 20.12.2023).
[465] *Ibid*

5.13. Agency

Section 182 defines the terms “agent” and “principal” and is therefore in the nature of a declaratory rule. Section 187 is also a definition and therefore does not fit in any of the three categories of rules.

Section 183 deals with essential conditions for employing an agent and are therefore mandatory. Section 184 deals with those who cannot be an agent. This is also mandatory, in order to foster legal responsibility on the agent. At the same time, with third parties, anyone can bind the principal. Section 185 declares that consideration is not necessary for a contract of agency. This is a rule of validity conferred by law and it is therefore mandatory. Section 186 recognises that the power of agent to represent the principal could be stated expressly or impliedly. It is declaratory in nature.

Section 188 which specifies the extent of authority: it states that an authorised agent has the power to do all legal acts necessary for the purpose.[466] This provision is in the nature of default rules and therefore the principal could constrict the agent’s functions for the principal. But when it comes to the agent’s authority vis-à-vis third parties, the test is more or less objective. The consequence thereof is provided in Section 237, which makes the principal responsible if the principal induced the agent to assume that the said acts of agent were authorised.[467]

Section 189 speaks of implied authority of agent in case of emergency. Again, like, Section 188, this is subject to an agreement to the opposite effect.

Section 190 states that an agent cannot employ sub-agent for the work given to her, except where ordinary custom of trade may so permit. This is, however, subject to the contrary, where the principal authorises the agent to do so (Vardhan, 2019, 1671).

[466] https://shorturl.at/opABF (accessed 20.12.2023).
[467] *Ibid*.

Section 192 has three paragraphs: para 1 relates to responsibility of principal for the conduct of a duly appointed sub-agent. Para 2 states that agent is responsible for the acts of sub-agent to the principal and para 3 provides for sub-agent's privity only to the agent and not the principal, with the exception being situations of fraud or wilful wrong. Contracting out of Para 2 has been judicially recognised.[468] However, the 1st Paragraph of Section 192 protects third parties against principals who disown acts of sub-agents duly appointed, that is, an externality. Therefore, normatively speaking, Paragraph 1 is not something that could be contracted out. Paragraph 3, which fastens liability on the sub-agent to the principal for fraud or wilful misconduct, could be contracted around for higher liability but not for lowering or contracting out liability (for fraud or wilful misconduct).

Section 193 is aimed at protecting the principal in relation to persons appointed by an agent as a sub-agent when such appointment is unauthorised. When an agent appoints, within her authority, be it explicit or implicit, a person for representing the principal, the person so appointed should be treated as an agent and not a sub-agent. This is the concept of "substituted agent" where law regards as privity having been established between the principal and the person so appointed (Vardhan, 2019, 1680). That person is liable to the principal in the same manner as an agent and such person is entitled to rights against the principal as an agent does. But there is nothing that prevents the principal and agent from agreeing against the provision and requiring the agent to agree to that effect with the person so appointed. So, this provision does not seem to be a mandatory rule.

Section 195 relates to how the agent should appoint such a person for the principal. Here, it states that the agent is bound to exercise discretion as an ordinarily prudent man would do so in his own situation.[469] This rule is aimed at safeguarding the principal and could be construed akin to Section 152: the parties could contract around the provision for an enhanced liability but cannot reduce the liability. However, where sophisticated

[468] *Summan Singh*, MANU/PH/0066/1952, Para 18.
[469] https://rb.gy/tpgbtk (accessed 25.12.2023).

parties are involved, there is no reason why parties could validly agree to contract out this rule.

Sections 196 to 200 deal with ratification. Ratification presumes that a person did not initially act on behalf of the principal with proper authority but later the principal takes up those acts as his own.

Section 197 is a declaratory rule in that it declares how ratification could be made. However, parties to an agreement could agree that ratification cannot be implied.

Section 198 is in the nature of a mandatory rule because it protects the principal against internality. Ratification without proper knowledge is not ratification.

Section 199 is intended to protect a third party (Vardhan, 2019, 1699), that is, against an externality. It does not allow ratification in part. Section 200, which protects third parties against ratification, has also the similar effect: of protecting third parties. Therefore, both Sections 199 and 200 are mandatory.

Sections 201 to 210 deal with revocation of agency. Section 201 relates to circumstances when agency could be terminated. There could be modes other than those prescribed under this section. In other words, parties could contract around this provision by adding to the grounds.
As stated previously, Section 202 is an explicit default rule. It also contains an altering rule: the principal could terminate a contract of agency where the representative has interest in the agency only though an explicit agreement.

With the exception of Section 202, Section 203 empowers the principal to revoke the agency before the representative acts to binds the principal. There is nothing that prevents the agent and the principal to agree to contract around this rule. For instance, the principal and agent could agree for a payout.

Section 204 protects the agent against an internality: revocation by the principal of acts already done by the agent on behalf of the principal. Absent this provision, the agent might lose the protection of indemnity afforded to her under Section 222 (Vardhan, 2019, 1717). Therefore, this provision is not a default rule which could be contracted around to the agent's disadvantage.

Section 205 concerns a continuing agency (for a defined period), revocation/ renunciation absent justifiable reasons, either by the agent or the principal, shall be met with liability for compensation by the party doing so. Note that termination without sufficient cause is a fairly common provision and therefore this provision could be contracted around by the parties.

The extent of meaning of continuing agency has been stated to mean an agency where parties have a consensus that "*the relationship would not be terminated until the expiry of a particular period.*"[470] In Bright Brothers (Private) Limited v. J.K. Sayani, the Madras High Court has acknowledged that an agency covered under Section 205 could be terminated "*for a sufficient cause or on a reasonable notice*"[471], thereby acknowledging the possibility that termination could be for convenience but by giving sufficient notice of the termination, which is a requirement under Section 206. Note that the Madras High Court's decision construes this provision to make it a default rule at two levels. In the first level, it lays down a higher threshold for continuing agency: it is only when the agency is for a fixed period without termination would Section 205 operate. At the second level, even such agency could be terminated by giving sufficient notice.

However, by construing so, it is possible to emasculate the right of the non-revoking party to compensation. Hence, the proper way to construe both provisions would be to state that Section 205, not being a provision, which guards against an internality/ externality, does not invalidate a contrary agreement. Even in an agency with a fixed

[470] Bright Brothers (Private) Limited v. J.K. Sayani, MANU/TN/0575/1975, Para 18.
[471] *Ibid*

duration, parties could agree to terminate the agreement for convenience; and whether the termination is for convenience or for sufficient cause, reasonable notice as per Section 206 would have to be provided. In other words, Section 206 would be a mandatory rule while Section 205 would be a default rule. Construing the notice requirement under Section 206 as mandatory is also consistent with case-law.[472]

Section 207 is in the nature of declaratory rule because it states the mode of revocation. Parties could agree that valid revocation could only be express. However, this may not affect implied revocation, such as, the agent making herself unable to perform the function of agency.

This provision is a default rule: the agent's authority could be circumscribed by the principal. This has been recognised by courts.[473]

Section 208 protect against termination of authority of agent without the agent knowing. The agent could incur personal liability owing to the agency and therefore this provision is intended to safeguard the agent. It is a mandatory rule. Likewise, it also protects third parties against termination of authority without such parties knowing. This provision guards against both internalities and externalities and are therefore mandatory.

Section 209 concerns the effect of death or insanity of the principal. In such a case, the provision obligates the agent to take reasonable steps towards "the interests entrusted to him".[474] Such action is to be taken on behalf of the principal's representatives. The agency agreement could specifically provide that certain actions were to be taken on the death of the principal, in which case it would be sufficient for the agent to take such action.

[472] See, for instance, Bright Brothers (Private) Limited v. J.K. Sayani, MANU/TN/0575/1975, Para 18; Popular Shoe Mart v. K. Srinivasa Rao, MANU/AP/0433/1989, Para 20.
[473] See, for instance, Ferguson v. Um Chand Boid, MANU/WB/0029/1905, Para 3.
[474] https://rb.gy/tpgbtk (accessed 26.12.2023).

Section 210 concerns the effect of termination of authority of the agent on the sub-agent's authority.[475] However, it is possible that the agreement between the agent and the principal may deal with a scenario, especially in the context of substitute agent (Vardhan, 2019, 1727).

Section 211 deals with how agent should conduct the business of agency. Although not specified explicitly, the agent should act as per contract (Vardhan, 2019, 1728), in the absence of which, as per the directions of the principal, and in the absence thereof, as per custom. Thus, this provision fills gaps where there is no agreement (1st level) or no directions (2nd level), then as per custom. Therefore, this is in the nature of default rules. In principle, there is nothing that prevents the parties from contracting around the second sentence of Section 211 regarding losses and profits. However, it is doubtable if an agency agreement can emasculate the liability of the agent under this section in its entirety.

Section 212 deals with the skill and diligence that should be exercised by the agent. Commentary on the law suggests that this provision could be contracted around, although an agreement excluding liability for fraud or wilful wrong would not be enforceable (Vardhan, 2019, 1738). The remoteness rule in Section 212 and that in Section 73 are penalty/ information forcing default rules: parties could agree for special damages in specific cases.

Section 213 is the primary duty of agent (Vardhan, 2019, 1740) and is in incident of the fiduciary duty of the agent. It is a means by which a principal holds her agent accountable and therefore cannot be contracted out. However, it is reasonable that parties could agree when the agent should render proper accounts, such as during normal business hours, or with a week's notice, and so on.

[475] https://rb.gy/tpgbtk (accessed 26.12.2023).

Section 214 covers situation where there is difficulty in communicating with the principal. The section mandates that the agent should "*use all reasonable diligence*"[476] so as to communicate with the principal. This is intended to protect the principal from adverse consequences (internality) and is mandatory. So is Section 215, which empowers the principal's right to declare as invalid a transaction if any material fact had been deliberately withheld the agent or if the agent had indulged in acts that were disadvantageous to the principal.[477] Likewise, Section 216 entitles the principal to take any benefit from the agent which the latter had derived from dealing with agency business on her own account. This has the same effect as the previous sections: it is doubtable if these could be contracted around.

At the same time, Section 217 provides the right to the agent to withhold for herself sums received from the agency for her principal. However, it is possible that the agency agreement might specify if the agent could have a lien on goods, including contracting around the rule in Section 217. Likewise, Section 218 is not something that could be contracted around by agreement between parties, since it does not guard against an externality or an internality. Sections 219 and 221 are explicit default rules. Section 220 disentitles an agent from remuneration on the business which he misconducted and is likely to be considered as a mandatory rule.[478]

Sections 222 to 225 deal with the obligation of the principal towards her agent. Section 222 gives the right of indemnity to the agent for lawful acts done by her for the principal.[479] This is to protect the agent and is therefore likely to be interpreted as mandatory. Section 223 contains a mandatory rule: when the agent performs the agency function for her principal in good faith and in that process injures third parties, the latter is to be responsible for indemnifying the agent. This is to protect against adverse effect pursuant to the contract. Section 224 can be regarded as an exception to Section 223. It is mandatory and cannot be contracted out as clearly made out in the provision: it clearly

[476] https://rb.gy/tpgbtk (accessed 29.12.2023).
[477] *Ibid*
[478] *Ibid*
[479] *Ibid*

provides that the principal would not be under obligation to indemnify the agent even "*upon express or implied promise*" if the agent is engaged to perform a criminal act.[480] This is to protect against externalities.

Section 226 concerns insisting on performance of agreements entered by agent for the principal. The provision treats the contract and obligations flowing therefrom with the same effect as if the agreement had been by the principal directly.[481] This transaction is intended to protect the third party against internality in the agreement between the agent and the third party.[482] Hence, it is likely to be considered as a mandatory rule.[483]

Section 227 and 228 speaks of the extent to which the principal is bound when the agent exceeds his authority. Section 228 deals with a situation where unauthorised acts of the agent are inseparable from authorised acts. In such a situation, Section 228 allows the principal not to recognise the transaction. This is aimed at guarding against internality: it is therefore likely to be interpreted as something which cannot be contracted around. Section 227, which provides that if the unauthorised acts are separable from authorised acts the latter acts (and not the former ones) would be binding on the principal, is intended to protect other persons who deal in good faith (externality) in relation to the authorised acts of agent are concerned and to protect principal against unauthorised acts (internality), the protection is likely to be construed as a mandatory rule.

Under Section 229, when the agent acts in a business for the sake of the principal, with respect to third parties, if a notice is served on the agent, it is as if the same has been served on the principal. But this provision does not prohibit any agreement undercutting the said rule. In such a case, the party transacting with the principal will be aware of the agreement to that effect and would accordingly deal with the principal. However,

[480] https://rb.gy/tpgbtk (accessed 29.12.2023).
[481] *Ibid*
[482] It would be an externality insofar as the agency contract is concerned.
[483] A possible way that this rule could be contracted around is the following situation: the agreement specifically provides the mode of performance in which the agent who signed has no part in the performance but the agent still purports to act contrary to the contractual terms and participates in performance. In such a case, it is doubtable that agent's acts regarding performance would bind the principal.

situation might be different where the agreement is signed for the principal, in which case the provision might be intended to protect the party against the principal disowning any liability after the liability has arisen. In that case, an agreement to the contrary may not undercut the rule's operation and possibly this would depend upon party sophistication.

Section 230, Para 1 is a default rule: it uses the expression "*[i]n the absence of any contract to that effect*".[484] Section 230, para 2 provides for presumes authority of the agent to sign contracts for the principal and presumes lack of personal liability of the agent for such contracts. These presumptions have been regarded as rebuttable and the agent could limit or exclude liability through contract (Vardhan, 2019, 1807).[485]

Note that the presumptions under Section 230 exist for guarding against internalities. For instance, Section 230, para 2(2) provides that agent could be personally liable if the agent fails to inform the identity of the principal.[486] Absent this provision, it is possible for the agent not to reveal the principal's identity and later state that he could not be held liable since he was acting only for the principal. It does not bar contract by agent on behalf of undisclosed principal but provides negative incentive on such a transaction so as to protect the third party contracting with such agent. The negative incentive is to make the agent personally liable. At the same time, the provision is not a mandatory rule in that the agent could contract out of this liability.

But if an agent wants to exclude responsibility, that at least provides an opportunity to the other party to negotiate with the agent to disclose the principal or get compensated for the risk undertaken. Despite the internality that this provision seeks to guard against, it has been regarded as a default rule. Normatively, one could conclude this should not be the case. On the other hand, it could also be argued that the provision attempts to balance party autonomy with protecting against internality. Perhaps, the correct

[484] https://rb.gy/tpgbtk (accessed 26.12.2023).
[485] See, for instance, C. Gnanasundara Nayagar vs. Berton Export Co., MANU/TN/0184/1963, Para 4.
[486] https://rb.gy/tpgbtk (accessed 26.12.2023).

position lies between these two differing views and would depend upon party sophistication.

Section 231 and 232 can be taken together because Section 232 has been regarded as a reiteration of Para 1 of Section 231. Para 1 of Section 231 states that where a third party contracts with a person without knowing that the latter was an agent of the principal:

- the third person can refuse to perform if such person would not have been willing to so agree if she had knowledge that the contract was with the principal or if had she known that the agent was not acting in her capacity, she would never have entered into an agreement.
- subject to the above, the principal can insist on performance but on the terms and conditions of the contract entered into with the principal.

This provision protects the third party from an internality since the contract is between the agent and the third party. The provision cannot be contracted out.

Section 233 concerns cases where a third party could make the agent or her principal or both liable. This is intended to protect a third party. At the same time, an agreement between the third party and the agent where the agreement provides that no remedy would lie against the agent (Vardhan, 2019, 1825).

Under Section 234, if a party who is not the principal in the process of entering into an agreement makes the agent to assume that only the principal would be held liable or makes the principal assume that only the agent would be responsible, such third party cannot later hold liable the agent or the principal, respectively. This is regarded as a rule of estoppel (Vardhan, 2019, 1825). It protects against an externality and is a mandatory rule.

Section 235 makes a pretended agent, that is, an agent who purports to represent a principal but does not actually represent her, liable to compensate a person who is made

by the pretended agent believe in certain state of affairs, for any loss or damage caused in that process.[487] This is not applicable if the principal ratifies such act.

Section 236 disables a pretended agent who executes agreements with a person other than the principal on the ground that he is acting for undisclosed principal. In that case, such pretended agent is disabled from seeking performance of the agreement if he was acting on his own behalf. This rule protects a third party (externality) and is an information forcing mandatory rule. It is an agreement avoidable for such third party.[488]

Section 237 protects third parties against a situation where an agent acts beyond her authority but the principal makes another person assume that the agent was acting within authority. This protects third parties (externality) and is cannot be contracted around.

Section 238 provides that if fraud/ misrepresentation is committed by an agent as a part of conducting business for his principal, the fraud/ misrepresentation is as if committed by her principal but if they are committed in matters beyond their authority, such acts do not bind the principal.[489] The following table summarises the protection afforded under this provision:

Table 13 Protection afforded against Fraud/ Misrepresentation

Acts Addressed	Within/ Beyond Authority	Person Protected	Internality/ Externality
Fraud/ misrepresentation	Within authority	Third parties	Externality
Fraud/ misrepresentation	Beyond authority	Principal	Internality

[487] https://rb.gy/tpgbtk (accessed 27.12.2023).
[488] Ramdas Topandas and Son v. Kodanmal Phagunmal, MANU/SN/0069/1932, Para 6.
[489] https://rb.gy/tpgbtk (accessed 27.12.2023).

Thus, this provision protects third parties (externalities) insofar as fraud/ misrepresentation within authority are concerned and the principal (internalities) insofar as such acts without authority are concerned. Therefore, this provision is mandatory.

It can thus be seen that Sections 226 to 238 deal with agency vis-à-vis third parties and many of the rules are mandatory in nature because they guard against externalities, and at times, internalities.

5.16. The Specific Relief Act

The Specific Relief Act, 1963 was enacted "*to define and amend the law relating to certain kinds of Specific Relief.*"[490] It is in three parts. Part I is on preliminary aspects; Part II concerns specific reliefs and Part III relates to reliefs that are preventive in nature. Part I contains four sections. Part II contains six chapters (from Sections 5 to 35) and Part III contains two chapter (from Sections 36 to 44).

The Specific Relief Act deals with remedies/ reliefs and many of the provisions apply where there is an agreement between the parties[491] while many provisions do not contemplate the existence of an agreement.[492] Hence, where there are provisions which do not contemplate existence of agreement, there is no question as to default rules. The question is: what if there is an agreement contracting around a provision?

The traditional view is that it is a procedural law (Saxena, 2022, 3).[493] Since the enactment of the 2018 amendments, there has been considerable controversy as to

[490] https://shorturl.at/eBMU4 (accessed 30.12.2023).
[491] See, for instance, provisions in the Specific Relief Act in Chapters II, III, IV and V.
[492] See, for instance, provisions in the Specific Relief Act in Chapters I, II, VII and VIII (except Sections 38(2), 42, etc.).
[493] See, for instance, Ali Hossain Mian v. Rajkumar Haldar, MANU/WB/0151/1943, Para 24; Adhunik Steels v. Orissa Manganese and Minerals, MANU/SC/2936/2007, Para 13; Jindal Saw Limited v. Aperam Stainless Services and Solutions Precision SAS, MANU/DE/2233/2019, Para 58.

whether the Specific Relief Amendment Act was prospective or retrospective (Saxena, 2022, 7- 8). This depended on whether the amendments were substantive or procedural.

This issue was decided in Katta Sujatha Reddy v. Siddamsetty Infra Projects Pvt. Ltd.[494], where the court held that to decide on the retrospectivity of amendments, it was not enough to look at the parent statute to see if the amendments were substantive or procedural.[495] The court was of the view that it must be examined if the amendments brought in substantive or procedural provisions.[496] In result, the court held that the 2018 amendments contained substantive provisions, which could not be brought with retrospective effect. The court cited the example of conversion of specific performance from a discretionary to the default remedy for contractual breach as an example of a substantive provision.[497] Accordingly, the court concluded: "*In view of the above discussion, we do not have any hesitation in holding that the 2018 amendment to the Specific Relief Act is prospective and cannot apply to those transactions that took place prior to its coming into force*."[498]

The traditional view has been offset by the emerging view that the Specific Relief Act is a combination of procedural and substantive provisions such as the amended Section 20 (Vardhan, 2019, 1865).

This has implication on the question as to whether a rule in the Specific Relief Act could be contracted around or not. In principle, a substantive provision could, in the absence of protection against an internality or an externality be contracted around or even contracted out. For instance, Section 26 deals with rectification of instruments and it is difficult to contemplate if this power of the court could be taken away through contract.

[494] MANU/SC/1046/2022
[495] *Ibid*, Para 45.
[496] *Ibid*.
[497] *Ibid*, Para 51.
[498] *Ibid*, Para 56.

It is quite rare for parties to agree to contract around procedural law, especially as regards suits. Therefore, there are not many precedents on the subject. This problem is compounded by the fact that there is no apparent explicit default rule in the Specific Relief Act, except Section 20(1), which has been inserted in 2018.

The Specific Relief Act codifies principles of equity (Saxena, 2022, 4) and when it does so, it usually addresses an internality or an externality. This could be an explanation of the lack of default rules in the statute.

It is settled law that an arbitral tribunal under the Arbitration Act can order specific relief, including to cancel an instrument.[499] It is also established that an arbitral tribunal is bound to act as per procedure agreed to by the parties.[500] In such a case, it is possible for parties to exclude from the tribunal's powers of specific reliefs that could be granted or even to regulate the power of the tribunal to do so.

5.16.1 Preliminary Aspects

Sections 1 to 3 of the Specific Relief Act are declaratory in nature. Section 1 is the provision on "*Short title, extent and commencement*".[501] Section 2 has the definitions in the Specific Relief Act and Section 3 is the Savings clause.

Section 4 prohibits grant of specific relief in for enforcing only rights of civil nature and not for enforcing penal law.[502] Again, this prohibition relates to criminal law, which is usually beyond the contractual domain and, therefore, a mandatory rule.

[499] See, for instance, Asian Avenues Pvt. Ltd. v. Syed Shoukat Hussain, MANU/SC/0492/2023; Sushma Shivkumar Daga v. Madhurkumar Ramkrishnaji Bajaj, MANU/SC/1344/2023
[500] See, Section 19(2), Arbitration Act.
[501] https://shorturl.at/eBMU4 (accessed 30.12.2023).
[502] *Ibid*

5.16.2 Recovering Possession of Specific Immovable Property

Sections 5 to 8 deal with recovering possession of immovable property.[503] It is not required that there should be an agreement between the parties to the suit. Therefore, these provisions could operate in a situation where there is no contract.

However, it is possible that they may operate where contracts are in operation. To illustrate, a suit for recovery of possession may be filed by a lessor wanting possession from the lessee further to a determined lease. Section 5 deals with a situation where one seeks to recover possession of an immovable property that is specific, in which case recovery would in line with the CPC.[504] It is doubtable if court's jurisdiction could be constrained by agreement.

However, in the context of a lease deed or other instrument where dispute for possession is arbitrable, there could be a complication. Section 19(1), Arbitration Act states that CPC would not be applicable to arbitral proceedings. In that circumstance, it is doubtable if a dispute regarding recovery of possession would be arbitrable as per the provisions of the CPC and in which case the procedures under the Arbitration Act would apply. This would be applicable only in a situation where an arbitration agreement in vogue. While a court's powers cannot be constrained by agreement, it is possible to contract around this provision through an arbitration clause. Therefore, Section 5, although mandatory, has elements of default rules in it. The altering rule is as specified in Section 7, Arbitration Act, that is, the writing requirement.

It is quite unusual for parties to provide in their lease deed emasculating such a provision. Therefore, there are not many precedents on the point. It is possible as regards arbitrations that courts could construe such a provision as that of contractual exclusion from arbitrability. In that case, a party could approach the court under Section

---

[503] https://www.icsi.edu/media/webmodules/EBCL%20UPDATE%20JUNE%202019.pdf (accessed 31.01.2024)

[504] https://shorturl.at/eBMU4 (accessed 30.12.2023).

5 of the Specific Relief Act for relief. Sections 6, 7 and 8 are also similar to Section 5 in terms of its nature.

5.16.3 Power to Order Specific Performance in Agreements

Section 9 allows a defendant to plead any defence that may be available under the law of contracts in respect of any suit relating to specific relief. Depending on the nature of the provision, that is, mandatory or default, the defence may be available or not. It is doubtable that this provision may be able to be contracted around or contracted out. Section 10 states that specific relief shall be enforced by a court. Pursuant to this provision, specific relief has been made mandatorily available to the parties. However, there is nothing that suggests that parties might provide that in case of contractual breaches, damages would be the only remedy available and not specific relief. To that extent, this provision could be construed as a default rule.

Section 11(1) affords specific performance of a contract made further to a trust and Section 11(2) recognises that specific performance made by a trustee in breach/ excess of powers[505] under trust as non-enforceable.[506] Since Section 11 is intended to protect the trust and the beneficiary of the trust and is therefore likely to be regarded as mandatory.

Section 13 relates to a situation where a person who enters into an agreement to sell or give on lease movable and immovable property where such person does not have any title or has imperfect title. This deals with internalities and externalities and is therefore mandatory in nature.

Section 12 provides for specific performance as regards a portion part of the contract.[507] Section 14 deals with contracts that cannot be specifically enforced by courts. Both

[505] https://www.icsi.edu/media/webmodules/EBCL%20UPDATE%20JUNE%202019.pdf (accessed 31.01.2024)
[506] https://shorturl.at/eBMU4 (accessed 30.12.2023).
[507] https://www.icsi.edu/media/webmodules/EBCL%20UPDATE%20JUNE%202019.pdf (accessed 31.01.2024)

these provisions are in the nature of a mandatory rules because it they with grounds where courts could and are refrained from ordering specific performance. Even in the context of arbitration, it is likely that the said provisions would be construed as a mandatory rule.

Section 14(a) is where a relief for breach of contract is already exercised through another party and is an anti-thesis of specific performance: both cannot go together. Section 14(b) is a situation which creates an externality on the court: an order of specific performance entails substantial supervision costs on courts/ arbitral tribunal. Similar costs could lie on the arbitral tribunal. Another reason why the provision is likely to be construed as mandatory by arbitral tribunals: they operate in purely domestic arbitrations only for a specific time, that is, twelve months within the stage of pleadings. Hence, it is difficult to envisage a different approach for arbitral tribunals.

Section 14(c) is important because it protects against an important internality: specific performance cannot be used to force a person to work for another which is in the nature of a bonded labour (Saxena, 2022, 146). Section 14(d) protects against another internality: where the contract is determinable in nature. Specific performance cannot be used as a tool to prolong a contract which can be put to an end by parties.

Section 14A deals with the power of courts to engage experts in any suit. This cannot be contracted around being power of the court. Section 26, Arbitration Act already exists regarding the power of the tribunal to engage experts and is in the nature of a default rule. Therefore, it is doubtable if a party could take assistance from Section 14A to hold it a mandatory rule in the context of arbitrations.

Section 15 which states who could apply for specific performance and Section 16 deals with personal bars to specific relief. These are akin to Section 14 and are likely to be construed as mandatory, be it courts or arbitral tribunals. Section 17 guards against internalities and externalities and is therefore a mandatory rule. Section 19 concerns

against whom specific performance could be ordered and is in line with these previous provisions analysed and is therefore mandatory.

Section 18 involves issues of fraud/ mistake of fact/ misrepresentation, or which deals with contractual variation or where there is a difference between the agreement's object and the agreement. It states that the plaintiff cannot obtain specific performance in the absence of variation set up by the defendant.[508]

Section 20 deals with substitute performance of contracts. Section 20(1) empowers the promisee whose contract has been breached for substituted performance. The remaining sub-sections of Section 20 relate to Section 20(1) and regulate the procedure for implementing the right of substituted performance (Thakur, 2018; Srinivasan, 2018, 6-7). Section 20(1) is an explicit default rule in that it employs the phrase "except as otherwise agreed upon by the parties" (Srinivasan, 2018, 6-7). So, Section 20(1) could be contracted around or even contracted out by the parties. Since the remaining sub-sections of Section 20 regulate the exercise of the right of substituted performance, they could also be regarded as default rules (Srinivasan, 2018, 7).

Section 20A has been inserted further to amendments in 2018. The Specific Relief (Amendment) Act, 2018 was enacted further to an Expert Committee.[509] The Committee, in Chapter II of its Report noted:

"*7. The Committee decided that there is a need to classify diverse public utility contracts as a distinct class recognizing the inherent public interest involved and problems to be addressed in the Act. The aim is that public works projects must progress without interruption. Thus, court's intervention in public works should be minimal. Smooth functioning of public works projects can be effectively managed through a monitoring system, and a regulatory mechanism*."[510]

[508] https://shorturl.at/eBMU4 (accessed 07.01.2024).
[509] https://www.icsi.edu/media/webmodules/EBCL%20UPDATE%20JUNE%202019.pdf (accessed 31.01.2024)
[510] Expert Committee, Report on the Amendments to Specific Relief Act, 1963 (2018), available at https://shorturl.at/HVZ13 (accessed 05.01.2024).

The recommendations of the Expert Committee were accepted and the Specific Relief (Amendment) Act, 2018 was enacted, bringing Section 20A into the statute book. As the aforesaid quote notes, the provision guards against court-based restraints such as injunctions against infrastructure projects, which are recognised as not in public interests. In other words, the provision is intended to guard against externalities.[511] It may be noted that it is not necessary that there should be a specific contract between the government and the plaintiff seeking relief for Section 20A to apply.[512] This implies that the provision casts a wider net. For these reasons, the provision is mandatory and cannot be contracted around.

Section 20B deals with constitution by the State Government of courts. This provision is beyond the field of contract law, so to say, and concerns administration of civil justice.

Section 20C calls for expeditious disposal of cases by civil courts involving infrastructure projects. Since public interest is involved, it may not be possible for parties to expand the period for disposal of suit, although constriction may be theoretically possible. At the same time, it may be difficult to argue around the principle that courts' jurisdiction cannot be curtailed by agreement. This lays the context for discussion on another aspect. What if an injunction is sought in the context of arbitrations? The provision being substantive (it deals with remedies), it will operate in the context of arbitrations as well. The prohibition in Section 20A and the time limits in Section 20C would apply to arbitrations and the terms "Court" and "suit" ought to be, and are likely to be, construed as "arbitral tribunal" and "arbitration", respectively.

Section 21, which provides for the power to award damages where the plaintiff sues for specific performance.[513] Similar to previous provisions, these are likely to be

[511] Hari Ram Nagar v. Delhi Development Authority, MANU/DE/5785/2019; Golden Edge Engineering Private Ltd v. BHEL, MANU/WB/0558/2020.
[512] Hari Ram Nagar v. Delhi Development Authority, MANU/DE/5785/2019, Para 14.
[513] https://www.icsi.edu/media/webmodules/EBCL%20UPDATE%20JUNE%202019.pdf (accessed 31.01.2024)

considered. Same is the case with Sections 22(1), 22(3), 23 and 24. Sections 22(5) and 22(2) are procedural provisions dealing with amendment to pleadings. As such, parties could agree to restrict the right to amend their pleadings, in line with Section 23(3) read with 23(1) of the Arbitration Act. To that extent, the proviso in Section 21(5) can be regarded as a default rule, at least in the context of arbitral proceedings.

Section 25 makes applicable Chapter II to awards outside the Arbitration Act's scope and to directions in wills/ codicils so as to implement settlements.[514] Each rule, be it default/ mandatory, will apply in the same way to the subject-matter of this provision.

5.16.4. Situations when Instruments could be Rectified

Chapter III, Part II, Specific Relief Act relates to rectification of instruments. It has a lone section: Section 26 which provides for situation when an instrument could be rectified.[515] Section 26 has four sub-sections. Section 26(1) deals with when and who can apply for rectification. Section 26(2) deals with how a court should deal with rectification requests. Section 26(3) deals with when court could specifically enforce a rectified contract. Section 26(4) deals with requirements of pleadings regarding granting the relief of rectification.

In Deccan Paper Mills v. Regency Mahavir Properties[516], the apex court held decided that the action for cancellation of an instrument was action as regards the parties and not as regards the world at large. As noted earlier, this position has been reiterated in Sushma Shivkumar Daga v. Madhurkumar Ramkrishnaji Bajaj.[517] By analogy, the relief of rectification of a deed under Section 26, Specific Relief Act is also a relief *in personam*. So it can be a subject-matter of arbitration. Note that this provision operates "*without prejudice to rights acquired by third persons in good faith and for* value."[518] In such a situation, the question is how far can Section 26 be modified?

---

[514] https://shorturl.at/eBMU4 (accessed 07.01.2024).
[515] *Ibid*
[516] MANU/SC/0599/2020 ("Deccan Paper Mills case")
[517] MANU/SC/1344/2023
[518] https://shorturl.at/eBMU4 (accessed 01.01.2024).

As stated earlier, Section 26(1) deals with when and who can apply for rectification. As regards a contract, it operates where a contract does not, owing to fraud/ bilateral mistake, capture the real contractual intent.[519] The provision operates in a scenario of fraud or mutual mistakes and consequences that follow therefor are mandatory. The provision's equitable origins (Saxena, 2022, 312- 313) points out at protecting against internality. Besides, the provision is to guard against an internality. Consequently, this is not a provision that could be contracted around. Section 26(2), which saves a third party who has acted in good faith and has acquired for consideration rights further to the transaction, protects against externality and to that extent it is mandatory.

Sub-Sections (3) and (4) of Section 26 deal with procedural and pleadings-related aspects. Therefore, they could be, if stated in their arbitration agreement, be modified. However, even in respect of a tribunal, specific performance can be awarded only when pleaded: if there is no pleading, a tribunal could not order any relief[520], although process cannot triumph substance.[521] The proviso in Section 26(4) allows a plaintiff to amend the pleading to introduce the relief of rectification, and the position is consistent with arbitrations where amendment of pleadings is usually allowed liberally. As such, parties could agree to restrict the right to amend the pleadings, in line with Section 23(3) read with 23(1) of the Arbitration Act. To that extent, the proviso in Section 26(4) can be regarded as a default rule, at least in the context of arbitral proceedings.

5.16.5. Rescinding Contracts

Chapter IV, Part II of the Specific Relief Act contains provisions regarding rescinding contracts. This remedy is without prejudice to the contractual remedies and grounds for termination that may be available. Section 27 employs the term "may sue" which points

[519] https://shorturl.at/eBMU4 (accessed 01.01.2024).
[520] See, for instance, Manish Engineering Enterprises v. Indian Farmers Fertilizer Coop. Ltd., MANU/UP/2702/2021 (in a section 11 context); J.G. Engineers (P) Ltd. vs. National Building Construction Corpn. Ltd., MANU/DE/1766/2008, Para 8; National Insurance Company Limited v. Digital World, MANU/DE/1149/2022, para 8.3.
[521] See, for instance, Indeen Bio Power Limited v. EFS Facilities Service (India) Pvt. Ltd., MANU/DE/2364/2019.

out that the relief is without prejudice to rights that may otherwise be available in law such as treating the voidable contract as void or claiming damages or raising the option to rescind as a defence (Saxena, 2022, 334).

Contracting parties cannot emasculate the court's power to order rescission by contract as jurisdiction of courts cannot be ousted by agreement (Atkins, 2022).[522] A suit for rescission is, in reality, a suit for declaration of the legality of rescission by the plaintiff (Saxena, 2022, 329).[523] Therefore, the principles regarding contracting around the provisions of the Specific Relief Act as regards declaratory decrees (Chapter VI- Sections 34 and 35) apply equally to rescinding contracts. This entails that the jurisdiction of the court cannot be circumscribed by contract. However, parties could agree on additional grounds entitling a party to terminate the contract and seek rescission. This is captured in Section 27(1)(a), Specific Relief Act: where the agreement is "terminable by the plaintiff".[524] Section 27(1) deals with such situations or when the contract is voidable/ unlawful. Therefore, this provision is likely to be construed as mandatory.

Section 27(2) deals with situations where there is an externality or internality guarded against. For instance, Section 27(2)(c) speaks of a good faith third party who has financial stakes involved. Section 27(2)(a) and (d) involve internalities.

Section 28, Specific Relief Act is aimed at preventing multiplicity of suits (Saxena, 2022, 335), as Section 28(4) conveys. It only deals with immovable property and not movable property.[525]

[522] See, for instance, Ram Bahadur Thakur and Company v. Devi dayal (Sales) Ltd., MANU/MH/0048/1954; Suleman Bhanji and Ors. vs. Emandi Pydiraju, MANU/MP/0270/1960; Neyveli Lignite Corporation, Neyveli v. Vinay Engineering and Ors., MANU/TN/0067/1992;
[523] Hungerford Investment Trust Ltd. (in vol. Liquidation) v. Haridas Mundhra, MANU/SC/0684/1972, para 27.
[524] https://shorturl.at/eBMU4 (accessed 03.01.2024).
[525] Hungerford Investment Trust Ltd. (in vol. Liquidation) v. Haridas Mundhra, MANU/SC/0684/1972

Section 28(1) concerns the consequence of failure by a party in a suit for specific performance of a an agreement to sell or to lease immovable property[526] to make payment of money consideration or other payment involved within the time specified.[527] It that in such a case, the seller or the lessor could seek in the same proceedings for rescission of the contract of sale or lease. The court's power cannot be circumscribed by an agreement. Section 28(2) deals with the powers and duties of the court in such proceedings. Section 28(3) concerns the power of the court in certain situations.[528]

These provisions are not likely to be construed as default rules. However, in arbitrations, there is nothing in law which constrains an agreement between parties for separate arbitral proceedings for such relief, notwithstanding an award passed by a tribunal in an earlier proceeding for specific performance.

In case parties exclude specific powers of arbitrator, it is possible for courts to construe such exclusion as signal of non-arbitrability and validate approaching courts for violating Section 28, the Contract Act.

Section 28(4) is a bar on further suit and is mandatory insofar as courts are concerned. As stated, in case of arbitral proceedings, parties could, theoretically agree for separate arbitral proceedings. Section 28(5) concerns costs, which, in arbitral proceedings, is a default rule, subject to Section 31A(5), Arbitration Act, which contains an altering rule that an agreement that one of the parties has to bear the costs is legally recognisable only if it is made subsequent to when the dispute arises.[529]

Section 29 provides that instead of a separate application made after the decree of specific performance, alternative relief of rescission could be sought in the same suit. This provision being in the nature of Section 28(1) is likely to be construed as

[526] https://jkja.nic.in (accessed 31.01.2024)
[527] https://shorturl.at/eBMU4 (accessed 04.01.2024).
[528] https://jkja.nic.in (accessed 31.01.2024)
[529] https://shorturl.at/bizO4 (accessed 04.01.2024).

mandatory. In the context of arbitration, it is possible to contract around this provision being procedural in nature.

Section 30 is regarding the court's jurisdiction to do equity, that is, to restore any benefit that might have been received by plaintiff seeking rescission from the other party or to pay compensation.[530] The scope of this provision is wider than Section 64, the Contract Act, which provides for restoration of any benefit under a voidable contract rescinded, although the provision is mandatory similar to Section 64.

There is, however, an interesting issue relating to whether such a provision can be contracted around in arbitration agreements. Section 28(3), Arbitration Act allows a tribunal to decide on equitable basis only in situations where parties have specifically authorised the tribunal. Therefore, it is doubtable if an arbitral tribunal could rely on Section 30 of the Specific Relief Act to act equitable, unless explicitly authorised as such.[531]

5.16.6. Cancelling Instruments

Chapter V, Part II, Specific Relief Act deals with cancelling instruments. Section 31 provides for when an instrument could be cancelled. A three judge Bench of the Supreme Court has decided in Deccan Paper Mills case[532] has held that the relief of cancellation of instruments in a relief *in personam* and not *in rem*. This operates where void/ voidable instruments are there and which is usually the consequence of protecting against an internality/ externality, therefore signalling a mandatory rule. While the rule could be construed as mandatory in terms of jurisdiction of a court, it may not be so as regards arbitration. If the contract excludes this relief, it is possible that this may be construed as excluding arbitrability and not the court's jurisdiction.

[530] https://shorturl.at/eBMU4 (accessed 04.01.2024).
[531] See, however, Adwel v. South Delhi Municipal Corporation, 2018(5) Arb LR 281 (Del)(DB)(holding the tribunal could use its discretion to apply the principle of equitable estoppel.)
[532] MANU/SC/0599/2020

Section 32 concerns partially cancellable instrument and has its nature similar to Section 31.

Note that the rationale for considering Section 30 to be a mandatory rule applies equally to Section 33. There is a significant difference between both provisions because Section 33 is wider and is applicable to void documents as well, unlike Section 30, which is not applicable to void documents but to voidable or terminable agreements.[533]

5.16.7. Situations when Declaratory Decrees can be Passed

Chapter VI of Part II to the Specific Relief Act deals with declaratory decrees. It contains two sections. Sections 35 deals with when a court could grant a declaratory decree and Section 36 deals with the effect of declaration.

Section 35 provides that courts have the discretion to pass declaratory decrees in certain situations mentioned therein. Note that this power of the court is not exhaustive and courts could pass declaratory decrees even outside the purview of this provision, under the CPC.

Assume a scenario where parties agree that the tribunal cannot grant declaratory decrees. Ordinarily, arbitrators are endowed with the power to grant declarations.[534] Whether this agreement is enforceable is the question. It is possible that courts could enforce such an agreement insofar as it relates to arbitration. It is settled that an arbitral tribunal's jurisdiction is circumscribed by contract.[535] However, that may not be sufficient to take away the court's jurisdiction to grant such a decree: the jurisdiction of courts cannot be ousted by agreement (Atkins, 2022).[536]

---

[533] Muppudathi Pillai v. Krishnaswami Pillai, MANU/TN/0455/1959, Para 11.
[534] Alok Kumar Lodha v Asian Hotels, 2023: DHC: 9211, Paras 20-26.
[535] Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum, Rajgurunagar, MANU/SC/0127/2022
[536] See, for instance, Ram Bahadur Thakur and Company v. Devi dayal (Sales) Ltd., MANU/MH/0048/1954; Suleman Bhanji and Ors. vs. Emandi Pydiraju, MANU/MP/0270/1960; Neyveli Lignite Corporation, Neyveli v. Vinay Engineering and Ors., MANU/TN/0067/1992;

This position is the same in several other jurisdictions, including under English law. For instance, in the case of Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd.[537], the English Court of Appeal observed: "*Of course, the parties cannot by agreement oust the jurisdiction of the court to determine those matters within the court's jurisdiction, i.e. the enforcement of the contractual rights of the parties*."[538] It may be noted that this decision had been nullified by the UK's in Beaufort Developments (NI) Limited v. Gilbert Ash NI Limited[539], however, this point was not criticised. The House of Lords observed: "*Since an arbitrator's powers, unlike the powers of the court, are derived ultimately from the contract under which he is appointed, it is by no means unusual to find his powers spelt out in longhand*."[540] Thus, according to the court, the source of the court's power was not the contract.[541]

The proviso to Section 34 states that a court cannot grant a decree of declaration, in a situation where a plaintiff could be asked for further reliefs other than a simple declaration as to title but does not do so.[542] In a situation where such a dispute could be arbitrated[543], it is doubtable if the proviso would bar a tribunal from passing merely a declaratory award. There is no internality or externality that this provision guards against, except multiplicity of proceedings/ possible evasion of *ad valorem* court fee (Saxena, 2022, 405- 406).[544] Such a problem does not exist in arbitrations. Therefore, proviso to Section 35 is a default rule in its application to arbitrations.

Section 35 deals with the effect of a declaratory decree. It states that declaratory decrees are binding only on parties to the suit.[545] This provision restricts the applicability of the declaratory decree only to the parties. As regards arbitration, it is theoretically possible to agree that a declaratory award could apply only to a specific sub-set of parties.

[537] MANU/UKWA/0014/1984: [1984] Q.B. 644
[538] *Ibid*
[539] UK House of Lords, 20 May 1998.
[540] *Ibid*
[541] See also, Radmacher (formerly Granatino) v Granatino (Rev 4), [2010] UKSC 427, Para 2
[542] https://shorturl.at/eBMU4 (accessed 02.01.2024). Also see, https://jkja.nic.in/ (accessed 31.01.2024)
[543] See, Booz Allen and Hamilton Inc v. SBI Home Finance Limited, (2011) 5 SCC 532
[544] Vasantha v. Rajalakshmi, 2024 INSC 109, Para 30.
[545] https://shorturl.at/eBMU4 (accessed 01.01.2024).

However, the provision cannot be contracted out to make declaratory decree applicable *in rem* considering the restricted scope of arbitration. Therefore, Section 36 insofar as it does not make a declaratory decree/ award applicable to third parties is mandatory.

5.16.8. Preventive Relief and Perpetual Injunctions

Chapter VII of Part III deals with preventive relief, that is, injunctions, and Chapter VIII of the said Part relates to perpetual injunctions. Section 36 recognises the court's power to grant discretionary preventive relief in terms of injunctions, which could be temporary or perpetual. Section 37(1) states that temporary preventive relief could be granted as per provisions of the CPC. Section 37(2) states that perpetual preventive injunctions could be granted in terms of a decree.

These are powers of the courts and it is doubtable if these powers could be taken away by agreement between the parties insofar as suits are concerned. Even for arbitration, it is doubtable if the equivalent provision in terms of Section 9, Arbitration Act, which deals with powers of court to grant interim relief akin to the CPC, could be contracted out by parties. Section 17, which deals with the power of the arbitral tribunal to pass similar interim relief, was originally enacted as a default rule: it employed the words "unless otherwise agreed by the parties". However, the provision has since been amended in 2015 and does not retain the said phrase. And with the provision now explicitly declaring that the tribunal will have powers akin to that of a court, courts have recognised the same.[546]

Chapter VIII of the Specific Relief Act deals with perpetual injunctions. Section 38 deals with situations when a court could grant perpetual injunctions. Section 39 relates to mandatory injunctions. Section 40 allows a plaintiff in a suit to seek damages apart from or in place of a perpetual injunction[547], in a suit for the latter. Section 41 concerns situations when courts could refuse injunctions and Section 42 deals with the power of

[546] See, for instance, Asad Mueed v. Hammad Ahmed, MANU/DE/0857/2023, Para
[547] https://shorturl.at/eBMU4 (accessed 06.01.2024).

courts to grant injunctions where the agreement provides for performance of an act which is linked with a restriction to refrain from doing a certain act. These provisions are concerned with the power of courts to grant reliefs cannot be constrained by agreement. Even in the context of arbitration, it is doubtable if such a power will be available to the parties. The Delhi High Court's judgment in MBL Infrastructures Limited v. Delhi Metro Rail Corporation[548] is illustrative of this approach by courts even in the context of arbitrations. Hence, these are in near the mandatory rules spectrum.

5.17. Findings and Conclusion

This chapter undertook the classification of various explicit rules of general contract law into the triumvirate. The following inferences ensued as a result of this exercise of classifying various rules of the Contract and the Specific Relief Acts:

- Courts in India have alternated between the several approaches: recognition only of explicit default rules, recognition of implicit default rules and public policy approaches, without clarity.
- Even recent decisions take a parochial view on power of contracting parties over default rules by taking the "public policy" route to justify their disability in contracting around rules of contract law. But the statute and the precedents have recognised the existence of such power of contracting parties. The lack of doctrinal clarity has led to courts applying inconsistent and amorphous tests (such as public policy) leading to inconsistent results thereby creating a "doctrinal muddle".
- The potential of certain rules to not fit strictly within any of the three categories of rules, viz., default, mandatory and altering rules have been noted in this Chapter and have been regarded as formal or declaratory rules. These included definitions contained in Sections 2, 9, 13, 14, 15, 16, 17, 18, 31, 124, 126, 127,

[548] MANU/DE/8454/2023

129, 148, 173, 182, 186, 197, and 207, Contract Act, and Sections 1 to 3, Specific Relief Act.

- The provision on territorial extent, which was regarded as a mandatory rule, was not a mandatory rule, in respect of international contracts even where the arbitration is seated within India. This is in consonance with Section 28(1)(b)(ii), Arbitration Act.
- Determination of whether a rule is mandatory, or default may not be straightforward in all situations. Mere reading of a particular rule, as Dasgupta (2010) contended, might not lead to the solution to the answer as to whether a particular rule is a default or a mandatory rule. An example is the mandatory requirement of notice of intended sale under Section 176, Contract Act.
- Certain provisions, including Section 4, Para 1 of Section 5, Section 7(1), Section 11, Section 27, Section 28, Para 1 to Section 30, Section 71 and Section 72, which have been regarded as mandatory, contained default rules in specific situations. On the other hand, certain provisions, such as Sections 38, 57, and 58 which have been regarded as default rules are in the nature of mandatory rules.
- Para 1 to Section 55 is a sticky default rule, as was noted in the earlier part of Chapter 5. Para 2 to Section 73 is a penalty default rule.
- There have been calls for converting certain mandatory rules such as those in Section 26 to default rules, at least, partially.
- The Initial Position does not identify altering rules, whereas the present work identifies at least two altering rules in the general portions, the Contract Act: Sections 43 and 52. In addition, Sections 171 and 202, the Contract Act also contain altering rules.
- The Specific Relief Act consists mostly of mandatory rules while there are some provisions that could be default rules, especially in arbitrations. There are some provisions in the Specific Relief Act, especially rules of pleadings, which could be considered as default rules.

The exercise of identifying various rules of the rules of general contract law into default, mandatory and altering rules is perhaps the first step in further analysing these rules in those terms.

CHAPTER 6: DEFAULT RULES DOCTRINE: ABSENCE OF A SYSTEMATIC APPROACH IN INDIA

6.1 Introduction

The last chapter noted that the Indian legal system does not engage with the Default Rules Doctrine. This chapter analyses how the Indian legal system misses out on failing to look at contract law through the Default Rules Doctrine (DRD). Merely because DRD is not prevalent in India does not mean that there are problems with the Indian legal system. In fact, there are countless theories/ doctrines/ positions that may be specific to certain legal systems but not others.

All the same, the Default Rules Doctrine is not just a theory on contract law but constitutes a galaxy of perspectives on understanding, designing, interpreting as well as critiquing contract law rules. Therefore, the absence of the doctrine in legal analysis and discourse is problematic on multiple levels. This chapter probes this aspect with analysis in specific contexts, listed below:

- Time as essence of contracts;
- Interface between time as essence and liquidated damages clauses;
- Disability on unregistered partnerships and arbitration;
- Enforceability of standstill/ tolling agreements in India.

6.2. Enforceability of Time-as-Essence Clauses in Construction

The manner in which time-as-essence clauses have been dealt with in Indian courts is a typical example of how the Default Rules Doctrine could be applied to enable better clarity of law. Time as essence clauses are routine in the Indian construction industry. Despite several precedents against enforceability of such clauses, project owners routinely act upon the clause to argue in favour of their right for termination of the

contract merely on non-compliance of the time stipulations. This section critically evaluates the law on the subject.

6.2.1. Time as Essence in the Contract Act

As had been discussed earlier, there are six chapters in the Contract Act insofar as it deals with general contract law. Of these six chapters, Chapter IV is the largest, containing 31 sections. Chapter IV is divided into six sub-chapters. The fourth sub-chapter titled "performance of reciprocal promises" is a significant.[549] One such provision is Section 55, which deals with three broad aspects:

- The consequences of the failure to perform the promise at the agreed time, where the parties' intent is that time is significant;
- Consequences of failure to comply with the time requirement, where the parties' intent is that time is not a significant aspect of the contract; and
- Consequence of promisee's acceptance contract performance at a time other than as agreed.

Each of these three aspects is dealt with as a separate paragraph in Section 55.

Para 1 to Section 55 states that where there is a failure to perform the promise (a) at, or (b) before the time specified for performance, the contract "*becomes voidable at the option of the promisee*", where intent was time was of significance to the contract. Para 1 of the Section also clarifies that where the promise, as noted above, was partially performed, the contract becomes voidable vis-à-vis the unfulfilled promise. Thus, it covers various types of performance such as performance within a particular deadline, performance at a specified time and performance milestones.

Para 2 deals with the same scenario, except that the contractual intent was that time was not of contractual essence. Para 2 clarifies that where time was not of the essence,

[549] Of these, Sections 55 and 56 are oft cited.

failure to comply with the time limit, will not result it from becoming voidable. At the same time, the promisee can claim compensation for loss suffered for breach in non-completion within time.

Para 3 is connected to Para 1 as it deals with the consequences of when the promisee treats the contract as voidable. In such a case, the provision contemplates the possibility where "*promisee accepts performance of such promise at any time other than that agreed*". If so, the promisee cannot later claim compensation owing to the non-performance by the promisor at the time agreed. Para 3 also contemplates an exception: where the promisee gives the promisor of notice of his intention to claim compensation due to the non-performance.

To analyse the import of Section 55, it would be useful to discuss earlier authorities on the issue, both judicial and academic, on Section 55.[550]

6.2.2. Earlier Authorities

The earlier editions of the commentary, "Pollock and Mulla on the Indian Contract Act" (1909, 251) provides the background of Section 55, Contract Act. Apparently, under English property law, there were difficulties in verifying the seller's title. Therefore, courts of Equity did not insist upon strict enforcement of clauses providing for payment of consideration or completing the transaction within a specified time (Pollock and Mulla, 1909, 251). Hence, historically, the presumption against time being of essence of contract existed in property transactions.[551] But this was just a presumption and it turned on facts and circumstances of individual cases to see if the presumption applied. Under English law, the presumption did not apply in the following circumstances[552]:

- express stipulation by the parties;

[550] There are a few earlier authorities discussing this aspect such Rughoonauth Sahoi Chotayloll v. Manickchund (02.02.1856 - PRIVY COUNCIL) : MANU/PR/0001/1856, but did not delve into the law on the subject. Hence, these are not discussed here.
[551] See, for instance, Tilley v. Thomas (1867) L.R. 3 Ch. 61
[552] Tilley v. Thomas (1867) L.R. 3 Ch. 61

- nature of the transaction militated against time not being of essence; and
- surrounding circumstances militated against such a presumption.

In addition, the presumption did not apply in English law to mercantile, or what is known these days as commercial, contracts (Pollock and Mulla, 1909, 251). This was the state of law in 1872 and at the time of the publication of the 2nd edition of the commentary.

One of the earliest decisions on Section 55 is in Jamshed Kodaram v. Burjorji.[553] The transaction involved was transfer of lease where milestones were provided for payment of consideration within the specified time. The appellant paid a part of the consideration as earnest money but did not proceed with the transaction. The respondent contended that since the transaction could not be completed within the specified time, he was entitled to forfeit the security deposit and put an end to the contract.

The Privy Council had to decide was whether time was of contractual essence. The Privy Council found that the section laid down a principle akin to the sale of land contracts under English law. Under English law, courts looked not at the time specified in the contract but at the transaction's essence what the parties intended to achieve.

Interestingly, the Privy Council clarified that that such a construction insofar as Section 55 was concerned applied to sales of land. Therefore, the Privy Council was not construing Section 55 generally but in specific context: real estate. In those transactions, equity jurisprudence in English law treated the time limits as not as important as the main purpose.

The Privy Council identified the following exceptions to this rule of equity:

[553] AIR 1915 PC 83

- Undue delay by the defendant and the plaintiff had given reasonable notice to the defendant to undertake the contract within a definite time[554];
- The nature and character of the property or other circumstances rendered treating time as not being of the essence likely to result in injustice; and
- There would be an inference of criticality of time by the court from circumstances that took place between the parties prior to the contract (but not what happened thereafter).

In explaining these three exceptions, the court relied on Chancery Court's judgment of Tilley v. Thomas[555], where it was held that the ground of circumstances, or 'surrounding circumstances', as was referred to, were fact-specific. The Chancery Court considered the second ground to be applicable to cases relating to "reversions, mines or trades", where it would be inequitable to consider time as not being of essence.

As regards the first ground, the Chancery Court opined that the court would not refuse a prayer for enforcing the timelines if there was an specific time stipulation in the contract.

Thus, for the Chancery Court, if it was inequitable to enforce the timeline specified in the contract or treat those timelines as of the essence, the court would not so enforce, except where there was an express stipulation in the contract.

The Privy Council's judgment is equally interesting as regards the impact of express stipulations in contract. It stated that the jurisdiction of equity to disregard the contractually stipulated date of completion can be controlled through "*plainly expressed stipulation*" but it "*must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable.*"[556] The Court explained that the language used by the parties would

[554] Available at https://archive.org/details/IndianContractAct1872/page/n1/mode/2up (accessed 09.05.2023)
[555] [1867] 3 Ch. 61.
[556] Available at https://archive.org/stream/in.ernet.dli.2015.125174/2015.125174.The-Indian-Contract-Act-1872-Vol1_djvu.txt (accessed 09.05.2023). Also see, AIR 1915 PC 83

exclude equity's jurisdiction "*if it plainly excludes the notion that these time limits were of merely secondary importance*"[557] and that disregarding the contractual stipulation would disregard the contract's foundation.

Madras High Court's decision in Kuppusami Naidu v. Smith and Company[558] is one of the earliest cases on the issue in building contracts. The court interestingly did not hold specifically as to whether time was critical to the contract but did hold that even if it was not so, there was a general right for the completion of building within a reasonable time and an obligation on the contractor to use utmost diligence to perform his part of the contract.[559]

Another interesting decision concerning the criticality of time in a sale of goods was rendered by the High Court of Madras in Balaram Paramsukdass Firm v. Gudiyatam Govinda Chetty.[560] The contract related to sale and purchase of silver. The delivery was to take place on 25.02.1918 on payment of price. On 25.02.1918, the plaintiff did not apply for delivery and the defendant wrote on 28.02.1918 asking the plaintiff to take delivery immediately or face a suit. The plaintiff cited custom of buying siler on Pournima day which was eight days after the appointed date for delivering silver. The defendant treated the contract as having ended and sold the silver. The plaintiff applied for delivery of silver on Pournima day, which was refused.

In the suit, the question was whether the defendant was liable for breach. The court held in defendant's favour since the plaintiff did not establish any custom that silver was bought on Pournima day. Importantly, the court opined, citing the English Court of Chancery in Doloret v. Rothschild[561] that in contracts of such nature, where the contract involved subject-matter with huge price fluctuations, time was of the essence.

---

[557] Available at https://archive.org/stream/in.ernet.dli.2015.125174/2015.125174.The-Indian-Contract-Act-1872-Vol1_djvu.txt (accessed 09.05.2023). Also see, AIR 1915 PC 83
[558] MANU/TN/0125/1895
[559] Kuppusami Naidu vs. Smith and Company, MANU/TN/0125/1895, Para 8.
[560] (1925) 49 MLJ 200.
[561] 57 ER 233

To sum up the earlier authorities, courts adopted a prudent approach in determination of time as essence of the contract, in that they deferred to the stipulations made by the parties. Sometimes, even when the contract did not so state, party intent was gathered from the subject-matter of the contract.

6.2.3 Dilution of Time-as-Essence

Later decisions diluted the concept of time-as-essence resulting in lenience to contractors. The question also frequently posed in construction contracts. There are uncertainties that hinder completion of construction projects. Therefore, in the UK, time was historically never regarded as an essential aspect of construction projects (Srinivasan, 2021, 5). Indian contract law as it is presently found was derived from English contract law. Therefore, the presumptions that existed in English law regarding the relation between time of completion and the contract were also brought in into Indian jurisprudence (Srinivasan, 2021, 6).[562]

Presumptions have been considered as default rules. As per the DRD, contract law applied in a presumptive sense and various presumptions could be rebutted through party intent (Barnett, 1994, 616-617). This means that parties could choose to alter the default through agreement, explicit or implicit (Srinivasan, 2021, 6).

Consistent with the rules of English law, in India, time has not been regarded as of contractual essence in construction contracts (Srinivasan, 2021, 6).[563] A limited exception to this has been recognised by some courts in India: where the contract was commercial, time was of contractual essence (Srinivasan, 2021, 6).[564]

Even so, it is noticed that courts have deviated from earlier authorities which approached the issue from the angle of prudence.

[562] See, Chand Rani v. Kamal Rani, MANU/SC/0285/1993, Para 18.
[563] See, Mcdermott International Inc. v. Burn Standard Co Ltd., (2006) 11 SCC 181, Para 86.
[564] See, Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates (P) Ltd., (2011) 9 SCC 147, Para 43.

5.2.3.1. Hind Construction Contractors v. State of Maharashtra

In Hind Construction case [565], the State of Maharashtra ("Maharashtra") awarded a construction contract to Hind Constructions, which was initially a partnership concern and later became a proprietorship. The commencement date of the contract was 05.07.1955 and the works were to be completed within 12 months, that is, by 04.07.1956. A work order was issued on 02.07.1955 and a formal agreement was signed on 12.07.1955. Despite the lapse of a year, Hind Constructions, the contractor, did not complete the contract. So, the Executive Engineer issued letter dated 27.08.1956 to the contractor rescinding the contract from 16.08.1956. Maharashtra also forfeited the security deposit.

Consequent to the rescission, Hind Constructions gave under Section 80 of the CPC, which is a two months' notice intimating a Government Department regarding the filing of a suit. Thereafter, Hind Constructions sued for damages for wrongful rescission by Maharashtra of the contract to the tune of Rs. 65,000/-, including on account of forfeiture of security deposit, payment for work done, loss of materials which became waste at site, damages for wrongful rescission and interest.

Hind Constructions' case was that Maharashtra fixed 05.07.1955 as the nominal commencement date but since the area received heavy rainfall preventing contractors from carrying out construction work, it was usual for Public Works Department pf Maharashtra ("PWD") to add two months to the period of completion. Hind Constructions also stated that they were orally informed by Maharashtra that they would be getting the said leeway in undertaking the construction works. Consequently, Hind Constructions argued, they commenced work only by December 1955. Hind Constructions also argued that time was not of contractual essence because of several difficulties in construction work such as heavy rainfall, lack of connectivity to site, frequent rejection of materials on spurious grounds by the government officials, etc., which were circumstances beyond the control of the contractor. The contractor

[565] (1979) 2 SCC 70

therefore stated that none of these factors were considered by Maharashtra while issuing the rescission letter.

On the other hand, Maharashtra took the position that time was indeed of contractual essence and there was nothing known as a nominal time period. Further, Maharashtra stated that Hind Constructions was well aware of the site and even if there were difficulties in carrying out the work during monsoon, the contractor should have at least carried out proportionate amount of work, which it failed to complete. The contractor thereby disabled itself from completing the contractor. Therefore, Maharashtra argued that the rescission was valid and correct and the decision to forfeit security deposit was correct.

The trial court concluded the following:

- The completion date fixed was not nominal;
- Time was not of contractual essence;
- Rescission by Maharashtra was wrongful;
- Hind Constructions was entitled to only nominal damages of Rs. 120 and it had not established a claim for damages.
- Maharashtra was liable to return the security deposit forfeited and to pay the amounts due for work done by Hind Constructions.
- Hind Constructions was entitled to a decree for about Rs. 10000 with interest at 6% from rescission.

Both Hind Constructions and Maharashtra preferred cross-appeals. Interestingly, the Bombay High Court did not decide whether time was of contractual essence or not. It went into the question as to whether Maharashtra rescinded the agreement in a mala fide manner. In other words, the court went into the correctness of the rescission.

The High Court examined about six aspects urged by the contractor in putting forth its case that the rescission was wrongful. After going through the evidence, the court found

that Hind Constructions was unable to establish either those aspects or even if it had, the contractor was unable to establish that it was arbitrary. Further, the High Court also found that as if July 1956, the contractor did not even complete half of the work and that, consequently, the rescission was correct. However, the High Court held that Maharashtra was not entitled to levy damages and also claim the security but upheld the latter action. Consequently, the court held decreed Rs. 5,845/-, which was for the work done by Hind Constructions under the contract.

Aggrieved by the decision, Hind Constructions appealed to the Supreme Court, where Hind Constructions argued that the High Court grossly erred in failing to decide the core aspect of criticality of time and instead went on to examine a question that was not relevant at all: the High Court went into the question of reasonableness of termination.

Hind Constructions argued that:

- if Maharashtra wanted to terminate the contract, they could have done so by making time critical and thereafter terminate it. Instead of considering the request for extension, Maharashtra terminated the agreement with retrospective effect. Hind Constructions
- the court below was wrong in assuming that the contractor could not finish the work within three months. On these grounds, Hind Constructions prayed for restoration of the decree of the trial court, conceding damages that had been rejected by the trial court.

Per contra, Maharashtra argued that time was explicitly critical to the contract and the milestone works had been specified. Therefore, Maharashtra argued that it was right in rescinding when the contractor failed to complete it within time. Maharashtra also put forth an alternative submission: it stated that even if it was provided that time was not of contractual essence, the High Court was correct in holding that the termination was not arbitrary or unjustified.

The Supreme Court considered it and opined that it had to be decided with reference to parties' intent. The court cited the Halsbury's Laws of England regarding building and engineering contracts[566], which was based on certain English decisions.[567]

The Supreme Court was not in favour of the argument that time was critical owing to the express stipulation in the contract and opined that such a provision had to be read together with other stipulations in the contract to determine the issue. It held that if on a construction such other stipulations excluded an inference that completion within stipulated time was not regarded as fundamental, time would not be of essence. The court illustrated those other stipulations by citing the cases of contractual term for extension of time and liability for LD for every day or week of unfinished work on expiry of time.[568] Since the contract contained a clause for liquidated damages for delay and a clause on the power of the executive engineer to grant extension of time, the court held that parties did not intend time to be of essence.

The court also went into the correspondence between the Government and the Contractor which showed that the Government had waived the 12 months delay for performance of the works since the contractor was allowed to perform beyond the 12 month period as Maharashtra made the rescission effective only from 16.08.1956 as opposed to at the end of the 12-month period. The court stated that even if time was not fundamental or was no more as such, the owner could still have made time crucial for the extended time and could have rescinded the contract for delay. Ruling for the contractor, the court concluded that the owner neither fixed further period making time as essence nor was time fundamental and that the rescission of contract was wrongful and illegal.

[566] Halsbury's Laws of England (4th ed.), Section 1179.
[567] Lamprell v. Billericay Union, (1849) 154 ER 850: [1849] 3 Ex 283.; Webb v. Hughes, [1870] L.R. 10 Eq. 281; Charles Rickards Ltd. v. Oppenheim [1950] 1 KB 616.
[568] *Hind Construction*, Para 8.

5.2.3.2. Importance of Hind Construction

The decision of Supreme Court in *Hind Construction* is significant because it is cited in almost all decision of various courts and arbitral tribunals in India where the question is whether time is fundamental to a transaction (Srinivasan, 2021, 12). The following table represents the search result for the phrase "*Hind Construction Contractors*" in various legal databases in India[569]:

Table 14 Hits on search phrase "Hind Construction Contractors" in Indian Legal Databases

Legal Database	**No. of Results/ Hits**
Indiankanoon[570]	206
SCC Online[571]	151
Manupatra[572]	186
LexisNexis India	142
Westlaw Asia (India)	102

Broadly, two strands of decisions or approaches[573] have been taken by courts in dealing with *Hind Construction*:

- Decisions that relied on *Hind Construction* by applying it[574]; and

[569] The results of search are as on 18.07.2023.
[570] https://indiankanoon.org/
[571] https://www.scconline.com/ (search results includes Digest Notes, Judgments, and Articles)
[572] https://www.manupatra.com/
[573] In some cases, *Hind Construction* was argued upon but the judgment did not address those aspects. Hence, these have been excluded from this analysis.
[574] See, for instance, McDermott International Inc. v. Burn Standard Co. Ltd., MANU/SC/8177/2006: (2006) 11 SCC 181; Citi Bank v. Standard Chartered Bank (2004) 1 SCC 12; S Brahmanand v. KR Muthugopal (2005) 12 SCC 764; Arosan Enterprises v. Union of India (1999) 9 SCC 449; Amal Peterson, MANU/TN/4351/2020, Para 7.8-7.11; Pondicherry University v. B.E. Billimoria and Company Limited, O.M.P. (COMM) 186/2019, I.A. 8723/2019, (Del HC: 26.05.2020); Star India v Kaleidoscope 2015(5) Arb LR 282 (Bom).

- Decisions distinguishing *Hind Construction* based on facts before it and holding the precedent as non-binding.[575]

5.2.3.3. Decisions Applying Hind Construction

In most decisions, the courts applied or followed *Hind Construction*. An instance thereof is Pondicherry University v. B.E. Billimoria.[576] Following *Hind Construction*, later decisions held that time was not crucial even if parties had stated so, since there was LD and EOT clauses, which according to the courts, allowed a construction that time was not of essence.[577] *Hind Construction* was even followed in other situations such as immovable property[578] and sale of goods.[579]

5.2.3.4. Decisions Distinguishing Hind Construction

Although decisions after *Hind Construction* predominantly follow it, some courts have not followed it, distinguishing it on two grounds:

- *Hind Construction* was inapplicable to commercial contracts (Srinivasan, 2021, 13) as has been stated by various courts, including in in Amal Peterson v. The Authorized Officer,[580] the court stated that the said precedent was not applicable to commercial contracts. This was in the context of auction of immovable property. But the surprising element in this decision of the Madras High Court

[575] See, for instance, Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates P. Ltd. MANU/SC/0939/2011; Amal Peterson, MANU/TN/4351/2020, Para 7.9; Rail Land Development Authority v. Yantti Buildcon 2018(3) Arb LR 356 (Del.)
[576] MANU/DE/1099/2020;
[577] Union of India vs. Glove Civil Projects Pvt. Ltd. (18.04.2023 - DELHC) : MANU/DE/2525/2023; Mas Developers Pvt. Ltd. vs. Magus Consortium Orchid Avenue (P) Ltd. (07.02.2023 - DELHC) : MANU/DE/1157/2023; Haryana State Industrial Development Corporation Ltd. and Ors. vs. Shushil Kumar Rout and Ors. (26.02.2019 - DELHC) : MANU/DE/0925/2019. See also, Srinivasan (2021, 6).
[578] See, for instance, Mono Orion Foods India Limited vs. Syndicate Realty Infra Private Limited (23.12.2021 - CALHC) : MANU/WB/0991/2021; Chand Rani v. Kamal Rani, MANU/SC/0285/1993, Para 46 (Five judges Bench) .
[579] Welspun Specialty Solutions Limited v. Oil and Natural Gas Corporation Ltd., Judgment in Civil Appeal Nos. 2826-2827 of 2016 dated 13.11.2021: (2022) 2 SCC 382.
[580] Amal Peterson v. The Authorized Officer, MANU/TN/4351/2020 (Amal Peterson), Para 7.9

was that traditionally time was not regarded as essence, akin to the presumption in construction contracts (Srinivasan, 2021, 13).

- Some courts have not applied *Hind Construction* by holding that the contractual provision in issue did not support a conclusion that time was not crucial. An illustration of this trend is the case of Devender Kumar v. Parsvnath Realcon Pvt. Ltd.[581], where the concerned quasi-judicial authority did not apply *Hind Construction* and held that time was of contractual essence.[582]

- In HSIDC v. Shushil Kumar Rout[583] the Delhi High Court did not follow the decision of *Hind Construction* (Srinivasan, 2021, 15). It is unclear if the clause did not contain a LD or an EOT clause. The facts of the case, briefly, are that Haryana State industrial Development Corporation Ltd. (HSIDC) allowed the contractor to proceed with the project despite completion of deadlines and their extensions. The tribunal decided for the contractor by applying *Hind Construction*. On challenge, the court held that the contractor failed to exercise due diligence and was merely avoiding the contract (Srinivasan, 2021, 15). Therefore, the court concluded that the finding that time was not of essence was "*contrary to the record*" and was *"not sustainable*." (Srinivasan, 2021, 15)[584]

6.2.4 Problems with Time-as-Essence Clauses

The issues emanating out of the extant law on the subject has been analysed in an article titled "**The Law on Time as Essence in Construction Contracts: A Critique**". (Srinivasan, 2021) One of the ideas mooted in the paper was that various presumptions regarding time as essence clauses were, in effect, default rules, which parties could agree to the contrary (Srinivasan, 2021, 6). But these are in effect sticky default clauses-

[581] Devender Kumar v. Parsvnath Realcon Pvt. Ltd., MANU/RR/0012/2020.
[582] See also, K.K. Krishnan Kutty v. Green Tree Homes and Ventures Pvt. Ltd., MANU/TN/4722/2019, where *Hind Construction* was not followed.
[583] Haryana State Industrial Development Corporation Ltd. v. Shushil Kumar Rout, MANU/DE/0925/2019.
[584] *Ibid*, Para 17 (Srinivasan, 2021).

default rules that are not easy to contract around (Ben-Shahar and Pottow, 2006). Their stickiness is on account of the following reasons:

- Courts construing time as essence clauses in an artificial manner, not reflective of commercial practice, as noted above; and
- Excessive use of templates in which these clauses are repeated without changes notwithstanding adverse judicial construction (Nyarko, 2021, 73-74);

The Default Rules Doctrine addresses both these concerns: there should be cogent policy reasons for making time as essence clauses as sticky (Ayres, 1993, 17). Absent policy reasons, whether supplied by courts or legislature, there is no justification in making such clauses difficult to contract around (Srinivasan, 2021, 15-29).

Courts are duty bound to provide directions as to future conduct. It is the call of the Default Rules Doctrine that where a contractual provision did not comply with the altering rule for displacing the default, the court deciding the issue, is duty-bound to explain the contractual provision to be used to displace the default. This is to enable parties as well as future contracting parties to employ appropriate contract language to displace the default where it is intended so (Ayres, 2012, 2054; Srinivasan, 2021, 28). Determination that parties have failed to alter a default is in effect a determination that the agreement is incomplete (Ayres and Gertner, 1989, 119-120).

Ian Ayres pointed out that the conditions for contracting around a default are usually prescribed by common law standards and that courts fail to explain the appropriate language to be employed by parties in their contracts in order to produce the effect of contracting around that default (Ayres, 1993, 16). The implications of time in construction contracts is reflective of this phenomenon. The effect of this is creation and amplification of inefficiency (Ayres 1993, 16). It also seriously undermines party autonomy in that a default rule is converted into something akin to a mandatory rule (Ayres, 1993, 17). The resultant effect is to give scope for opportunistic behaviour by the contractor.

However, it is not that courts frequently fail to provide guidance to future contracting parties, as mentioned above (Srinivasan, 2021, 28). To illustrate, in *Hind Construction*, the apex court held that if time was not crucial or if a time stipulation was not effective, the promisee could ensure the performance within time becomes essential:

"*If time was not of the essence of the contract or if the stipulation as to the time fixed for completion had, by reason of waiver, ceased to be applicable then the only course open to the respondent-defendant was to fix some time making it the essence and if within the time so fixed the appellant-plaintiff had failed to complete the work the respondent-defendant could have rescinded the contract*." (Srinivasan, 2021, 28-29).[585]

But this guidance cannot be said to be complete as the Supreme Court did not provide any guidance as to how parties could validly contract around the default and provide in their contracts that time is of the essence (Srinivasan, 2021, 28). No wonder that there are arguments made that time is of the essence even in 2023, when right from 1979, when *Hind Construction* was decided, the courts have been, with near consistency, holding against promisees in construction contracts that time is not of essence.

Another problem with the limited "guidance" proffered by the Supreme Court is that when time was not the originally essential, it cannot be made as of essence by unilaterally stating so by the promisee.[586]

The normative idea of the DRD that judges ought to provide future guidance to contracting parties while deciding that a contractual provision did not alter the default is of core importance to the evolution of contract law (Ayres, 1993, 16; Ayres, 2012, 2054; Srinivasan and Yadav, 2022, 206). Ayres goes to the extent of arguing that failure by courts to provide such guidance is against contractual efficiency (Ayres, 1993, 16). Lawyers are expected to take note of judgments and examine whether contracting

[585] *Hind Construction*, Para 10.
[586] See, for instance, VR Mohanakrishnan Dealer and Importer of Motor Parts and Accessories v. Chimanlal Desai and Co., AIR 1960 Mad 452.

language is to be appropriately modified based on judgments. Therefore, it is important for the sake of certainty in contract law if judges provide such guidance (Srinivasan and Yadav, 2022, 206).

The prevailing view in the Default Rules Doctrine literature is that where a default rule is untailored (off-the-rack), contracting parties contract around it through an explicit provision (Ayres, 1993, 4). This is what happens in case of construction contracts. Considering the untailored nature of Section 55 and the presumption in construction contracts that time is not of the essence, parties tailor it to the specific context by explicitly providing that time is of contractual essence. Where courts disregard this choice of the parties, they are, in effect, defeating the act of contracting parties to contract around the default to specific circumstances, thereby exercising party autonomy.

The contradiction in approach of Indian courts in glorifying party autonomy in specific contexts such as arbitration[587] while disregarding it in contexts like Section 55, the Contract Act absent policy reasons is mystifying. There is copious literature that untailored rules should be designed which most parties would have (hypothetically) wanted. Ayres (1993, 5-6) has cited and discussed the decision of the US Supreme Court in Lewis v. Benedict Coal Corp.[588] which adopted the hypothetical approach in deciding the question before it. The sticky default rule propounded in terms of presumptions that time is not of contractual essence in relation to construction contracts may not reflect this position.

Equally mystifying is the absence of efforts by contracting parties to modify their contracting practices despite lapse of more than 43 years after *Hind Construction* was decided in 1979. Even in 2023, promisees have been making the same arguments before courts that time is of essence and courts have been rejecting such arguments.[589] Take

[587] See, for instance, Centrotrade Minerals v Hindustan Copper, 2017(4) Arb LR 325 (SC); BALCO, MANU/SC/0090/2016.
[588] 361 U.S. 459 (1960)
[589] See, for instance, Union of India vs. Glove Civil Projects Pvt. Ltd. (18.04.2023 - DELHC) : MANU/DE/2525/2023; Mas Developers Pvt. Ltd. vs. Magus Consortium Orchid Avenue (P) Ltd.

the recent decision of the Delhi High Court in Union of India vs. Glove Civil Projects Pvt. Ltd.[590] Clause 5 of the agreement provided that time was the essence of the contract. The contract also contained a provision for time extension. Since the contractor did not complete the contract within 21 months and was completed only after a delay of 32 months. Disputes arose between the parties. It was contended on behalf of the promisee that time was of contractual essence. But the arbitral tribunal, as well as the Delhi High Court rejected it, relying on *Hind Construction*. The Delhi High Court, in the petition challenging the arbitral award held:

"*22. A reading of the above would show that the said Clause also provides for grant of extension of time for completion of the Contract. In Hind Construction Contractors (supra), it has been held that the question whether or not time was of essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. Even where the parties have expressly provided that time is of the essence of the contract, such a stipulation will have to be read along with other provisions of the contract, and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental….*"[591]

As one would notice, this is the rationale taken in support in *Hind Construction* in 1979. Even after four decades, there is a repetition of the contractual clauses and contentions before the arbitral tribunals/ courts and parties do not seem to have taken efforts to modify their contracting language and practices (Srinivasan, 2021, 28-29; Poppe, 2021, 108).

This reifies the argument made by **Julian Nyarko** in a recent paper titled "**Stickiness and Incomplete Contracts**" where it is argued that the longevity and prevalence in use of a clause may not be evidence of its optimality (Nyarko, 2021, 73). Ayres and Gertner

(07.02.2023 - DELHC) : MANU/DE/1157/2023; Haryana State Industrial Development Corporation Ltd. and Ors. vs. Shushil Kumar Rout and Ors. (26.02.2019 - DELHC) : MANU/DE/0925/2019.
[590] MANU/DE/2525/2023
[591] MANU/DE/2525/2023, Para 22.

argue: "*If a court can identify that ex ante the parties to the contract had identical interests in allocating a certain risk or duty of performance, then it can, in a sense, pierce the ex post adversarial veil*." (Ayres and Gertner, 1989, 89) Thus, if the parties are able to change their contracting parties to enable courts identify that *ex ante,* they intended to allocate risks towards holding time as of the contractual essence, that should be sufficient for a court to uphold the choice (Srinivasan, 2021 31).[592]

The problem with the approach of Indian courts that an express stipulation regarding time as essence would be undercut by an extension of time clause and LD clause is against commercial contracting practices since most standard form contracts employ such clauses (Srinivasan, 2021, 19-20).

This issue can be looked at another perspective, emanating out of the Default Rules Doctrine. When courts hold, as it did in *Hind Constructions* and subsequent decisions following it, that the contracting parties' attempt at contracting around a default rule was not successful, such a holding was identical to stating that there was a gap in the contract[593], which the default rule filled. Taking this perspective to the present context, when the Supreme Court held in *Hind Construction* that the parties' attempt to contract around the presumption (which is a default rule) that time was not essential in construction contracts through a specific clause failed, such holding was equivalent to stating that there was a gap in the contract as to whether time was of the essence. This meant that those parties wishing to agree for time of performance being of the essence had to fill that gap through appropriate contract language, which they failed to do.

[592] The paper suggests that parties could draft the time as essence clause to apply notwithstanding the liquidated damages and extension of time clauses, thereby conveying explicit *ex ante* choice.
[593] *Filling Gaps*, p. 120.

6.3. Relevance of Whether Time if of Essence for Determining Liquidated Damages

About eighteen years before the enactment of the Indian Contract Act, 1872, Ruggles, J. of the New York Court of Appeals observed regarding LD:

"*The ablest judges have declared that they felt themselves embarrassed in ascertaining the principle on which the decisions [distinguishing liquidated damages from penalties]... were founded.*[594] *They have said that the law relative to liquidated damages has always been in a state of great uncertainty; and that this has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves*."[595]

It is precisely this problem that Section 74, Contract Act intended to address: it sought to make cut across the judge-made rules regarding differentiating liquidated damages and penalties and provide for a uniform rule: notwithstanding party agreement, court will grant "reasonable compensation not exceeding" the stipulated damages.

Section 74 states that where a contract quantifies the amount to be paid for a breach of that contract or contains a penalty stipulation and the promisor breaches the agreement, reasonable compensation will ensue to the victim of breach. Such reasonable compensation, according to Section 74 cannot be more than the amount specified in the contract or the stipulated penalty, as the case may be. Section 74 speaks of reasonable compensation. This is important. A crucial difference between Sections 73 and 74 is that in Section 73 the court (or the arbitral tribunal) determines the compensation *ex post* and Section 73 determines damages *ex ante*.

[594] Cotheal v. Talmage, 9 N.Y. 551 (1854), https://cite.case.law/ny/9/551/ (accessed 2 November 2022), quoted in Kenneth W. Clarkson, Roger Leroy Miller, and Timothy J. Muris, Liquidated Damages v. Penalties: Sense or Nonsense?, 1978 Wisconsin Law Review 351, 351.
[595] Cotheal v. Talmage, 9 N.Y. 551 (1854), https://cite.case.law/ny/9/551/ (accessed 2 November 2022).

This prelude is relevant to the interface between time-as-essence clauses and a claim for liquidated damages, which is another instance where Default Rules Doctrine can provide better insights in contract law.

It was already seen in the previous section of this Chapter that under Indian law, the default rule regarding time not being the essence in construction contract as a sticky default rule, making it difficult to alter the default position. Another instance where Indian law attempts to make a default rule sticky is to enforce the liquidated damages clause in a constricted manner by reading it with reference to the time of essence clause. While sticky default rules per se are not problematic, making them so in the absence of sound policy rationale is problematic.

This can be examined through the decision of the Supreme Court in Welspun Specialty Solutions Limited v. ONGC.[596]

6.3.1. Facts in Brief

In 1994, ONGC published an international call for tenders for the purpose of purchase of steel pipes of about 3.93 lakh metres (Srinivasan and Yadav, 2023, 119). Remi Metals was the successful tenderer to whom ONGC issued four purchase orders for delivery of the said quantity of steel pipes within a time of about 40 weeks (Srinivasan and Yadav, 2023, 119).

As per the purchase orders, date and time of delivery were of contractual essence, and that even if ONGC granted extensions, such extensions were without prejudice to the claim for damages on failure and termination.[597] The purchase order contemplated exception to the said clause: where ONGC waived its right to recover damages in writing and with the approval of its competent authority.[598]

[596] Judgment in Civil Appeal Nos. 2826-2827 of 2016 dated 13.11.2021: (2022) 2 SCC 382
[597] Clause 9, General Terms and Conditions to the Purchase Order, *Welspun Specialty*, Para 6.
[598] *Ibid*.

The purchase order contained a liquidated damages ("LD") clause which contemplated recovery by ONGC of LD at half percent of the contracted price of goods that were not delivered for every week of delay. The clause also capped recovery of LD up to five percent of the goods that the contractor failed to deliver.[599]

Remi Metals delayed in performance of the contractual obligations and ONGC granted extensions. While granting some extensions, ONGC did not impose liquidated damages but in respect of some extensions, ONGC did impose liquidated damages. While making the payments, ONGC deducted those amounts imposed towards liquidated damages and made the remaining payments. Remi Metals contested the imposition of liquidated damages and disputes arose.

6.3.2 History of the Case

Therefore, Remi Metals invoked the arbitration in the purchase order. The tribunal framed 17 issues, including whether time was of the contractual essence and whether ONGC was justified in recovering liquidated damages.

The tribunal decided that there was no breach of contract as time was not critical to the contract. The Supreme Court noted the following as the rationale for holding the liquidated damage clause as unenforceable:

"*13. On the aspect of liquidated damages, the Arbitral Tribunal held that liquidated damages, which are pre-estimated damages, cannot be granted as there was no breach of contract due to the fact that time was not the essence. Accordingly, the Arbitral Tribunal proceeded to determine the actual damages based on the evidence furnished*."[600]

[599] Clause 10, General Terms and Conditions to the Purchase Order, quoted in *Welspun Speciality*, Para 7.
[600] *Welspun Specialty,* Para 13.

Thus, to the tribunal, since the time as essence clause was not breached, liquidated damages was not payable. However, the tribunal went on to assess damages under Section 73, Contract Act. ONGC estimated the total losses to be Rs. 3.80 crores but the tribunal held that since ONGC waived damages during the extended period, it was entitled only to Rs. 2.09 crores.

Dissatisfied with the arbitral award, ONGC challenged the award on the ground that the tribunal disregarded clause in the contract on LD, which was a genuine pre-estimate of the likely losses that was agreed between the contracting parties.[601]

The Court reiterated the conclusions regarding time not being essential and that the actual losses were to be granted. The District Court only reduced the costs awarded against ONGC substantially.

Both parties invoked Section 37, Arbitration Act to go before the Uttarakhand High Court, where the court held that ONGC was correct in deducting amounts towards liquidated damages and that both the tribunal and the District Court were in error in construing the time as essence clause. The tribunal also upheld the modification of the District Court's decision regarding costs while allowing the claims of Remi Metals.

Both Remi Metals and ONGC filed review petitions in the Uttarakhand High Court, which upheld, partly, the decision of the District Court in favour of ONGC and party in favour of Remi Metals.[602] Both parties appealed to the Supreme Court.

6.3.3. Arguments of the Parties

Remi Metals argued as follows:

[601] Arbitration Case No. 31 of 2004, District Court, Dehradun.
[602] Order dt. 27.07.2010 in Review Petitions No. 1339 and 1340/ 2008, High Court of Uttarakhand at Nainital.

- The view of the tribunal was reasonable and plausible, which had to be sustained.
- Time was not of contractual essence since it provided for liquidated damages and extension of time clauses.
- When ONGC waived levy of LD for the first two extensions, it could not have claimed the same for subsequent delivery extensions.
- Courts cannot interfere with arbitral awards unless they are patently illegal.

On the other hand, ONGC contended as follows[603]:

- Liquidated damages was already upheld by the Supreme Court in a similar case in ONGC v. SAW Pipes.[604]
- The award should be annulled because it ignored the term providing for liquidated damages and instead provided for unliquidated damages.
- Time was of contractual essence and was so in respect of every extension.
- The award construed the contractual clauses in an implausible and unreasonable manner.

6.3.4. Decision of the Court

The Supreme Court held in favour of Remi Metals and against ONGC. The court held that the tribunal's determination regarding time not being critical was beyond question[605] and that the tribunal had correctly based its decision on the contractual conditions and conduct of ONGC. The Court held that existence of the clause extending duration of the contract had the effect of diluting the clause on time as the contractual essence (Srinivasan and Yadav, 2023, 119).

[603] *Welspun Specialty*, Para 22.
[604] (2003) 5 SCC 705 (hereafter "*SAW Pipes*").
[605] *Welspun Speciality*, Para 27.

Consequently, the court held that the measure of LD clause which was also of the essence of the contract could not have been the basis of determining ONGC's loss.[606]

The tribunal's construction that Section 55, Contract Act referred to actual loss provable by evidence rather than pre-estimated loss is an interpretation that is reasonable and cannot be a ground for setting aside the arbitral award.[607] ONGC was unable to dispute this conclusion by the tribunal by pointing out any document or correspondence to the contrary.[608]

The court decided that since the contract was a standard form of ONGC, ONGC was assumed to have a greater bargaining power, absent a clear intention to the contrary.[609]

As regards the applicability of *Saw Pipes*,[610], the court stated that *Welspun Speciality* was different on facts since it did not deal with waiver (Srinivasan and Yadav, 2023, 121).[611] On the other hand, in *Welspun Speciality*, ONGC had waived liquidated damages on two occasions before giving extension along with liquidated damages. The apex court agreed with the tribunal that when ONGC waived liquidated damages on the first occasion, unless the contract clearly was to that effect, ONGC could not have imposed liquidated damages subsequently.[612]

The tribunal's view that time was not essential to the contract and that damages was payable was plausible[613] and the courts below went beyond the mandate of Sections 34 and 37 to review the arbitral awards[614] and upheld the arbitral award.[615]

---

[606] *Welspun Speciality*, Para 28.
[607] *Ibid*, Para 31.
[608] *Ibid*, Para 31.
[609] *Ibid*, Para 31.
[610] (2003) 5 SCC 705
[611] *Welspun Speciality*, Para 32.
[612] *Ibid*, Para 33.
[613] (2003) 5 SCC 705
[614] *Welspun Speciality*, Para 35(d).
[615] *Ibid*, Para 36.

6.3.5. Critique of the Supreme Court's Decision

A detailed critique of the decision in *Welspun Specialty* has been undertaken elsewhere (Srinivasan and Yadav, 2023) and the summary of the critique is provided in this part of the work. Before doing so, it is necessary to understand the nature of an LD clause from the perspective of the Default Rules Doctrine. Section 74, Contract Act deals with liquidated damages.

Section 74 entitles a promisee to recover from the promisor reasonable compensation but which does not exceed the agreed amount if the promisor breaches the contract. Section 74 also performs another function: if the amount named is a penalty, it restricts the amount recoverable to reasonable compensation. A clause in the contract prescribing the amount named is known as an LD clause. Law's recognition of LD clause is an attempt by the parties to determine damages *ex ante*, thereby contributing to preventing litigation (Dimatteo, 2001).

An LD clause is that it seeks to prevent costly *ex post* decision making (Dimatteo, 2001).[616] When LD are agreed upon, the promisee incurs a risk- she is disentitled from recovering any amount beyond the agreed damages, even if she suffers more loss than provided in the contract.[617]

The risk of delay is passed on in terms of contract price: every risk that the promisee incurs is translated to the contract price. When bidders quote the contract price, they arrive at the bid price based after converting the risk into monetary terms and adding to the bid price. In the bidding process, there is no compulsion for bidders to quote a specific rate. Therefore, the argument that the contractor is asked to sign in dotted lines or that the transaction is pursuant to a standard form contract with unequal bargaining power may not present the complete picture.

[616] Triple Point Technology, Inc v PTT Public Company Ltd [2021] UKSC 29, Para 35 and 74.
[617] Kailash Nath v. DDA, MANU/SC/0019/2015, Para 43.1.

6.3.5.1. Nature of Liquidated Damages Clause

A statutory provision enforcing an LD clause is a provision allowing the parties to alter the default rule of court-assessed damages: this perspective is well-entrenched in law and economics literature (Hermalin *et al*, 2007, 118-119). *Ex post* assessment by courts (or an arbitral tribunal, for that matter) of damages are a costlier process for the following reasons:

- It will entail a delay (of several years) in assessment of damages and award thereof;
- The assessment runs the risk of a failure by courts to appreciate the losses actually incurred (Walt, 2011, 181);
- The assessment of damages will lead to considerable costs for the parties towards litigation;
- With litigation ensuing, parties tend to expand the scope of their disputes by adding to their existing claims and counter-claims disputes that were previously put to rest or which they would, but for the litigation, not taken up;
- Often the process of approaching a proper court or constituting an arbitral tribunal is in itself a huge process (Srinivasan, 2012).
- With courts (and arbitral tribunals) not awarding costs based on the "loser pays" principle, a genuine promisee who is a victim of breach may not be fully compensated for the costs expended towards litigation process, especially if (and is usually) protracted (Srinivasan, 2012; Srinivasan, 2017).

Hence, it is important that the legal system allows parties to agree upon a liquidated damages clause (Hermalin *et al*, 2007, 119). Converting every dispute involving a LD into one relating to ex post determination of damages will considerably undercut the aforesaid problems that a LD clause is intended to avoid. At the same time, the mandatory rule of not allowing the promisee to recover excessive compensation far

beyond the losses that could have been suffered is to be kept in mind.[618] The challenge is where a liquidated damages clause enables a party to recover excessive compensation, the legal system should protect the promisor.

Any construction of the liquidated damages clause, whether by a court or a tribunal should keep these aspects in perspective.

6.3.5.2. Determination of whether Time was of Essence is not Essential to Determine Liability for Liquidated Damages

For the purposes of Para 1 of Section 55, Contract Act time as the contractual essence would have been significant ONGC treated the contract as voidable and terminated the contract, which ONGC did not (Srinivasan and Yadav, 2023). Therefore, the question as to time being of contractual essence was not relevant at all in determining whether liquidated damages was payable. The tribunal, therefore, erred in framing the first issue as to whether time was of the essence[619] and in deciding that the measure of damages specified by the LD clause could not be correct (Srinivasan and Yadav, 2023, 121).[620]

The paper titled "**Time as Essence and Liquidated Damages Clauses: A Critique of Welspun Specialty v ONGC**" (Srinivasan and Yadav, 2023) notes the circularity of reasoning of the tribunal: the tribunal held that time was critical because of the of the clauses on time extension time and LD[621] but then decided that since time was not of contractual essence, LD was not payable as per the contract.[622] Notably, Remi Metals also argued in the Supreme Court against time being of contractual essence owing to the LD clause, in addition to the extension clause (Srinivasan and Yadav, 2023, 121).[623]

---

[618] See, for instance, Kailash Nath Associates v. DDA, MANU/SC/0019/2015
[619] *Welspun Speciality*, Para 11.
[620] *Ibid*, Para 12-13.
[621] *Ibid*, Para 12 (the tribunal referred to such clause as "penalty", as per the Supreme Court's decision.
[622] See, *Welspun Speciality*, Para 28, quoting the tribunal's finding on liquidated damages. Also see, *ONGC v REMI- High Court*, Para 19.
[623] *Welspun Speciality*, Para 21.

Given the circularity of the tribunal's reasoning, its conclusion that since time was not essential, there was no contractual violation, was patently wrong.[624]

The Supreme Court substantially dealt with the case-law on the scope of challenge to arbitral awards but did not cite any precedent on whether an LD clause was enforceable where time was not of the contractual essence (Srinivasan and Yadav, 2023). When the Supreme Court discussed the basic principles regarding the relevance of "time conditioned obligations"[625], it did not state if time stipulations were relevant to considering issues relating to liquidated damages nor did it cite any case-laws on it (Srinivasan and Yadav, 2023). Even in *SAW Pipes*, the decision which the Supreme Court sought to distinguish, did not contain any discussion on this aspect, even though the time stipulations in both contracts were similar.[626]

While Indian contract law doesn't mandate courts to interpret time stipulations when evaluating the enforceability of liquidated damages clauses, a few rulings have followed this approach.[627] It appears that ONGC also set up its case in that manner. This is an incorrect approach.

The issue on whether loss was incurred or not is different from whether there was a contractual breach (Srinivasan and Yadav, 2023). Section 55, it may be recollected, concerns the effect of breach of conditions of contract that determine the time of performance and notwithstanding whether time was of the essence or not, the victim of breach is, at the minimum, entitled to damages. The recognised exception to this is a situation falling within Para 3 of Section 55: where the promisee accepts performance different from what was agreed and without notice of compensation at the time of such acceptance (Srinivasan and Yadav, 2023). For Para 3 to apply, the below conditions are to be satisfied (Srinivasan and Yadav, 2023):

---

[624] *Welspun Speciality*, Para 13, cited in Srinivasan and Yadav (2023)
[625] *Ibid*, Para 29.
[626] See, *Saw Pipes*, Para 37 and *Welspun Speciality*, Para 6.
[627] See, for instance, *Pure Pharma Limited v. Union of India*, MANU/DE/0949/2008, cited in Srinivasan and Yadav (2023)

- Time of performance of the contract should be of essence;
- The contract should have been voidable owing to the promisor's failure to comply with the time of performance (Srinivasan, 2021, 5);
- The promisee should have accepted performance of the promise at a time other than the one stated in the contract;
- The promisee should not have given notice to the promisor at the time of acceptance that he intended to claim compensation for loss occasioned owing to the promisor's failure to perform at the agreed time of performance (Srinivasan, 2021, 4).

Another exception to the rule that compensation is payable for breach of time stipulations (whether or not time is of contractual essence) is contained in Section 63, the Contract Act, which allows the promisee to permit the promisor not to perform the contract or provide more time for performance (Srinivasan and Yadav, 2023, 122):

In *Welspun Speciality*, neither Para 3 of Section 55 nor Section 63 was employed in support by the Supreme Court. It appears from the judgments at different levels that the tribunal did not so rely on these provisions. Instead, the tribunal awarded general damages to ONGC (Srinivasan and Yadav, 2023, 122). The Supreme Court affirmed this approach (Srinivasan and Yadav, 2023, 122).

6.3.5.3. Tribunal and the Court Ignored Terms of the Agreement

The core aspect of the tribunal's reasoning was that for liquidated damages to apply, time should be of contractual essence. However, this construction was grossly faulty. The entire clause 10 is not quoted in the apex court's decision but is quoted in the Order of the Nainital High Court including Clause 11.[628] A summary of clauses 10 and 11 is provided below:

[628] ONGC v. REMI, Order dt. 14.10.2005 in AO 472/2005 and AO 466/2005 (Uttarakhand High Court, Nainital)(hereinafter "*ONGC v REMI- High Court*")
[628] Clause 10(a).

- The heading of clause 10 stated: "FAILURE AND TERMINATION CLAUSE/LIQUIDATED DAMAGES".
- The first sentence of Clause 10 stated that time and date of delivery were of the contractual essence.
- Clause 10 also provided for three alternative remedies, without prejudice to any other right or remedy, in case the contractor failed to deliver the whole or part of the goods. The consequences were provided in six sub-clauses.
- The first remedy was to recover liquidated damages.[629] The second was to purchase or authorise purchase at the risk of the contractor by serving prior notice without cancelling the contract.[630] The third was to cancel the contract and purchase the undelivered goods at the risk and cost of the contractor.[631]
- Clause 10(d) provided for risk and cost contracting further to the second and the third remedies.
- Clause 10(e) deals with the method of recovery of liquidated damages
- Clause 10(f) contains a non-obstante clause which states that an equipment would be deemed delivered when all its components are delivered.
- Clause 11 provides for an exception to imposition of liquidated damages: it states that liquidated damages would be imposed on the order value unless 75% of the order is supplied within time.

A perusal of these two clauses (Clauses 10 and 11) do not provide for determination of time as essence as a condition for imposition of liquidated damages. In other words, the construction by the tribunal is erroneous on the face of the aforesaid clauses.

In view of the unambiguous contractual term, the tribunal grossly fell in error in ignoring the clause on liquidated damages. There is an "or" at the end of Clause 10(a), which provides for liquidated damages, thereby clearly conveying that ONGC could either impose liquidated damages or go for risk and cost contracting.

[629] Clause 10(a)
[630] Clause 10(b)
[631] Clause 10(c)

The fulcrum of the tribunal's reasoning was that the LD clause was worked out on the basis that time was essential to the contract.[632] This construction is neither supported by the contract nor by law in view of the difference in the objective of an LD clause and a time-as-essence stipulation: the former aims at simplifying proof of losses in case of breach by stipulating the likely breach in the agreement while the latter's purpose to put the contractor to notice that completion of the contract within time was important (Srinivasan and Yadav, 2023).

6.3.5.4. Does Section 55(2), Contract Act is Restricted to General Damages?

As stated earlier, at a broader level, Section 74 recognises that Section 73 is a default rule in allowing parties to agree to damages *ex ante*. Therefore, a claim for LD is on the same pedestal as that of unliquidated damages (Srinivasan and Yadav, 2023, 123).[633] The issue is whether Para 2 of Section 55 covers only unliquidated damages or includes even liquidated damages. Hence, the issue is one of construction of a statutory provision (Srinivasan and Yadav, 2023, 123). Indian courts have recognised that Para 2 of Section 55 is not limited to unliquidated damages (Srinivasan and Yadav, 2023, 123).[634] Jurisdictions outside India to which the Contract Act continues to apply, such as Pakistan and Bangladesh, have construed compensation to mean either unliquidated damages (Section 73) or liquidated damages (Section 74) (Srinivasan and Yadav, 2023, 123).

The Supreme Court did not explain why Section 55 is limited to unliquidated damages. As dealt with earlier, except for limited purposes contemplated in Section 74, the Contract Act does not distinguish between liquidated and unliquidated damages

[632] *ONGC v REMI- High Court*, Para 19.
[633] See also, Union of India v. Raman Iron Foundry, MANU/SC/0005/1974; Thakorlal V. Patel v. Syed Badruddin, MANU/GJ/0238/1992, Para 32; Indian Oil Corporation v. Lloyds Steel Industries Ltd., MANU/DE/8665/2007 (although here the court rejected the claim for liquidated damages, it did not discount that liquidated damages could be claimed for violation of time stipulations if they were not of essence); Haryana Telecom Ltd. v. UoI, MANU/DE/8645/2006; Pure Pharma Limited v. UoI, MANU/DE/0949/2008.
[634] See, for instance, Anand Consthruction Works v. The State of Bihar, AIR 1973 Cal 550;

(Srinivasan and Yadav, 2023). To provide an example, the rule of mitigation contained in the explanation to Section 73 applies to liquidated damages too.[635] Even with regard to a determination under Section 74, the principles in Section 73 are applicable (Srinivasan and Yadav, 2023, 123).

Hence, the Supreme Court's determination in *Welspun Speciality* in affirming the tribunal's ruling restricting the scope of Para 2 of Section 55 only to general damages and not to liquidated damages is a conclusion not supported by extant law (Srinivasan and Yadav, 2023, 123).

Srinivasan and Yadav (2023) also criticise several other aspects of the decision, which are not repeated here.

6.3.6. Welspun Specialty v. ONGC vis-à-vis Liquidated Damages Clause

The previous part of this Section dealt with the problems with court assessed damages previous that liquidated damages clause addressed. By converting a dispute regarding enforcement of liquidated damages and assessing ex post the damages, the arbitral tribunal and the courts undermined the *raison d'etre* of a liquidated damages clause.

- It will entail a delay (of several years) in assessment of damages and award thereof[636];
- The assessment runs the risk of a failure by courts to appreciate the losses actually incurred;

[635] See, for instance, Tower Vision India Pvt. Ltd. v. Procall Private Limited, MANU/DE/4958/2012, Para 23.
[636] The Business Standard, Time taken to resolve commercial cases in India down nearly 50%: Report 22.08.2022), https://www.business-standard.com/article/current-affairs/time-taken-to-resolve-commercial-cases-in-india-down-nearly-50-report-122082200304_1.html#:~:text=It%20takes%20626%20days%20on,within%20306%20days%2C%20on%20average. (accessed 02.01.2023); The Economic Times, From 1,095 days to 306: Govt data shows quicker disposal of commercial disputes (22.08.2021), https://economictimes.indiatimes.com/news/india/from-1095-days-to-306-govt-data-shows-quicker-disposal-of-commercial-disputes/articleshow/85533708.cms (accessed 02.01.2023)

- The assessment of damages will lead to considerable costs for the parties towards litigation;
- With litigation ensuing, parties tend to expand the scope of their disputes by adding to their existing claims and counter-claims disputes that were previously put to rest or which they would, but for the litigation, not taken up;
- Often the process of approaching a proper court or constituting an arbitral tribunal is in itself a huge process (Srinivasan, 2012).
- With courts (and arbitral tribunals) not awarding costs based on the "loser pays" principle, a genuine promisee who is a victim of breach may not be fully compensated for the costs expended towards litigation process, especially if (and is usually) protracted (Srinivasan, 2012; Srinivasan, 2017).

The time taken to get the dispute resolved completely is apparent from the fact that the purchase order was issued in 1995 and several extensions were given in 1996 and 1997. The petition for invalidating the award was filed in the District Court in 2004.[637] Thus, it took about two decades for the resolution of the dispute, till the stage of completion of the appeals process. This speaks volumes about the court/ arbitral tribunal ignoring the parties' conduct of contracting around of the default through the liquidated damages clause.

What was to be a simple issue relating to determination of liability on account of liquidated damages clause under Section 74, Contract Act became a full-blown issue relating to damages under Section 73, Contract Act. The desirability of such expansion of litigations relating to LD clause is a matter that requires a re-look at a larger level.

Another aspect that was highlighted by Srinivasan and Yadav (2023, 125-126) is that the intent of the legislature is to prioritise contract enforcement, given the amendments to the Specific Relief Act, through the 2018 amendments, the clause regarding time being of essence could be declared legislatively as a default rule in the context of commercial contracts and parties could contract out the same if they do so intend.

[637] The case was registered as Arbitration Case No. 31 of 2004 by the District Judge, Dehradun.

6.4. Disability on Unregistered Partnerships and Arbitration

Another notable example of the problem with failure to appreciate and apply the Default Rules Doctrine is the case of Section 69, Partnership Act.[638]

6.4.1. Statutory Scheme of Section 69 Partnership Act

Before construing the provision and explaining its relevance to the Default Rules Doctrine, it would do well to explain Section 69 as a whole and the objective behind its enactment.

The Indian Partnership Act, 1932 ("Partnership Act") consists of eight chapters. Chapter VII is titled "Registration of Firms". Section 69 of the said Act comes within Chapter VII. The heading of Section 69 reads: "Effect of non-registration".

Section 69 creates certain disabilities on an unregistered partnership. Section 69(1) disentitles a partner from filing a suit in any court to enforce a right arising out of an agreement against the firm or an alleged partner of the firm except where such a firm is registered.

Section 69(2) disentitles an unregistered firm, either through itself or through another person, from instituting a suit in a court to enforce a right against a third party, except where such a firm is registered. Section 69(3) clarifies that the disabilities in Sections 69(1) and (2) would "*apply to a claim of set-off or other proceeding to enforce a right arising from a contract...*"[639]

---

[638] See, Umesh Goel v. Himachal Pradesh Co-operative Group Housing, 2016(4) Arb LR 96 (SC)(hereinafter "*Umesh Goel*").

[639] Also see, www.jkja.nic.in (accessed 09.05.2023). Available at https://shorturl.at/dgjK8 (accessed 08.05.2023).

However, Sections 69(3) and (4) create several exceptions to these disabilities. First, Section 69(3) states that the disabilities created by Section 69 would not affect certain rights relating to dissolution such as the right to seek dissolution, for accounts and for realising property. Another exception is the power of official assignees, receiver or the court under other insolvency legislations for realising the property of an insolvent partner.

Second, Section 69(4) makes the disabilities in Section 69 inapplicable to the following:

- Firms/ partners to which the Act does not extend to, geographically;
- Firms/ partners in areas where Chapter VII does not apply, as notified under Section 56 of the Partnership Act;[640]
- to certain suits/ claims of set-off of minimum value and execution proceedings prescribed in Section 69(4) of the Partnership Act.

6.4.2. Rationale for Section 69 Partnership Act

Section 69, Partnership Act was enacted as a balance between the need for transparency in dealings by partnership firms and flexibility in operations by partnership firms.[641] The transparency was sought to be established through compulsory registration of partnerships but since such a requirement would have been unduly burdensome on small partnerships which should not be saddled with burdensome compliance requirements[642], registration was made optional but certain negative incentives or disabilities were placed on unregistered partnerships.[643] These disabilities were incorporated in Section 69 of the said statute.

---

[640] The heading of Section 56 reads: "Power to exempt from application of this Chapter.".
[641] See, Law Commission of India, Seventh Report on Partnership Act, 1932 (1957), p. 6 (quoting the Special Committee), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080541-1.pdf (accessed 30.12.2022)
[642] The Special Committee noted: "*... any small benefit to be derived from registration would be counter-balanced by the clerical labour involved…*".
[643] Himachal Pradesh Cooperative Group Housing Society v. Umesh Goel, MANU/DE/8959/2007, Para 5 (citing para 17 of the Report of the Special Committee).

Registration of partnerships had an important function: the partners are liable for the debts and liabilities of the firm. Therefore, where an aggrieved party desired to initiate legal action against the partners, she must be able to do so with relative ease.[644] Failure by partners to register as a firm may be suspicious and could be a springboard to unethical and illegal actions, such as defrauding creditors.[645]

Hence, these negative incentives were enacted pursuant to the Special Committee which was entrusted with drafting the Partnership Bill. The Special Committee noted that English law made registration compulsory. It noted that there were several calls for making registration public mainly from mercantile bodies decided against recommending it since adopting the English scheme of compulsory registration in India would be a drastic move, especially for small firms.

Hence, the Committee recommended that an unregistered firm would not be in a position to enforce its third party claims in courts.[646] The Committee also carved out an exception to this bar: a partner of an unregistered firm could sue for dissolution of the firm. This exception was created since registration (and related provisions regarding disabilities) was meant to protect third parties.[647] Accordingly, the Special Committee drafted the Indian Partnership Bill, which later became the Partnership Act.

Later, when the Indian Partnership Bill was being discussed through the Legislative Assembly and Council there was considerable dissonance on the disabilities sought to be imposed on unregistered partnerships. Har Bilas Sarda of the Select Committee noted regarding the then Clause 68, now Section 69: "*3. Clause 68 is not only the most vital clause in Chapter VII-the most important Chapter in the Bill-but it introduces a provision on which serious difference of opinion exists.*"[648] He also stated that a blanket

[644] MANU/DE/8959/2007, Para 3.
[645] *Ibid*, Para 3.
[646] Himachal Pradesh Cooperative Group Housing Society v. Umesh Goel, MANU/DE/8959/2007, Para 5 (citing para 17 of the Report of the Special Committee).
[647] *Ibid*.
[648] Har Bilas Sarda, Note of Dissent, Report of the Select Committee on the Indian Partnership Bill (24.01.1932),

application of the said Clause 68 would be a clog on small businesses. Instead, Har Bilal Sarda suggested that Clause 68 should not apply to small business which can show a capital of less than Rs. 1,000/-.[649] Nevertheless, the majority members of the Select Committee did not share that view and went ahead with retaining the disabilities for non-registration.

Accordingly, the legislature went ahead with enacting the said provision. But to address the difficulties, this provision was statutorily kept in abeyance for a year in terms of Section 1(3).[650]

About quarter of a century after the enactment of the Partnership Act, the Law Commission of India examined its working. The Law Commission came up with its seventh report on the Partnership Act.[651] On registration, the Commission unequivocally recommended that registration should be made compulsory, but for partnerships whose duration is six months or beyond.[652]

6.4.4. Applicability of Disability under Section 69 to Arbitration Proceedings

Umesh Goel v Himachal Pradesh Co-operative Group Housing.[653] is a notable decision on this issue. Himachal Pradesh Cooperative Group Housing Society Ltd. ("HPCGHS") invited tenders for a construction project. An unregistered partnership in the form of the appellant ("Umesh") submitted its bid and emerged as the successful bidder. Disputes arose between the parties. An arbitrator was appointed. Claims and counter-claims were filed. Ultimately, the arbitrator awarded close to Rs. 1.36 crores in favour

---

https://eparlib.nic.in/bitstream/123456789/763729/1/jcb_1932_indian_partnership_bill.pdf (accessed 18 September 2022).

[649] *Ibid.*

[650] Section 1(3), Partnership Act provided: "*It shall come into force on the 1st day of October, 1932, **except section 69, which shall come into force on the 1st day of October, 1933***." (emphasis added) Also see, www.jkja.nic.in (accessed 09.05.2023). See also, Surendra Nath De and Ors. vs. Monohar De and Ors. (30.07.1934 - CALHC) : MANU/WB/0099/1934, Para 2.

[651] Law Commission of India, Seventh Report on Partnership Act, 1932 (1957), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080541-1.pdf (accessed 30.12.2022)

[652] *Ibid*., Paras 11-13

[653] MANU/SC/0694/2016

of Umesh. It is significant no plea was made before the arbitrator citing the bar under Section 69. HPCGHS challenged the award which was rejected by the Single Judge of the Delhi High Court. On appeal, the decision of the Single Judge was reversed by a Division Bench of the High Court. Against this decision, Umesh appealed to the Apex Court.

The decision of the Supreme Court is significant in the context of the present discussion and is summarised below:

- Section 69(1) primarily bars a person in his capacity as partner from filing a suit against the firm or its partners to enforce a right emanating out of an agreement or conferred by the Partnership Act.[654] Section 69(2) bars the unregistered firm or any of its partners from filing suing a third party to enforce a right that arises out of an agreement.[655]
- The common theme underlying Sections 69(1) and (2) is that the bar is against filing of a suit in a court.
- The condition for ban to apply under Section 69(3), which impliedly incorporates Sections 69(1) and (2)[656], is filing of a suit by an unregistered firm or a partner thereof either to claim set-off in the suit or other proceedings that are intrinsically connected to the suit.[657]
- Exclusions in clauses (a) and (b) of 69(3), although may come within the ambit of "other proceedings" only relate to a suit and cannot refer to a different proceeding other than a suit.[658]
- The phrase "other proceedings" is also used in Section 69(4)(b) where it provides that Section 69 would not apply to a suit or claim for set-off that does not exceed Rs. 100 in value or to execution proceedings or other similar

[654] MANU/SC/0694/2016, Para 11.
[655] *Ibid*, Para 11.
[656] *Ibid*, Para 10.
[657] *Ibid*, Para 13.
[658] *Ibid*, Para 15.

proceedings. This gives a clear picture that the phrase "other proceeding" in Section 69(4) can relate to a suit pending in a court of law..[659]

Umesh Goel has been followed in numerous decisions.[660]

6.4.3. Decisions on Section 69: Previous Position

This portion of the section looks at the construction of Section 69(2) since the enactment of the statute.

One of the earliest reported decisions on this point is Surendra Nath De v. Monohar De[661] where the question was whether Section 69(2) acted as a disability against the partnership firm/ partners for recovery of money against a third party. The case was decided almost within nine months from the effective date of Section 69. The Calcutta High Court decided in favour of third party and against the partnership firm/ partners recognising the legislative intent behind the provision and holding that the disability applied to litigations commenced after the effective date of Section 69.[662] The bar was upheld in numerous decisions that followed the Calcutta High Court's decision.[663]

Another interesting question arose, this time before the Lahore High Court in (Firm) Krishen Lal-Ram Lal vs. Abdul Ghafur Khan[664], was whether the suit, if instituted by an unregistered partnership, should be stayed rather than be dismissed if an objection regarding disability owing to Section 69 is taken. The Lahore High Court negatived opined that Section 69 did not contemplate such a procedure but held that dismissal of

[659] MANU/SC/0694/2016, Para 16.
[660] See, for instance, Md. Wasim and Another v. Bengal Refrigeration and Company, Order dt. 30.09.2022 in A.P. No. 27 of 2022 (Calcutta High Court); Jayamurugan Granite Exports vs. SQNY Granites, 2015-4-L.W. 385 (Madras High Court).
[661] MANU/WB/0099/1934
[662] MANU/WB/0099/1934, Para 3.
[663] See, for instance, Basanta Kumar Pal v. Durgadas Akrur Chandra Banik, MANU/WB/0290/1935; Gopinath Motilal v. Ramdas MANU/WB/0171/1935
[664] MANU/LA/0359/1935

the suit on the ground of Section 69 would not bar a subsequent suit after registration provided the limitation law does not bar it.[665]

Interestingly, in one of the earliest decisions on the interface between Section 69 and arbitration in Satish Chandra Chakrovarty v. P.N. Das and Co.[666], the Patna High Court ruled in favour of enforcing the award. The High Court was of the view that although the concerned firm was unregistered, the matter was brought within the ambit of the exception contained in Section 69(3) and therefore the award could be filed before the court. While the court did not reject the award for non-registration, it did act upon the award within the framework of Section 69 and not outside it.

Babulal Dhandhania v. Gauttam and Co.[667] is perhaps the earliest authority on whether the bar in Section 69 applied to arbitral proceedings. The moot issue was whether a proceeding to enforce a contractual right under Section 69(3) would include arbitration proceedings. The Calcutta High Court recognised that while Section 69 was the one of the most vital provision in the Partnership Act but held that proceeding in Section 69(3) was in the nature of a suit. On this ground, the court considered that there was no bar for referring the dispute to arbitration.

The court held that the language employed in Section 69(3) was not clear, that merely because there is such ambiguity and right of a person under a valid contract to refer a matter to a private forum could not be taken away in the absence of explicit statutory language.[668]

---

[665] MANU/LA/0359/1935, Para 6. See also, Ram Prasad v. Kamta Prasad, 1935 SCC OnLine All 210: AIR 1935 All 89; Dost Mohammad and Ors. vs. (Firm) Jai Ram Damodar MANU/PE/0049/1935; M.S.A. Subramania Mudaliar Firm v. The East Asiatic Co. Ltd. MANU/TN/0103/1936 (which were decided on similar lines). See also, Radha Charan Saha and Ors. vs. Matilal Saha and Ors. (15.01.1937 - CALHC) : MANU/WB/0427/1937 (which held otherwise- that a suit liable to be dismissed for want of registration need not be if subsequent to the filing, the plaintiff obtains registration and seeks amendments to the plaint)

[666] 1937 SCC OnLine Pat 193 : ILR (1937) 16 Pat 742 : AIR 1938 Pat 231

[667] 1949 SCC OnLine Cal 67 : ILR (1950) 2 Cal 607 : AIR 1950 Cal 391

[668] ILR (1950) 2 Cal 607, 613.

Similar conclusions were reached by Patna High Court[669] and also reiterated by the Calcutta High Court.[670]

Kajaria Traders case[671] is a notable decision on the applicability of the bar in Section 69 to arbitral proceedings. The case arose out of a partnership agreement between the parties, Kajaria Traders (India) Ltd., and Jagdish Chander Gupta, through Messrs Foreign Import and Export Association, a proprietorship concern. The firm entered into an agreement to export 10,000 tons of manganese to New York. But the firm could not perform the agreement owing, allegedly, to failure by Jagdish Chander Gupta. Hence, Kajaria Traders invoked arbitration under the partnership agreement an appointed its arbitrator. Since Jagdish Chander Gupta failed to appoint its nominee, Kajaria Traders approached the court. On behalf of Jagdish Chander Gupta, it was objected that the petition for appointment of arbitrators was barred by Section 69(1), Partnership Act.

In Kajaria Traders (India) Ltd. v. Messrs Foreign Import and Export Association[672], the court had the occasion to construe the phrase "other proceedings" in Section 69(3) in relation to arbitral proceedings. The matter initially was dealt with by a Division Bench consisting of Justices Mudholkar and Naik, who differed on the issue. Hence, the case was placed before the Chief Justice who referred the matter to Justice KT Desai. Justice KT Desai, after considering the difference in views, and hearing the parties held that the phrase "other proceedings" in Section 69(3) could not be construed widely to include arbitration since the phrase "a claim of set-off" had a limiting effect on the succeeding phrase noted above.[673] Accordingly, Justice Desai concluded that "other proceeding" under Section 69(3) did not include an application under Section 8 sending the matter to arbitration.[674]

---

[669] Mahendra v. Gurdeyal, 1950 SCC OnLine Pat 85 : ILR (1951) 30 Pat 109 : AIR 1951 Pat 196
[670] Meghraj Sampatlall v. Raghunath and Son MANU/WB/0076/1955
[671] (1964) 8 SCR 50 : AIR 1964 SC 1882 (hereinafter *Jagdish v. Kataria*")
[672] 1960 SCC OnLine Bom 70 : (1960) 62 Bom LR 753 : AIR 1961 Bom 65
[673] (1960) 62 Bom LR 753, p. 776.
[674] *Ibid*, p. 777. See also, Ram Lal Harnam Dass v. Bal Krishen, MANU/PH/0069/1957.

Jagdish Chander Gupta appealed to the Supreme Court. A four judge Bench heard the matter and held that while the ejusdem generis rule was general applicability, it did not apply in specific situations.[675] In deciding its applicability, the court was of the view that the nature of the general and the special words had considerable importance.[676] The court held that before the allegedly general words can be interpreted as such, those words should disclose a genus or a category.[677] In the present case, the phrase "claim of set-off" which was used before "other proceeding" in Section 69(3) did not disclose a genus.[678] The court went in detail into this aspect as to whether there could be a proceeding which could be in the nature of a "claim of set-off" but the court could not find any such proceeding.[679] Hence, the court concluded that the phrase "other proceeding" in Section 69(3) "*must receive their full meaning untrammelled*" by the phrase *"a claim of set-off"*[680] and that Section 69(3) provided for application of Sections 69(1) and (2) "*to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract*"[681], in addition to a claim for set-off, subject, of course, to the exceptions provided in Sections 69(3) and (4).[682]

Later decisions predominantly followed *Jagdish v. Kataria*, more or less up to the enactment of the Arbitration Act. For instance, in Delhi Development Authority vs. Kochhar Construction Work[683], the question was whether a contract between an unregistered partnership and the Delhi Development Authority could be sent to arbitration. The court relied on *Jagdish v. Kataria* and held that "other proceeding" in Section 69(3) included a proceeding for reference of a suit to arbitration.[684]

---

[675] (1964) 8 SCR 50, Para 6.
[676] *Ibid*
[677] *Ibid*
[678] *Ibid*
[679] *Ibid*
[680] *Ibid*
[681] *Ibid*, Para 9.
[682] *Ibid*, Para 9.
[683] MANU/SC/1279/1998
[684] *Ibid*, Para 3. See also, Shreeram Finance Corpn. v. Yasin Khan, MANU/SC/0341/1989 (where in an earlier matter, the Supreme Court came to a similar conclusion).

6.4.5. Critique of Umesh Goel v. Himachal Pradesh Co-operative Group Housing

6.4.5.1 The Nature of Bar in Section 69

The second chapter dealt with mandatory rules, where it was seen that mandatory rules in contract law were usually intended to protect parties to a contract or those persons external to it. The rationality enhancing default and altering rules are intended to protect parties internal to the contract, that is, against adverse effects on contracting parties, known as internalities. But they may not be effective where there are adverse effects on parties outside the contract, known as externalities (Zamir and Ayres, 2020, 290-291, 293).

Mandatory rules are designed to prevent externalities and internalities. Use of mandatory rules to prevent externalities has been considered legitimate (Zamir and Ayres, 2020, 292).[685] Even where mandatory rules are intended to be used to prevent externalities, the attempt is to use non-compulsory means (Zamir and Ayres, 2020, 292). Only when such means fail are mandatory rules used.

To be sure, in theory, the effect sought to be produced by Section 69 of disclosure of complete information by the firm and its partners towards third parties can be brought into through contractual negotiations and contracts. But there are several problems associated with this theoretical assumption: for instance, it is assumed that the third party seeking to contract with the unregistered firm would be a sophisticated one, with the ability to seek disclosure of complete information on the partnership from the unregistered firm. This is not always so, especially in India, where such contracting takes place in rural areas or even in urban areas with people of less literacy (Zamir and Ayres, 2020, 294). Also, it is not always that a third party, who enters into with an unregistered firm, acts in a rational manner in doing so.

[685] The authors (Zamir and Ayres) argue that such interventions are neither opposed by proponents of contractual autonomy of parties nor by proponents of efficiency theory.

One could argue that instead of creating a bar in terms of Section 69, the legislature could have simply created a mandatory disclosure duty- to disclose the partners, their identity and other details when contracting with a third party. But as has been dealt with in the 2nd Chapter, disclosure duties in terms of mandatory rules (mandatory procedural rules) may not be effective in tackling the problem that the statute seeks to address, especially when it seeks to protect the interest of third parties (Zamir and Ayres, 2020, 322).

When it comes to business entities where certain special status is endowed therewith, law requires registration. Take the case of a company. Sections 11(1) and 11(2), Companies Act, 1956 mandated registration by a company consisting of a specified minimum number of persons. Failure to the comply with these requirements led to criminal[686] as well as personal liability.[687] Section 464 of the Companies Act, 2013 provides for similar sanctions.[688] Likewise, the LLP Act sanctions the conducting a business in the name of a limited liability partnership through fine except after incorporation.[689]

The Partnership Act is one of the exceptions to the aforesaid rule explicitly requiring registration. Here, registration has not been specifically made mandatory. But then can this rule be called a default rule? The answer to this is in the negative. As has been dealt with earlier, default and mandatory rules cannot be looked at as water-tight compartments. There are blurred lines where seemingly default rules operate like mandatory rules, leading Ayres and others to call such rules as quasi-mandatory (Ayres, 2012, 2074). The rule requiring registration operates near the spectrum of mandatory rules although the Partnership Act makes registration non-compulsory. Hence, the requirement of registration read with the bar in Section 69 is a mandatory rule.

---

[686] Section 11(4), Companies Act, 1956 states: "*Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business*."
[687] Under Section 11(5), Companies Act, 1956, the offence is punishable with fine of Rs. 10,000/-.
[688] See, Section 464(3), Companies Act 2013.
[689] See, Section 20, LLP Act.

This can be looked at another way. Parties to an unregistered partnership cannot contract out the bar (or contract-in the rights barred) in Section 69 and so it applies mandatorily to an unregistered partnership.

Such mandatory (or quasi-mandatory) rules can be called as danger zones as opposed to safe harbours, which are altering rules laying down conditions, if followed, leading to a more favourable contractual outcome (Zamir and Ayres, 2020, 322). They are danger zones because they create a constricting environment in case of non-compliance. The constricting environment under discussion here is the bar under Section 69, Partnership Act.

One should not be misguided by the fact that registration has not been made compulsory or subject to criminal sanctions akin to the Companies Act, 1956 (or the 2013 statute, for that matter) noted above. Mandatory rules are not always designed such that effect of non-compliance leads only to invalidation of the underlying transaction or imposition of criminal sanctions (Zamir and Ayres, 2020, 333).

Thus, the provisions on registration read with the bar in Section 69 in the Partnership Act creates a mandatory (or quasi-mandatory) rule requiring registration and imposing a constricting environment in case of failure to comply therewith. It is intended to protect third parties against fraudulent conduct by the partners of the unregistered partnership.

6.4.5.2 Dilution of Effect Intended by the Mandatory Rule through Arbitration Clause

Umesh Goel hits at the efficacy of the constricting environment (danger zone) sought to be created by this mandatory rule by allowing circumventing of the bar through an arbitration clause. The constriction is sought to be eased through an arbitration clause. So, all that an unregistered firm's partners wanting to remain in the fringes of law need to do is have an arbitration clause:

- in the partnership deed to wriggle out of the bar in Section 69(1); and
- in the agreements with third parties to escape the rigours of Section 69(2).

Umesh Goel encourages conduct by partners of an unregistered firm that the Partnership Act sought to discourage. In fact, in 1957, the Law Commission went a step further than the Partnership Act and recommended compulsory registration of partnerships. But what *Umesh Goel* does is to dilute Section 69. Arbitration is the usual method of solving commercial disputes and therefore *Umesh Goel* has virtually abrogated Section 69.

The dangers of using of arbitration to dilute mandatory rules in other jurisdictions have been observed (Ware, 1999; Guzman, 2000; Zamir and Ayres, 2020, 311) and have been regarded as "troubling" (Zamir and Ayres, 2020, 311).

Stephen Ware in his paper titled "**Default Rules from Mandatory Rules: Privatizing Law Through Arbitration**" (1999) argues that with extremely limited grounds for review of arbitral awards, courts are likely to enforce arbitral awards even if there is an error in law (Ware, 1999, 711). The effect therefore is to contract out all of the mandatory rules that courts would have applied, but for the arbitration agreement (Ware, 1999, 711).

Andrew Guzman in his paper titled "**Arbitrator Liability: Reconciling Arbitration and Mandatory Rules**" (2000) argued that the pro-arbitration approach of US courts in enforcing arbitral agreements/ awards result in minimum judicial intervention, which makes arbitral tribunals avoid enforcement of mandatory rules (Guzman, 2000, 1281).

While Ware's argument is centred on American Law, the argument applies equally to India because Indian law also contains limited reasons for setting aside arbitral awards. Pertinently, Section 34(2A), Arbitration Act explicitly bars setting aside an arbitral award on the ground of "*erroneous application of the law*".[690]

[690] See, Proviso to Section 34(2A), Arbitration Act.

But Stephen Ware's suggestion that the US Supreme Court should reverse its position that claims under mandatory rules were arbitrable (Ware, 1999, 754) is neither practical nor is based on sound rationale. It is not practical because the prevailing system, while not perfect, attempts to balance public interests and private interests. In the context of India, where there is considerable pendency of litigations in courts, use of arbitration and other forms of dispute redressal systems, both amicable and otherwise are a necessity. Ware's recommendation is not based on sound rationale because it fails to take into account the multifarious objectives with which mandatory rules are designed, including protecting parties internal (internalities) and external (externalities) to the contract.

Similarly, Guzman's suggestion to adopt a regime to enable parties sue the arbitrator if the arbitrator fails to apply mandatory rules (Guzman, 2000, 1281) is also impractical in the light of statutory provisions on immunity of arbitrators.[691] Adoption of such a regime could potentially open the flood gates for suits against arbitrators by losing parties thereby undermining arbitration itself. This is the reason why advanced arbitration jurisdictions have enacted legal provisions on immunity of arbitrators. For instance, Section 42B, Arbitration Act provides: "*No suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder*."[692]

Further, such an argument assumes that courts do not ignore or dilute mandatory rules. This assumption is erroneous, as this very instance, regarding dilution of mandatory nature of Section 69 in arbitration proceedings clearly illustrates. Besides, if such a regime is legitimate for arbitration, it would equally be legitimate for court proceedings.

At the same time, Ware's point is that arbitration has the effect of converting mandatory rules into default rules is relevant in the present context, although with a difference: it

[691] In the Indian context, see Section 42B, Arbitration Act (concerning arbitral immunity)
[692] On the need for arbitral immunity, see, for instance, Hodges (2023) and Cevc (2019).

is not the arbitrators who convert mandatory rules to default rules but the arbitration ecosystem itself. The arbitration ecosystem includes courts, counsels, academics, arbitrators, arbitral institutions, etc. who call for a pro-arbitration approach, notwithstanding various policy reasons that may triumph a pro-arbitration approach.

This is a situation where the policy rationale of Section 69 clearly triumphs over a pro-arbitration approach: this provision is intended to prevent externalities including fraudulent conduct by partners of unregistered partnerships, as has been noted above. *Umesh Goel* has the effect of converting this mandatory rule into a default rule by simply adding an arbitration clause.

6.4.5.3 Relevance of the Arbitration Act

Umesh Goel and other decisions seek to distinguish *Jagdish v. Kataria* and to justify non-applicability of bar in Section 69 to arbitrations by holding that the 1996 Act is entirely different from the previous statute, the Arbitration Act, 1940.[693] The 1996 Act or provisions therein such as Sections 5, 8, 9, etc.[694] are immaterial in considering the scope of Section 69. The question and the only one in that is whether Section 69 covers within its scope arbitration proceedings or not.

Mostly courts have examined the question from a literal reading of the provision. Decisions based on policy were masqueraded by courts through statutory construction while courts in the past few decades have been more explicit in referring to the underlying policy rationale.

Irrespective of the approach towards statutory construction, the effect of *Umesh Goel* and other such decisions is to convert the mandatory rule into a default rule and without any regard to the design of the mandatory rule requiring registration and imposing sanctions for non-registration. In other words, the problem with *Umesh Goel* is to ignore

[693] MANU/SC/0694/2016, Para 27.
[694] *Ibid*, Para 27.

the Default Rules Doctrine from the angle of design of the mandatory rule and to convert the mandatory rule into a default rule whose design really does not comport with what was regarded as the most vital provision in the statute.[695]

6.4.5.4 Court includes Arbitration

The idea in *Umesh Goel* that the term suits excluded legal proceedings is not supported by the contemporaneous usage prevailing as regards the Contract Act. In various places such as Sections 25, 60, 61, 125, 176, 180 and 181, the Contract Act employs the term "suits". Likewise, the term "Court" is also employed in various sections in the said statute, including in Sections 19A, 23, 25 and 27. Does this mean that these provisions are applicable only to suits and in courts? Cannot these provisions be applied by arbitral tribunals? The settled law on the issue is that references to suit in these provisions have included references to arbitration.[696]

6.4.6. Reassessment of Mandatory Rules

Ian Ayres and Eyal Zamir call for reassessment of existing mandatory rules based on analysis from a policy perspective (Zamir and Ayres, 2020, 310). Recent development in the non-applicability regarding Section 69 vis-à-vis arbitration proceedings need reassessment and reversal in position. Registration is "encouraged" through the bar in terms of Section 69 and hence the manner of enforcement of contract, whether through litigation or arbitration, is immaterial to its applicability. Section 69(3) can be statutorily amended to include the term "arbitration" after the phrase "a claim of set-off" and would then read as "a claim of set-off, arbitration or other proceeding".

---

[695] Har Bilas Sarda, Note of Dissent, Report of the Select Committee on the Indian Partnership Bill (24.01.1932).

[696] See, for instance, International Design and Engineering Solutions Pvt. Ltd. vs. MGI (India) Pvt. Ltd. (13.08.2019 - DELHC) : MANU/DE/2714/2019; Tata AIG General Insurance Company Limited vs. Manhattan Exports (24.04.2019 - BOMHC) : MANU/MH/0977/2019; Southern Railway v. Santhosh Babu, 2022 SCC OnLine Ker 189 : (2022) 1 Arb LR 514; Union of India v. L.S.N. Murthy and Ors. (23.11.2011 - SC) : MANU/SC/1377/2011;

6.5. Enforceability of Standstill Agreements

A standstill agreement is an agreement that seeks to stop time from running for the purposes of limitation period or to extend the limitation period so that parties to a dispute can have a proper go at taking steps to resolve the dispute. The Limitation Act, 1963 ("Limitation Act") does not explicitly envisage such an agreement. Section 3 thereof provides that every suit instituted after the limitation period prescribed in the said Act shall be dismissed. The provision makes this mandate subject to Sections 4 to 24 of the Limitation Act. It also states that a court is bound by this duty even if the other party has not defended the claim using limitation law.

Given the seemingly mandatory nature of Section 3 of the Limitation Act[697], doubts have been raised on whether one could validly enter into a standstill agreement and extend the limitation period, or, at the least, stop time from running (Ramasubramanian, 2020). Such doubts have not only been limited to India but also abroad. To illustrate, the enforceability of Standstill Agreements was the subject of considerable debate under English law. Mostyn, J. expressed reservations against such agreements in Mary Jane Cowan v. Martin John Foreman and Ors.[698]:

"*I was told that to agree a stand-still agreement of this nature is "common practice". If it is indeed common practice, then I suggest that it is a practice that should come to an immediate end. It is not for the parties to give away time that belongs to the court. If the parties want to agree a moratorium for the purposes of negotiations, then the claim should be issued in time and then the court invited to stay the proceedings while the negotiations are pursued. Otherwise it is, as I remarked in argument, simply to cock a snook at the clear Parliamentary intention*."

This portion of the work discusses, at the first instance, standstill agreements and their purposes. It then proceeds to discuss how standstill agreements have been viewed in other jurisdictions. Thirdly, the legal framework of the law of limitation in India is

[697] See, for instance, Jawaharlal v. Mathura Prasad, (1934) I.L.R. 57 All. 108 (FB)
[698] [2019] EWHC 349 (Fam), Para 34.

examined, especially as regards the rationale of Section 3, Limitation Act. Fourthly, this portion of the work critically evaluates the mandatory nature of Section 3 and examines whether it should be construed as overriding party intent to provide for enforceability of standstill agreements. Based on this, the last part of this portion of the paper draws certain conclusions.

6.5.1. Standstill Agreements and Their Purposes

The purpose of standstill agreement is to stop the limitation period from running or in some cases, extend the limitation period for the purposes of preserving or freezing the rights of the parties and their enforceability for a limited time in order to enable them solve the dispute amicably either by themselves or through settlement mechanisms such as conciliation, mediation, etc.

The term "standstill" connotes the maintenance of status quo and has been used in various contexts. In India, frequently, the term "standstill agreement" has been used to refer to agreements that were entered into after India attained independence vis-à-vis some of the territories such as the Nizam of Hyderabad and Berar. These agreements were concluded between the Indian Dominion and such a territory to the effect that till a final agreement is reached between the Dominion of India and such a territory as to its final status and relationship with India, the existing arrangements as regard matters that were of common concern between the Dominion and such territory were to continue as between India and the Nizam.[699] These agreements were to be in force usually for a year.[700] Standstill agreements were entered into by the Dominion of India

[699] See, for instance, Standstill Agreement between the Dominion of India and the Nizam of Hyderabad and Berar, 1947, p. 153, https://www.google.co.in/books/edition/British_Documents_on_Foreign_Affairs/_TvieqWAk2kC?hl=enandgbpv=1 (accessed 15.05.2023).
[700] *Ibid*, Article 5.

with territories such as Orissa[701], Baroda[702], Tonk State[703] (subsequently merged in Rajasthan), Charkhari and Sarila[704], and so on.

In the American context, the term "standstill agreement" is used to denote an agreement by which a bidder can purchase the stock of a target company or a lender pauses from seeking instalment payments till the borrower (Hayes, 2022).[705] The American equivalent of a Standstill Agreement (i.e., an agreement that suspends the period of limitation) is a Tolling Agreement.[706]

Broadly, Standstill Agreement serve one of the two purposes: one, it freezes time from running; and, two, it extends the period of limitation. A Standstill Agreement could be aimed at achieving one of these two outcomes.

6.5.2. Standstill Agreements: International Perspectives

6.5.2.1. Position in UK

One of the earliest decisions on Standstill Agreements is the case of The Oxford Architects Partnership v. The Cheltenham Ladies College[707], where the English High Court held that any provision in an agreement preventing a party from relying on the statutory defence provided in the law of limitation.[708]

However, the enforceability of standstill agreements received a jolt when Mostyn, J. stated that such agreements were to disregard or show contempt at the legislative intent.[709] On appeal, the appellate court took a more lenient view: it held that such an

[701] Saradhakar Naik and Ors. v. The King (09.09.1948 - ORIHC) : MANU/OR/0012/1950
[702] In Re: Antonius Raab and Ors. (24.11.1948 - BOMHC) : MANU/MH/0048/1950
[703] Ram Babu Saksena v. Rex (11.11.1949 - ALLHC) : MANU/UP/0131/1950
[704] Virendra Singh v. Uttar Pradesh, MANU/SC/0025/1954
[705] For a similar usage pertaining to lender-borrower, see, Drax Holdings Ltd., Re [2003] EWHC 2743 (Ch).
[706] See, Contracts Counsel, Tolling Agreement, https://www.contractscounsel.com/t/us/tolling-agreement (accessed 15.05.2023).
[707] [2006] EWHC 3156 (TCC).
[708] *Ibid*, Para 15
[709] Mary Jane Cowan v. Martin John Foreman and Ors., [2019] EWHC 349 (Fam), Para 34.

agreement could be enforceable if it is clear, properly provided for the duration of the standstill/ moratorium and included the potential parties to a litigation.[710]

Recently, the English Court of Appeal indicated in Kajima Construction Europe (UK) Ltd and Anor v. Children's Ark.[711] the importance of a standstill agreement in the context of a national tragedy where the concerned parties were attempting to work at an acceptable solution.[712] As such, Standstill Agreements have become the norm and a part of the strategy of disputing parties to reach amicable resolution.[713]

6.5.2.2. Position in Scotland

In 2017, the Scottish Law Commission submitted its report on prescription ("Prescription Report").[714] Chapter 5 of the Prescription Report considered the treatment that could be meted out to Standstill Agreement. The Scottish Law Commission considered the issue in detail and recommended that the issue should be clarified statutorily.[715] The Commission examined contracting around the limitation period both ways, lengthening and shortening. As regards an agreement for shortening the limitation period, the Commission recommended that such agreement should not be of any effect.[716] As regards agreements extending the prescribed limitation period, the Commission recommended that those agreements should be allowed provided the fulfilled the below conditions[717]:

[710] [2019] EWCA Civ 1336, Para 91. Also see, Herbert Smith Freehills, Court of Appeal overturns High Court decision in Cowan v Foreman (13.08.2019), https://shorturl.at/jlCFR (accessed 15.05.2023).
[711] [2023] EWCA Civ 292 (17 March 2023).
[712] [2023] EWCA Civ 292 (17 March 2023), Para 18.
[713] See, for instance, the strategy of the parties in the recent decision of Dignam-Thomas v. McCourt [2023] EWHC 546 (Fam) and Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnerships Ltd and Ors [2023] EWHC 644 (TCC).
[714] Scottish Law Commission, Report on Prescription (July 2017), http://www.bailii.org/scot/other/SLC/Report/2017/247.html (accessed 19.05.2023).("Scottish Commission Report 2017")
[715] Scottish Commission Report 2017, Para 5.1
[716] *Ibid*, Para 5.25
[717] *Ibid*, Para 5.17

- the agreement is made after the period has started to run but before it has expired;
- the extension of limitation period is up to one year; and
- only one such extension is permitted.

These recommendations have been incorporated in Section 13, Prescription and Limitation (Scotland) Act 1973.

6.5.2.3. Position in Australia

In Australia, the landmark decision on whether parties could agree not to plead the defence of the law of limitation is that of the High Court of Australia, the apex court of Australia, in Price v Spoor.[718] The matter was heard by a Bench of five judges. There was a total of three opinions rendered.[719] In the case, the submission for appellants was that there was public policy in the principle that there should be finality to litigation and that therefore an agreement waiving limitation as a defence was not enforceable.

The Australian High Court rejected those contentions and held that an agreement not to take the benefit of the limitation law could be enforced. The court recognised the public policy in limitation law that there should be finality to litigation. At the same time, the court considered that the test should not be as to whether a party could contract out a right whose basis is public policy but whether the benefit conferred is private or whether it is based on public policy or expediency.[720] The opinion of Kiefel, CJ and Edelman, J. was that this was a benefit that could be given up validly. It may, however, be noted that in Australia, it is up to a defendant to set-up the defence of limitation.[721] Kiefel, CJ and Edelman, J. recognised the right of a defendant to raise the limitation defence or not and that limitation law did not bar the right but the remedy.

[718] [2021] HCA 20.
[719] The three opinions were of: (1) Kiefel CJ and Edelman J., (2) Gageler and Gordon JJ., and (3) Steward, J.
[720] *Ibid*, Para 17.
[721] *Ibid*, Para 20.

Gageler and Gordon, JJ. summarised the law on when a statute could be construed as having prohibited renounce the rights conferred by a statute[722]:

- by an express provision prohibiting contracting out;
- by reading the statue as a whole, which leads to an inference that renunciation of the benefits is not permitted; or
- rights are not meant just for individual enjoyment but in public interest which are not capable of being waived.

Gageler and Gordon, JJ. also relied on the entitlement of the defendant to set up limitation as a defence but held that limitation law conferred the right on the individual.[723]

But neither opinions squarely addressed the argument of the appellants that not setting up the defence of limitation was different from expressly waiving it: the appellants argued that the defendant is faced with a claim and has knowledge of what is claimed against him and therefore could opt not to set up the limitation. However, the appellants argued, the plaintiff does not have such knowledge when concluding the standstill agreement. Steward, J. addressed this point and held that there is no basis in principle for distinguishing cases of waiver of limitation as a defence and a promise not to raise it as a defence on the basis of knowledge of the defendant.[724] Steward, J. also recognised that once the right to plead limitation as a defence is conferred on a private individual, it could be waived. Importantly, Steward, J. recognised that the limitation statute applicable neither expressly nor impliedly went against waiving it through a contract and concluded that the principle of freedom of contract dictated that parties could enter into such an agreement.[725]

[722] [2021] HCA 20, Para 39.
[723] *Ibid*, Para 41.
[724] *Ibid*, Para 86.
[725] *Ibid,* Paras 88 and 98.

Thus, the three opinions in Price v Spoor[726] concluded that standstill agreements were enforceable but their decision was based on the principle that limitation could be set as a defence at the option of the defendant, or not.

6.5.2.4. Position in New Zealand

Recently, the New Zealand Court of Appeal had the occasion to decide on the enforceability of a standstill agreement of 2016 in PGG Wrightson Real Estate Limited v Routhan.[727] The claimant brought an action against the respondent , who raised limitation as a defence. The lower court rejected the defence and found that the action was initiated in time further to the effect of the limitation standstill agreement. The Court of Appeal upheld this finding.[728]

6.5.3. Section 3(1), Limitation Act as a Mandatory Rule

The enforceability of standstill agreements will depend on whether Section 3(1) is a mandatory rule. If so, an agreement seeking to contract around a mandatory rule may not be enforceable, except where it falls within the scope of one of the situations contemplated in Sections 4 to 24. On the other hand, if Section 3(1) is a default rule, then it could be contracted around, and an agreement between parties for stopping time from running would be enforceable.

Section 3(1) states that if a suit, among other things, is filed after the prescribed period, a court shall dismiss the suit, even if the defendant has not pleaded the defence of limitation. Section 3(1) is subject to Sections 4 to 24, Limitation Act. There are umpteen judgments construing the provision as a binding obligation on the courts to examine a suit for limitation and dismiss it if filed beyond limitation and the court has no choice on this aspect.[729]

---

[726] [2021] HCA 20.
[727] [2023] NZCA 123
[728] *Ibid*, Para 93- 94.
[729] Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee and Ors. (02.05.1963 - SC) : MANU/SC/0259/1963, Para 11.

One of the earliest decisions on this point is that of the Privy Council rendered in 1850 in East India Company v Oditchurn Paul.[730] The plaintiff (Odichurn Paul) filed a suit in 1839, six years after the contract was broken, on the ground that there was an inquiry pending, which concluded only in 1838. The defendant (East India Company) raised the defence of limitation. Both the trial court and the Supreme Court of Judicature decided the issue in favour of the plaintiff. The Privy Council rejected the contention of the plaintiff that time did not begin to run during the time when parties were in negotiation and when inquiry was being conducted.

While so rejecting the Privy Council hypothesised that parties could agree that they would not take advantage of the law of limitation pending an inquiry, that a breach of such agreement was actionable, but held that even in such a case, the defendant could raise the plea of limitation so as to defeat the suit. Having held so, the Privy Council overturned the decision.[731]

Hari Shankar Singhania v. Gaur Hari Singhania[732] was rendered in the context of family settlements and arbitration. Various members of a family had entered into a partnership deed, which was dissolved through a dissolution deed after a few years. Since differences arose as regards the distribution of immovable property, the parties could not undertake the distribution by May 1987, as required under the dissolution deed, and were involved in lengthy negotiations for several years. A plaint was ultimately filed in 1992 relating to the same. The defendant objected to it on the ground of limitation. The issue was decided in favour of the defendant. After appeals, the case was filed in the apex court.

The Supreme Court relied on the policy of encouraging settlement between the parties and not push them to litigation and held that where there is hope for parties to amicably

[730] [1849] UKPC 21
[731] Indian law has since evolved. It is not within the scope of this research to trace the evolution of this law.
[732] MANU/SC/1686/2006

resolve the issues without invoking adversarial methods of dispute resolution such as filing a suit or invoking arbitration, law should promote them.[733] The court stated that where negotiations are taking place between the parties and correspondences are being exchange in relation thereto, the right to apply to courts arise when it becomes necessary for a party to so apply.[734] In holding so, the court placed special emphasis on family settlements, which are aimed at ensuring harmony among family members and that special equity is applicable to such transactions.[735] The court remarked that technicalities such as limitation should not derail attempts at reaching family settlements. Based on these aspects, the court held that there was no delay in filing the suit.[736] Interestingly, the court reached this conclusion even when the plaintiff did not take such a plea in the plaint.[737]

Geo Miller and Co. Pvt. Ltd. vs. RVUNL[738] is a significant decision to note. In this case, there was a departure from the rule that limitation begins to run from the date of breach/ cause of action. The facts, in brief, are as follows[739]: dispute related to an agreement where there was an arbitration clause. The cause arose in February 1983, when the final bill was handed over. The Claimant, however, served an arbitration notice only in 2002. When the ground of delay was raised, the Claimant contended that it was in good faith negotiations with the Respondent and that therefore the period when they were in negotiations had to be excluded for reckoning the limitation period.

In principle, the court decided that the period when negotiated in good faith to amicably resolve the dispute ought to be excluded to reckon the limitation.[740] The court also stated that a court before which such a plea is raised should consider the complete history of negotiations between the parties, which must be particularised and pleaded.[741]

[733] MANU/SC/1686/2006, Para 20.
[734] *Ibid*, Para 27.
[735] *Ibid*, Para 36.
[736] *Ibid*, Para 39.
[737] *Ibid*, Para 41.
[738] (03.09.2019 - SC) : MANU/SC/1198/2019
[739] A detailed analysis of the facts is not relevant for present purposes.
[740] MANU/SC/1686/2006, Para 10.
[741] *Ibid*.

The court considered it significant to arriving at the "breaking point" in efforts to arrive at amicable resolution, which would, in such cases, be treated as the date from which limitation period would have to be reckoned.

The Supreme Court drew the analogy of a similar position recognised in Hari Shankar Singhania and Others v. Gaur Hari Singhania[742], but in the context of family settlements. The Court also held that the threshold for determining breaking point in commercial disputes would be lower as compared to family settlement contexts since the objective of a commercial dispute is to obtain payment of dues while in family settlement he objective is to amicably resolve family disputes.[743] The court also cautioned that once there is a denial of a claim, the cause of action arises and the claimant cannot wait for an indefinite period of time merely due to failure by the respondent to settle the amount claimed even if the claimant has been writing letters.[744] In other words, the court cautioned that unilateral communications are not sufficient and it is necessary for both claimant and respondent to embark on bona fide attempts to resolve the dispute as evidenced by record.

This decision changes the landscape insofar as limitation is concerned. The effect of this three judge Bench decision is to postpone time running to a date when there is breakdown of bona fide negotiations between the parties in settling a dispute.

Zillon Infraprojects v. BHEL[745] is another decision on the issue. Brief facts are that Bharat Heavy Electricals Limited (BHEL) awarded a works contract to Zillon Infraprojects Pvt. Ltd. (Zillion Infra) in September 2010. BHEL awarded another works contract to Zillion Infra in May 2011, both for works in the same site. BHEL was not making proper payments from October 2012.

---

[742] MANU/SC/1686/2006
[743] Geo Miller and Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd., MANU/SC/1198/2019, Para 11.
[744] *Ibid*.
[745] MANU/WB/0742/2023

Later, the contract was put on hold and thereafter it was considered closed by BHEL. Both parties entered into lengthy correspondences with each other and held several meetings, including in 2017. Finally, Zillon Infra invoked arbitration in 2019. Thereafter, BHEL called Zillon for a meeting in its office. After the meeting was held, BHEL called upon Zillon to submit its claim with supporting documents. BHEL acknowledged receipt of the claim and requested Zillon to withdraw arbitral proceedings. In September 2019, Zillon Infra wanted to proceed with arbitration but BHEL stated that it wanted a bifurcation of claims to analyse the same and to amicably resolve the issue.

Zillon filed an arbitration petition under Section 11 in the Delhi High Court, which was withdrawn. Later, in July 2021, Zillon approached the Calcutta High Court for the same purpose. BHEL argued that the claims were time-barred. On the other hand, Zillon relied on *Geo Miller* and submitted for determination of the breaking point of negotiations.

The court determined that they were in discussions even when the cause of action arose: project was put on hold (2013) and when BHEL short closed the contract (2015). Notably, Zillon sent a legal notice to BHEL in March 2017. Parties, according to the court, were in continuous negotiations and the breaking point was when the notice of arbitration was issued by Zillon in 2019, and that the claim remained live throughout the negotiations.[746] The court also held that since the petitioner was undergoing insolvency process, moratorium period had to be excluded.[747] Accordingly, the court concluded that the petition was filed in time.[748]

B and T AG v. Ministry of Defence[749] is another recent and important decision on the issue. B and T AG ("Band T") entered into an agreement in 2012 with the Ministry of Defence ("MOD") for the supply of submachine guns. MOD contended that B and T

[746] MANU/WB/0742/2023, Para 32.
[747] *Ibid*, Para 33.
[748] *Ibid*.
[749] Judgment of the Supreme Court of India dt. 18.05.2023 in Arbitration Petition (C) No. 13/2023.

delayed in supplying the goods contracted for and encashed the warranty bond of little over 200,000 euros issued for B and Tfor recovery towards liquidated damages. The encashment was in February 2016. Further amounts were September 2016. In September 2017, MOD informed B and T that its actions were in accordance with the contract. In September 2019, the B and T requested MOD to give a chance to explain its stand. B and T invoked arbitration in November 2021. Since MOD objected to the appointment of arbitrator, B and T applied under Section 11, Arbitration Act for constituting the tribunal.

On the basis of these negotiations and the *Suo motu* order of the apex court for extension of limitation period due to Covid19 pandemic[750], B and T contended that parties had constantly engaged in bilateral negotiations and that the claims were not time barred, although MOD argued that these claims were could not be pursued further to the Limitation act.

The Supreme Court, first, noted that Article 137, I Schedule to the Limitation Act applied and stated that as per Article 137, the limitation period began when the right to initiate legal proceedings first accrued.[751] It noted that endless bilateral negotiations would not prevent the time from running.[752] Third, the Supreme Court held that in cases where a party relies on good faith negotiations to save its claim from the Limitation Act, it was crucial for the court to identify the "breaking point", that is, the point at which a reasonable party would have stopped discussing with the other party regarding settlement in order to refer the dispute to arbitration.[753] Next, it reiterated the law on when cause of action arises: when infringement takes place.[754] According to it, when

[750] Order dt. 10.01.2022 of the Supreme Court of India in Miscellaneous Application No. 21/2022, https://main.sci.gov.in/supremecourt/2022/871/871_2022_31_301_32501_Order_10-Jan-2022.pdf (accessed 26.05.2023).
[751] Judgment of the Supreme Court of India dt. 18.05.2023 in Arbitration Petition (C) No. 13/2023, Paras 31-34.
[752] *Ibid*, Para 37.
[753] *Ibid*, Para 44.
[754] *Ibid*, Paras 57- 58.

the cause of action time begins to run and if time lapses, the claimant cannot once again invoke arbitration.[755]

The court noted that the breaking point was traceable to the time when the MOD enforced the BG, imposed liquidated damages and deducted amounts levied towards liquated damages and held that even after that B and Twas negotiating in good faith with MOD anticipating amicable settlement was not correct. On facts, the court noted that disputes arose when MOD encashed the guarantee in February 2016 towards liquidated damages, which, according to the court, was when the breaking point arose.[756] The court also noted that the dispute arose between the parties in October 2014.[757] Relying on *Geo Miller,* the court decided that a mere averment that parties were in continuing negotiations was not sufficient and that the complete history of good faith negotiations has to be pleaded in order to enable the court consider when the breaking point took place.[758]

Interestingly, the court held that merely because parties were in negotiations for a decade or two would not postpone the limitation period.[759]

A conspectus of the case-laws analysed reveals that it is possible for parties to embark on the path of good faith negotiation to keep the cause of action alive and prevent time from running out, if they choose to do so. If one of the parties does not respond to the negotiations or reject it, the story ends there as there is a 'breaking point'. This has a drastic impact on the rigour of Section 3(1): by entering into good faith negotiations, disputing parties can, by consent, choose to make Section 3(1) inapplicable till they reach a breaking point. If the negotiations succeed, there ends the dispute; if the negotiations fail, time begins running from the date of the breaking point and if a court

[755] Judgment of the Supreme Court of India dt. 18.05.2023 in Arbitration Petition (C) No. 13/2023, Paras 31-34.
[756] *Ibid*, Para 59.
[757] *Ibid*, Para 61.
[758] *Ibid*.
[759] *Ibid*, Para 63.

comes across a situation in which the prescribed period in the said Act is exceeded, such authority is bound to dismiss the suit or arbitration by the force of Section 3.

One could argue that through these judicial developments, courts have only affected the prescribed period of limitation in the I Schedule, Limitation Act. But this is not so: the existing clauses therein continue to apply. For instance, if the parties do not embark on good faith negotiations, the clauses in the schedule nevertheless apply. Where they apply, Section 3(1) has to, but for the judicial recognition of the situations discussed above, mandatorily apply. These situations are kicked in by bilateral party action: an explicit or implied consensus to resolve the dispute through negotiations.

This, in other words, makes Section 3(1) a default rule at least insofar as commercial and family disputes are concerned. The purpose of this analysis is not to comprehensively examine the contexts in which courts have exempted the rigour of the limitation law but to point out that the seemingly mandatory nature of Section 3(1) is not so when a deeper analysis is undertaken.

The altering rule, as stated earlier, lays down the conditions for the parties to circumvent the default. In family and commercial disputes, the conditions for kicking in the default is for the parties to enter into good faith negotiations, which should not have a breaking point. Further, if there is a breaking point, the relevant cause commences from that date and the time period prescribed in the I Schedule, Limitation Act.

If parties can, by consensus, contract around Section 3(1) through good faith negotiations, nothing should really prohibit them from entering into an explicit agreement for prevent time from running, in order to enter into good faith negotiations. Therefore, standstill agreements which stop time from running or which extend the limitation period for the period when they negotiate in good faith to resolve a dispute would be in line with the above precedents.

There are a few more reasons why standstill agreements should be enforceable despite the seemingly mandatory nature of Section 3(1), Limitation Act:

- Indian judiciary is overburdened with a huge number of backlog of cases. Parties are put to immense difficulty dealing with delays in resolution of disputes. Therefore, it is of utmost importance to encourage all possible measures to encourage settlement of disputes.

- Parties could, by agreement, counter the effects of limitation law by agreeing to in writing, even without consideration, to pay a time-barred debt (Srinivasan, 2019).[760] It could be argued that such an agreement would constitute a separate cause of action (Vardhan, 2018, 615). However, the fact that parties could get around the force of Section 3(1), Limitation Act by making a fresh agreement is a method of contracting around that provision.

- Limitation law recognises the principle that where there is ambiguity/ lack of clarity, the law should be construed to preserve the remedy.[761] Therefore, lacking specific bar against an agreement, and in light, the Contract Act recognising an agreement to pay time barred debts, it could be construed that this lack of clarity on enforceability of standstill agreements, such lack of clarity could be construed to preserve the remedy, that is, against the operability of Section 3(1), Limitation Act.

- The legal position in various jurisdictions such as UK, Australia, New Zealand, etc. permit parties to contract around the law of limitation and enforce standstill agreements.

- There is no internality or externality to be safeguarded against when it comes to an agreement between parties to save the limitation period in order to attempt to settle disputes.

[760] See, 25(3), the Contract Act.
[761] Balmukund v. Lajwanti, MANU/SC/0376/1975, Para 20.

Once it is concluded that Section 3(1) may not be a mandatory rule after all, at least in some contexts, the argument against enforceability of standstill agreements that they seek to contract around public policy loses potence. If parties could contract around Section 3(1) by going for good faith negotiations, they could do so by entering into an agreement to do so and also lay down the contours of their understanding in that agreement.

6.5.4. Assessment of Enforceability of Standstill Agreements and Limitation Law

There are important lessons pursuant to the afore-stated analysis of the enforceability of standstill agreements in relation to Section 3(1), Limitation Act. One, what might, on a first reading, seem to be a mandatory rule, may on a proper analysis, turn out to be a default rule. This is especially so when decisions on that rule are analysed. Most implicit default rules are of this sort. A rule, standing alone, may read as a mandatory rule but its real nature can be gauged while reading it in conjunction with another rule which may influence that seemingly mandatory rule. A rule could operate differently depending on different transactions. It may be a mandatory rule in some contexts and a default rule in others.

6.6. Findings and Conclusion

To sum up, this Chapter dealt with four illustrations of how the Indian legal system is not better off with failing to employ the Default Rules Doctrine in a systematic manner. These four illustrations demonstrate that various insights of the Default Rules Doctrine would have contributed to better understanding of the rules of contract law, courts could have reached better decision-making, and contract enforcement could be better promoted with the help of the insights of the theory.

The impact of the lack of percolation of the theory can be seen from both the positive as well as negative perspectives. The positive approach was seen as the potential of the

DRD in Chapter 2 while the negative perspective was dealt with in this chapter, which looked at the deficiencies in the state of law where Default Rules Doctrine is not employed in understanding and critiquing the law. As such it is critical in perspective.

CHAPTER 7: DEFAULT RULES DOCTRINE IN INDIA: EMPIRICAL PERSPECTIVES

7.1. Introduction

The details of the empirical study conducted in relation to the relevant research questions noted in Chapter 1 are presented in this chapter. The chapter first discusses the universe, population and the sampling procedure for collection of data. It goes on to discuss the questions posed in the questionnaire. Subsequently, it descriptively presents the data collected further to the circulation of the questionnaire. The remaining portion of Chapter 7 analyses the data and draws inferences therefrom.

7.2. Universe, Population, Sampling and Structure of Empirical Study

This section of the chapter describes the universe, the population and the sampling employed for the empirical study.

7.2.1. The Universe

The universe of the study is the country of India. India as a whole is taken because the present work tests the level of awareness and the utility of the Default Rules Doctrine from an Indian perspective. Further, the experiences of one geographical area or a specific context or a sub-profession of law cannot be taken to be that of all geographical areas/ contexts/ legal sub-professions, as the case may be. Hence, the universe of study is India.

7.2.2. The Population

The population is the recognised law schools in India from which various law students are studying or were studying in the past. The term “law school” means any law college,

whether it is a part of a central/ state/ private university or a government/ private law college affiliated to any university, recognised by the Bar Council of India.

Responses were collected from those who are students at present or were past students of law schools. It is possible that the law schools might have taught the Default Rules Doctrine in the past but not at present, or vice versa. In order to avoid these issues, responses have been obtained from present or past law students. Past law students may, at present, be advocates, in house counsels, law academicians or those practising in other sub-professions in law such as legal journalism, non-governmental organisations, etc.

7.2.3. Sampling Methodology

There are about 1890 law schools recognised by the Bar Council of India.[762] Broadly the syllabus on contract law prescribed in most universities and law schools is more or less similar and accords with the prescriptions of the University Grants Commission and the Bar Council of India.

Although there might be similarities, there could be differences in the syllabus between premier law schools such as the national law schools on the one hand and traditional law schools on the other.[763] Differences may also be possible between premier and non-premier law schools in terms of teaching methodologies, access to quality reading material and to exposure to foreign writings on the subject. Therefore, it is more important to obtain responses from various types of law schools than in terms of absolute numbers. This includes various types of law schools such as national law universities, central universities, state universities (excluding national law universities), affiliated colleges, private universities and other law institutions, thereby representing both premier and non-premier law schools.

[762] https://www.barcouncilofindia.org/info/recognised-universities-colleges
[763] This has been dealt with in detail in Chapter 2.

Accordingly, a total of responses from present or past law students of about 90 to 100 law schools in India were considered as adequate as representational of the population for the purposes of the present empirical study.[764] This represents about 4.7% to 5% of the population. The questionnaire was kept open for responses from 11.09.2023. As on 24.02.2024, a total of 231 respondents from about 142 institutions had responded. A map of the institutions to which the respondents belonged is provided below:

Figure 3 Location of Institutions from which respondents have completed their undergraduate law programme

As would be seen from the above map, the respondents are from institutions from all over India.

The respondents are from all kinds of law schools including national law universities, central universities, state universities (excluding national law universities), affiliated

[764] This is given the similarity in the syllabus prescribed by the University Grants Commission (2001). See, Sinha & Kharb (2017, 326) ("*The more same the units of the population are, the smaller sample can be and still be representative*").

colleges, private universities and other law institutions, thereby representing both premier and non-premier law schools. This represents about 8% of the population and has been taken as the sample for study. The methodology of obtaining samples has been explained in Chapter 1. The type of sampling is random sampling.

No empirical study has been conducted in India on the Default Rules Doctrine. Therefore, this research may be considered as a starting point of empirical research on the Default Rules Doctrine in India. This research work should be taken to be a part of the continuum of research, where hypotheses are tested out using various methodologies, each successive research building upon the previous ones.

7.2.4. Structure and Descriptive Analysis of the Questionnaire

The structure of the questionnaire (**Appendix 1**) was explained in Chapter 1 and is summarised in the form a table below:

Table 15 Structure of Questionnaire

Section of Questionnaire	Section Title/ Purpose	Questions
I	Introduction	I to IX
II	Awareness of the Default Rules Doctrine	X to XIV
III	Learning about the Default Rules Doctrine	XV to XVIII
IV	Teaching Default Rules Doctrine	XIX to XXIII
V	Usefulness of the Default Rules Doctrine	XXIV to XXVI

Thus, a total of 26 questions were posed to the respondents on the Default Rules Doctrine to test the level of awareness and its usefulness.

7.2.5. Preliminary Aspects

The respondents were asked to fill two preliminary aspects before they could embark on the questions: the first one was their email address. Collecting of email address was a mandatory aspect that they respondents had to fill. This was for the following reasons:

- it lent a sense of authenticity to the study and duplicate responses could be filtered out based on the email; and
- follow-up questions, if any, could be sought from the respondents on the questions.

The second preliminary aspect was consent to use data. Confirmation/ Consent was sought from the respondents for the following:

- Confirmation that the respondent had read the details provided regarding this research project and that the respondent understood the content.
- Confirmation that the respondent understood that participation in the study was voluntary and that the respondent was free to withdraw from the study, sans reason
- Consent to use the responses as aggregate or anonymous statements, but with a after ensuring confidentiality and without attribution to any individual respondent
- Confirmation that the respondent understood that anything stated in the response would be treated confidentially and would be used only for research purposes
- Consent to take part in the research.

Thus, informed consent was sought and obtained from the participants on the above aspects.

7.3. About the Respondents

It is noticed that while a few respondents were based out of India (such as The Hague, Kabul, etc.), most respondents were from India and were spread out throughout India, as depicted in the below map:

Figure 4 Location of Individual Respondents

This map depicts the location of the respondents.

The third and the sixth questions related to gender and monthly income, respectively. These questions are fairly standard questions in empirical research and accordingly were placed in the research. At the minimum, it showed that the data was restricted not to specific categories of gender or income alone.

The fifth question related to the sub-profession of the respondents. The responses came from the cross-section of lawyers and law students and not just from one of the sub-professions in law. This is important because the responses from one of the sub-

professions could be biased in favour of a particular question. This is apparent from the below pie-chart:

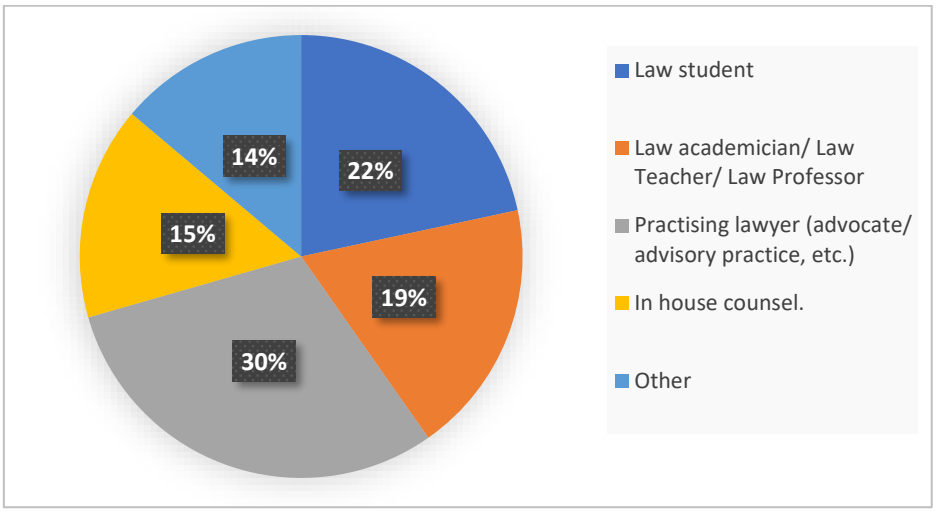

Figure 5 Percentage of Sub-professions in Law

The approximate percentage of respondents against each sub-profession is noted below:

Table 16 Percentage of Sub-Professions in Law

S. No.	Respondents	Percentage (approx.)
1	Law student	22%
2	Law academician/ Law Teacher/ Law Professor	19%
3	Practising lawyer (advocate/ advisory practice, etc.)	30%
4	In house counsel.	16%
5	Other	14%
	Total	**100%**

Law academicians includes law teachers in whatever designation- be it lecturers, assistant professors or professors of whatever grade. Practising lawyers includes those advocates practising in courts of law, lawyers engaged in advisory practice, such as transactional lawyers, etc. The category "other" subsumes many sub-professions such

as judges, legal journalists, lawyers in NGO/ policy space and other miscellaneous lawyer sub-professions.

On gender, males constituted about 59% of the responses while females formed about 41% of the responses. Although the respondents were given the option not to disclose gender, they chose to do so. One of the respondents did not want to disclose gender. The percentage share of gender of the respondents is depicted in the below figure:

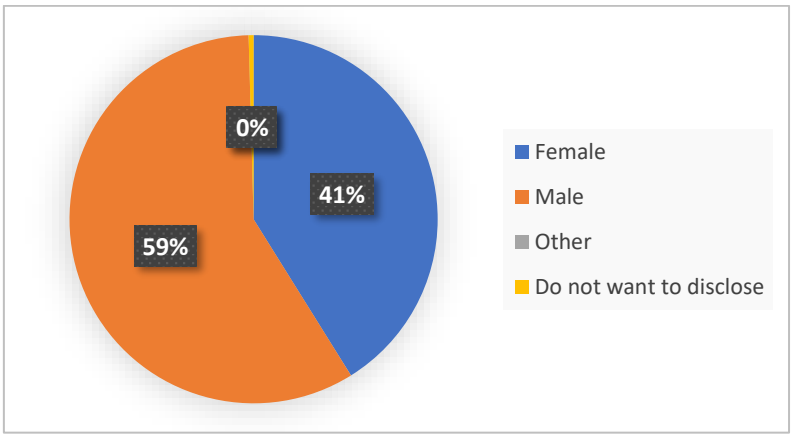

Figure 6 Gender of Respondents

This data clearly shows that the respondents are not skewed towards any gender. Besides, the nature of the issues involved are not those which are affected by gender of the respondents.

Another aspect that has been included as a matter of abundant caution is the monthly income of the respondents, which are as follows:

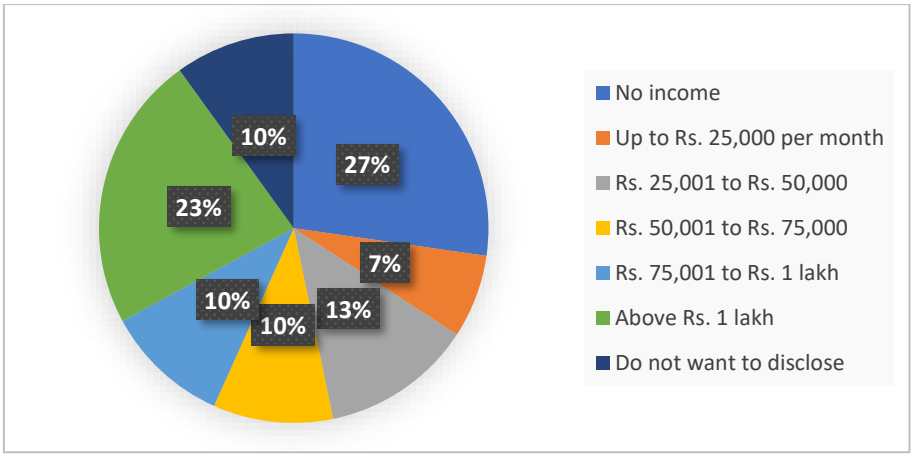

Figure 7 Income of Respondents

The income range is tabulated below:

Table 17 Income of Respondents

S. No.	Income Particulars	Percentage of Respondents
1	No income	27%
2	Up to Rs. 25,000 per month	7%
3	Rs. 25,001 to Rs. 50,000	13%
4	Rs. 50,001 to Rs. 75,000	10%
5	Rs. 75,001 to Rs. 1 lakh	10%
6	Above Rs. 1 lakh	23%
7	Do not want to disclose	10%
	Total	**100%**

Some of the respondents have not chosen any option, in which case it has been presumed to be

The study also collected data regarding the educational qualifications of the respondents. About 42% of the respondents were graduates in law, about 44% were postgraduates in law and about 14% of the respondents were not yet graduates in law.

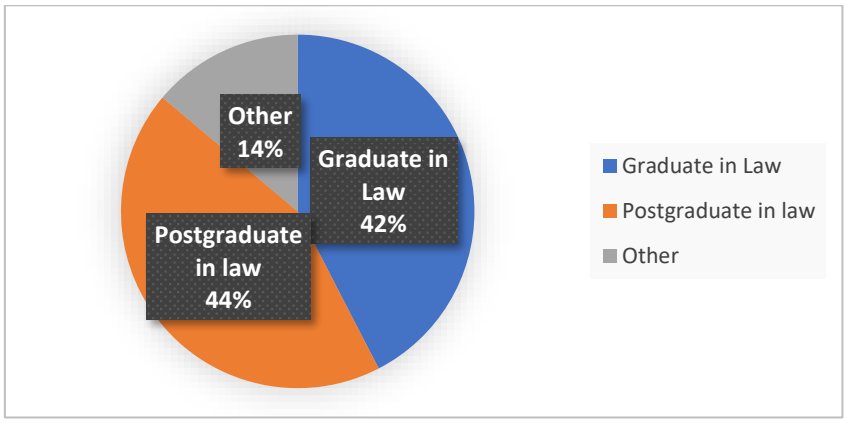

Figure 8 Educational Qualifications of Respondents

The study also collected data regarding the type of law college that the respondents passed out of. This also ensured that the respondents were not skewed towards a particular type of law college. The below pie-chart depicts the type of law college from which the respondents passed out:

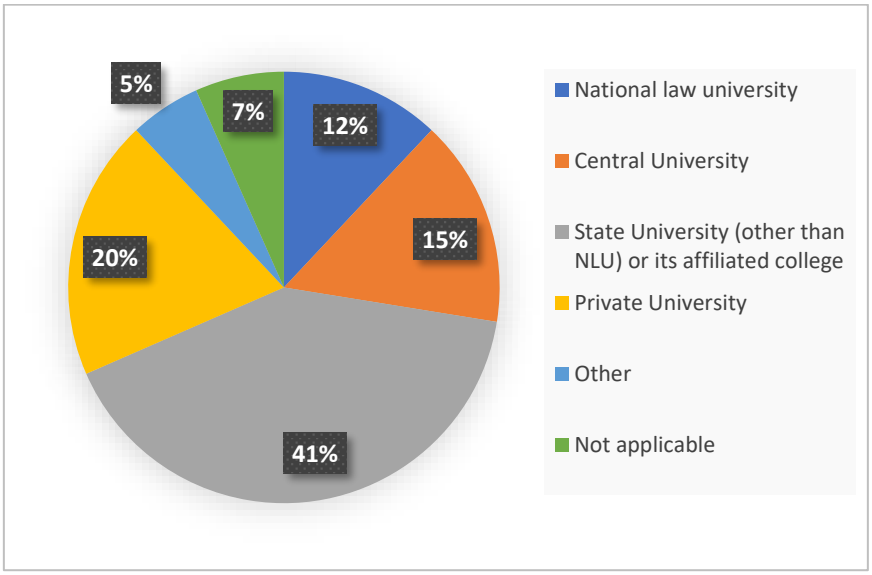

Figure 9 Type of Institution from which Respondents completed UG in Law

As could be seen from the above pie-chart, the respondents were from national law schools, central universities, state universities, private universities an also other categories of institutions. Some even chose the option "not applicable" perhaps

indicating that they were yet to pass out of law school. The percentage of the responses are provided below:

Table 18 Type of Institution from which Respondents completed UG in Law

S. No.	Type of Law College	Percentage of Respondents
1	National law university	12%
2	Central University	15%
3	State University (other than NLU) or its affiliated college	42%
4	Private University	19%
5	Other	5%
6	Not applicable	7%
	Total	100%

The empirical study collected data regarding the type of law college that the respondents, who were postgraduates, passed out of. Again, this also ensured that the respondents were not skewed towards a particular type of law college. The below pie-chart depicts the type of law college from which the respondents, who were postgraduates, passed out:

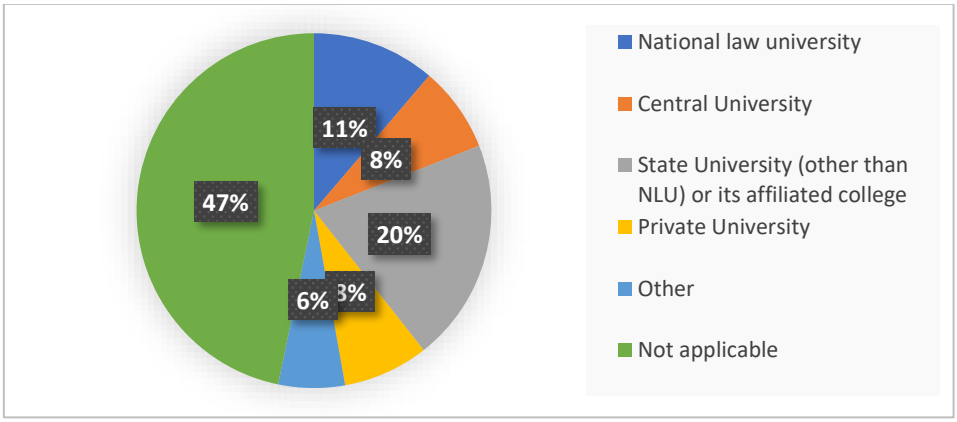

Figure 10 Type of Institution from which Respondents completed PG in Law

As could be seen from the above pie-chart, the post-graduate respondents were from national law schools, central universities, state universities, private universities an also other categories of institutions. Some even chose the option “not applicable” perhaps indicating that they did not pursue their postgraduate degree in law. The percentage of the responses are provided below:

Table 19 Type of Institution from which Respondents completed PG in Law

S. No.	Type of Law College	Percentage of Respondents
1	National law university	11%
2	Central University	8%
3	State University (other than NLU) or its affiliated college	20%
4	Private University	8%
5	Other	6%
6	Not applicable	47%
	Total	100%

It is possible that some of the latest batches of students who passed out could be aware of the Default Rules Doctrine while the older ones may not be so aware. Hence, this questionnaire also collected details of experience of the respondents in law to examine if there was any relationship between experience in the field of law and the knowledge of the Default Rules Doctrine. If experience has any impact on the awareness of the said doctrine, it may skew the responses one way. The respondents who answered the questionnaire were with varied experience, as the below figure depicts:

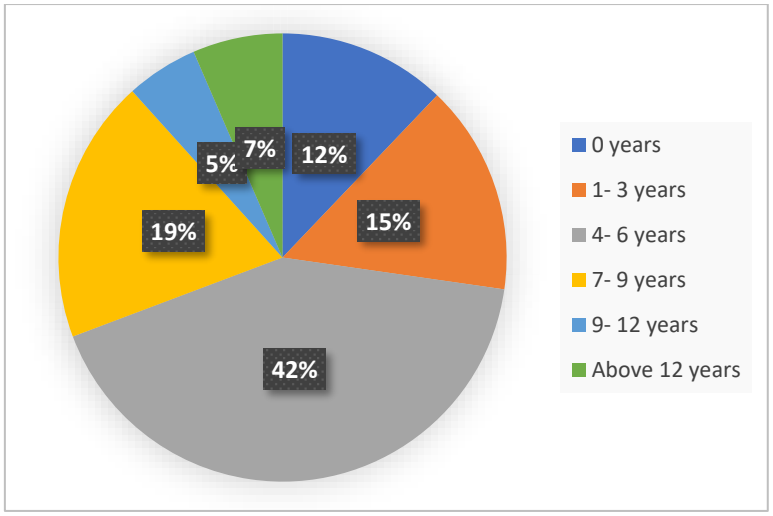

Figure 11 Experience of Respondents

As is clear from the above pie-chart, the respondents who have answered the questionnaire, have done so with varied years of experience in law, right from no experience to experience above 12 years. The below table details this aspect:

Table 20 Experience of Respondents

S. No.	Experience Particulars	Percentage of Respondents
1	0 years	12%
2	1- 3 years	15%
3	4- 6 years	42%
4	7- 9 years	19%
5	9- 12 years	5%
6	Above 12 years	6%
	Total	**100%**

Thus, respondents from all strata are represented in the randomly sampled responses to the questionnaire.

7.4. Awareness About the Default Rules Doctrine

7.4.1. Responses on the Awareness of Various Aspects of the DRD

The responses in the study on the awareness of the Default Rules Doctrine are interesting. When asked about the awareness of the meaning of default, mandatory and altering rules[765], about 78% of the respondents answered the question in the affirmative while only 22% answered that they were not aware of these concepts. The below pie-chart depicts this state of affairs:

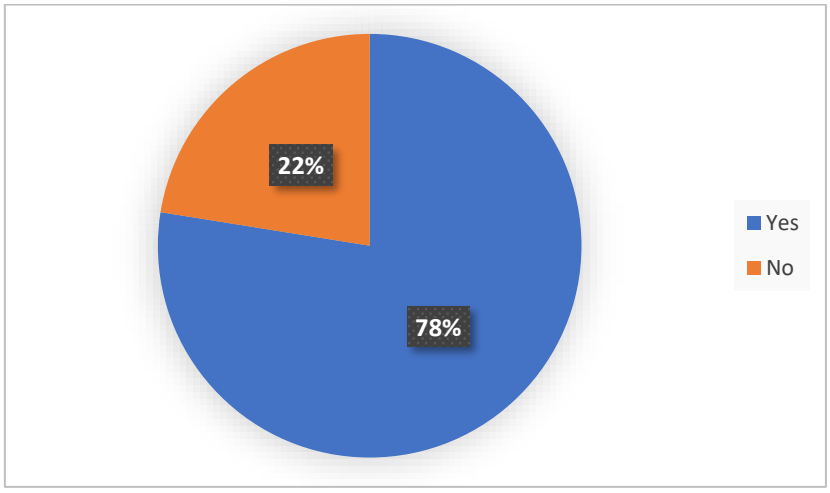

Figure 12 Claimed Awareness of Default Rules Doctrine

In the next question[766], the respondents were asked the depth of their awareness of the Default Rules Doctrine. About 77% of the respondents stated they knew about the meaning of default rules. About 71% were of the view that they knew about the meaning of mandatory rules and, expectedly, a lesser percentage (about 56%) stated they were aware of the meaning of altering rules. This data is pictorially represented as under:

[765] Question No. X.
[766] Question No. XI

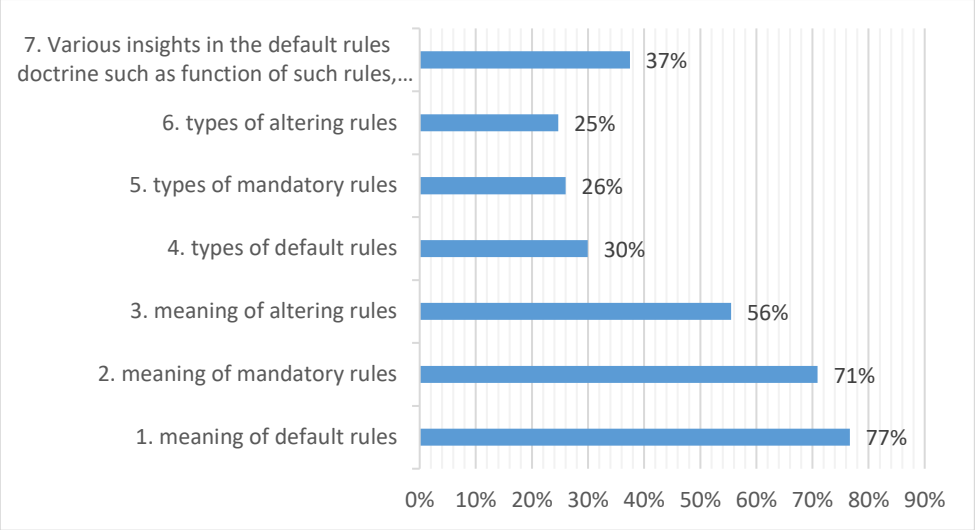

Figure 13 Claimed Knowledge of Details of Default Rules Doctrine

The above table starting from Sl. No. 1 to Sl. No. 7 represents increasing depth of knowledge of the Default Rules Doctrine.

About 30% of the respondents stated had a more in-depth knowledge of the Default Rules Doctrine- they knew about the types of default rules; about 26% stated they knew about the types of mandatory rules and almost an equal percentage (about 25%) stated they knew about the types of altering rules. About 37% of the respondents stated that they were aware of various insights of the Default Rules Doctrine.

7.4.2. Meaning of Default Rules

To test whether, notwithstanding their representation that they knew about the DRD, question Nos. XII to XIV were meant to test whether they knew a least the basic aspects of the DRD. Question No. XII tested whether the respondents knew the meaning of default rules. About 34% of the respondents answered the question correctly: "*rules that fill gaps in incomplete contracts*". About 66% of the respondents had either answered the question wrongly or had acknowledged that they did not know the meaning of the phrase "default rules". The percentage of responses against each answer is tabulated below:

Table 21 Responses on Meaning of Default Rules

Response to meaning of default rules	Percentage
1. rules which apply in case of default by a party	19%
2. rules which apply mandatorily to a transaction	6%
3. rules that provide how one can contract around a compulsorily applicable rule	27%
4. rules that fill gaps in incomplete contracts	**34%**
5. I do not know	14%
Total	**100%**

This is pictorially represented, after rounding off, as under:

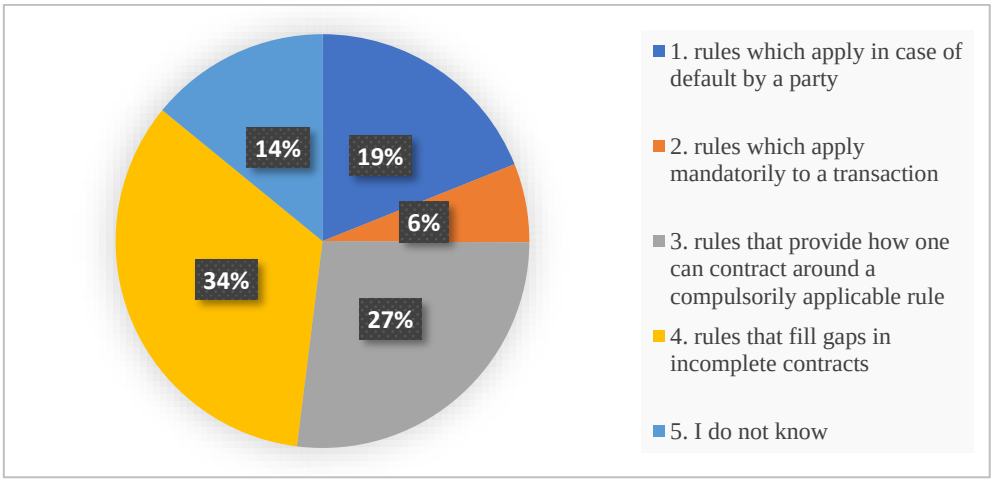

Figure 14 Responses on Meaning of Default Rules

7.4.3. Meaning of Mandatory Rules

Question No. XIII tested whether the respondents knew the meaning of mandatory rules. About 56% of the respondents answered the question correctly: "rules that apply mandatorily to a transaction". The percentage of responses against each answer is tabulated below:

Table 22 Responses on Meaning of Mandatory Rules

Response to meaning of mandatory rules	Percentage
1. rules that mandatorily allow contracting around	16%
2. rules that apply mandatorily to a transaction	**56%**
3. rules that lay down how a rule could be contracted around	8%
4. rules are mandatory only to one party while optional to the other	3%
5. I do not know	17%
Total	**100%**

This is pictorially represented, after rounding off, as under:

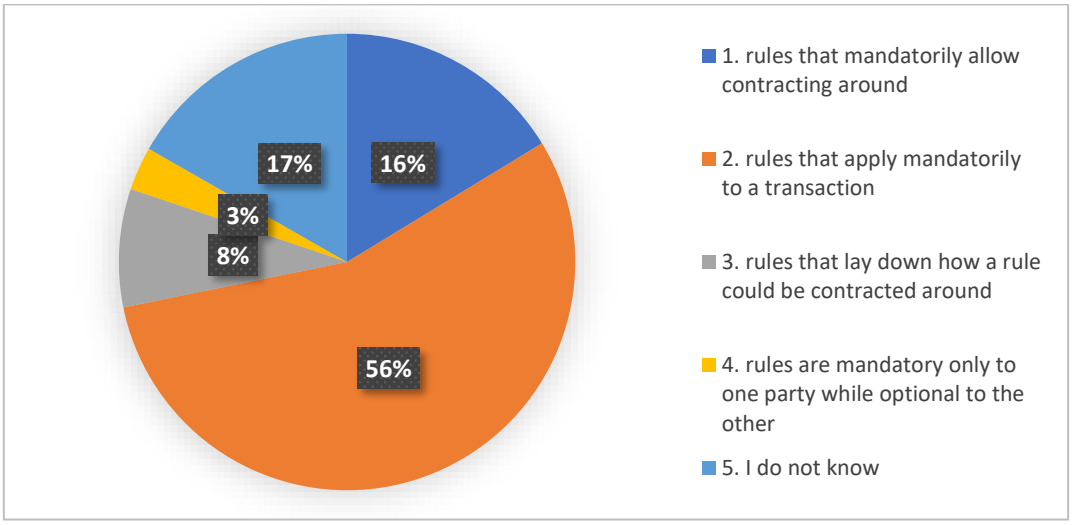

Figure 15 Responses on Meaning of Mandatory Rules

7.4.4. Meaning of Altering Rules

Question No. XIV tested whether the respondents knew the meaning of altering rules. About 30% of the respondents answered the question correctly: "rules that lay down how a rule could be contracted around". The percentage of responses against each answer is tabulated below:

Table 23 Responses on Meaning of Altering Rules

Response to meaning of altering rules	Percentage
1. rules that apply compulsorily to a transaction	5%
2. rules that allow altering of a debt	19%
3. rules that lay down how a rule could be contracted around	30%
4. rules are rules optional to one party while mandatory to the other party	12%
5. I do not know	34%
Total	**100%**

Pictorially, this is depicted, after rounding-off, as provided below:

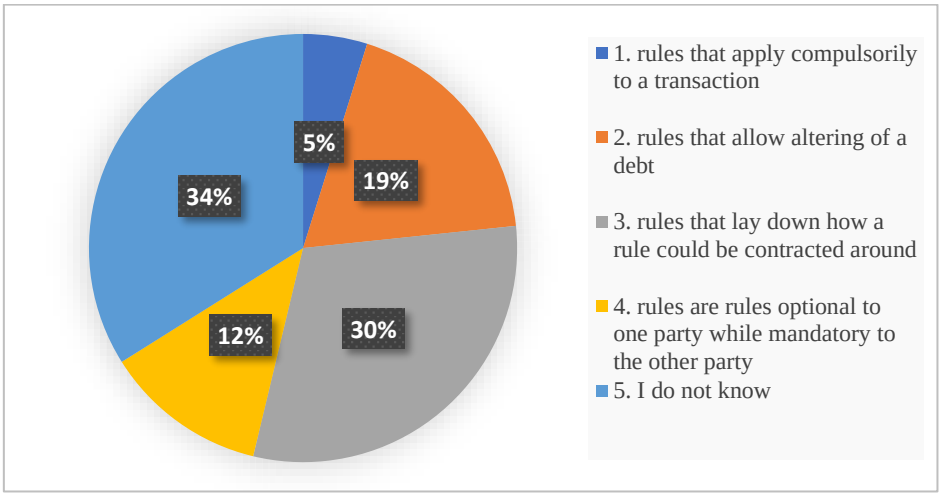

Figure 16 Responses on Meaning of Altering Rules

7.5. Teaching of Default Rules Doctrine in Law Schools

The two sections of the questionnaire explored whether and how the Default Rules Doctrine was taught in Indian law schools. Questions XV to XVIII explored whether students are taught the doctrine in undergraduate and postgraduate programmes in law in India and Questions XIX to XXIII sought responses from law teachers of the doctrine in India.

7.5.1. Whether Default Rules Doctrine was Taught?

The XV question of the questionnaire asked: "*Whether Default Rules Doctrine was taught to you in law school?*" There were three possible replies to the question: (1) Yes, (2) No and (3) Do not remember. The third response, "Do not remember" is personal to the respondents and not the institutions *per se*. However, the response in the negative is significant because it points out that about 76% of the institutions (108 out of 142 institutions) from which the respondents belonged did not teach the Default Rules Doctrine.

However, the problem is not as straight-forward because respondents belonging to an institution has stated that the Default Rules Doctrine was not taught while another from the same institution has stated that it was taught. If the respondents who had stated that the Doctrine was taught is analysed, it is following conclusions ensue:

- Out of 38 law colleges where the Default Rules Doctrine, according to the respondents, was stated to have been taught, two respondents from two colleges claimed that they did not know even the meaning of the concepts of default, mandatory and altering rules but knew various insights of the Default Rules Doctrine.
- Only 11 respondents answered the meaning of the concept of default rules correctly. This represents only about 9 institutions out of the 38 institutions.
- Only 10 respondents got the answer relating to the concept of mandatory rules correct. This represents only 9 institutions out of the 38 institutions
- Only 8 respondents got the meaning of altering rules correct. This represents only 6 institutions out of 38.
- Out of the 34 institutions from which respondents claim to have been taught the Default Rules Doctrine, only three institutions figure out in the correct responses to all the three concepts.
- Out of the 34 institutions from which respondents claim to have been taught the Default Rules Doctrine, respondents from only five institutions figure out in the correct responses to default and mandatory concepts.

- Out of the 38 institutions from which respondents claim to have been taught the Default Rules Doctrine, respondents from only 10 institutions figure out in the correct responses to the meaning of default rules. This could possibly imply that the Default Rules Doctrine was taught in at these 10 institutions.
- Assuming that these 10 institutions are duplicate entries which figure out in the list of 102 institutions, the institutions where the Doctrine is not taught works out to 92 (out of 142 institutions), which represents about 65% of the institutions from which respondents responded.

It is thus seen that majority of the institutions have not taught the Default Rules Doctrine in India.

If individual respondents are considered, about 61.5% of the respondents answered the question as to whether the Default Rules Doctrine was taught in the negative. About 16.5% were of the view that it was taught to them and about 22% stated that they did not remember if the doctrine was taught to them. This data is pictorially represented as under:

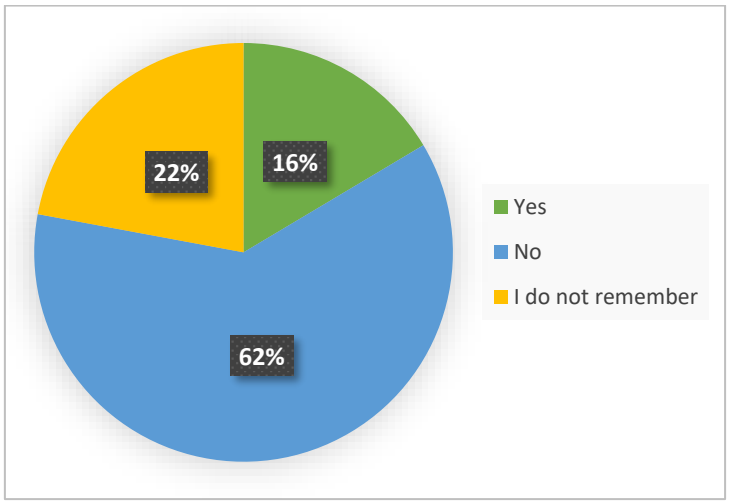

Figure 17 Responses on Whether Default Rules Doctrine was Taught

The sixteenth question went into details of when the doctrine was taught, whether at the undergraduate or postgraduate level? On this question, the percentage of the responses is tabulated below:

Table 24 Level at which Default Rules Doctrine was Taught

Level at which Default Rules Doctrine was Taught	Percentage of Respondents
Undergraduate level	18%
Postgraduate level	3%
Not taught	79%

Note that this was a multi-option and not a multiple-choice question and therefore it is possible that some respondents were taught at the undergraduate as well as at the postgraduate level. The percentage of such respondents, who were taught at both levels, were less than 1%. But the responses did not correctly answer the meaning of default rules.

7.5.2. Subjects in which DRD was Taught

Question No. XVII sought to explore if the Default Rules Doctrine was taught as a part of a particular subject and the responses were to give short answers to it. However, the responses to the question have been employed for this particular study for the following reasons:

- The question was marked as mandatory instead of optional. Therefore, many respondents mistakenly chose the options instead of selecting the option "other" as one of the respondents had commented.
- Most of the respondents have chosen the option "other" and have stated in response to Question No. XVIII that it has not been taught.

7.6. Analysis and Inferences on Awareness of Default Rules Doctrine

7.6.1 Analysis and Inferences on Awareness of Meaning of Default Rules

Section 2 of the questionnaire, Questions X to XIV related to the awareness of the respondents on the Default Rules Doctrine. Question XII was on the meaning of default rules.

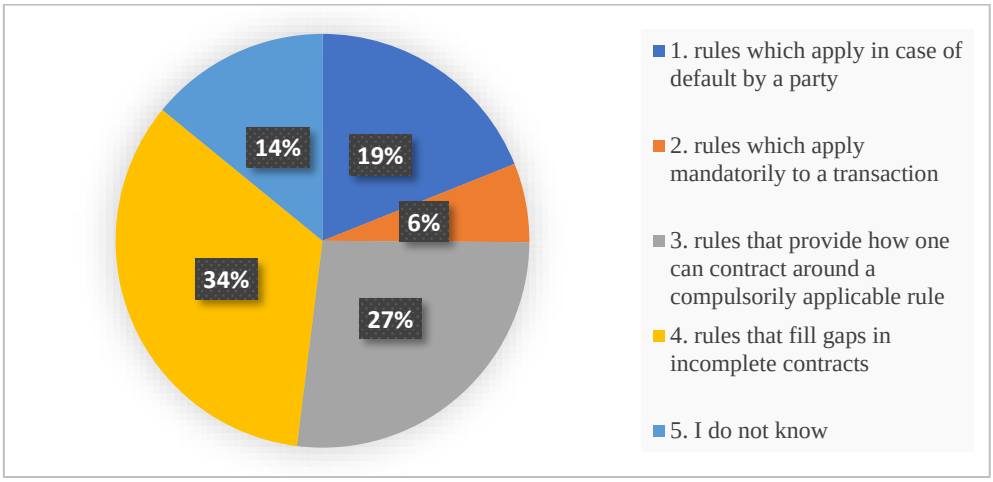

Figure 18 Meaning of Default Rules

It was noticed in the previous section that while about 77% of the respondents stated that they knew about the meaning of default rules, only about 34% got the question on the meaning of default rules correct. So, 66% of the respondents were either, admittedly, not aware of the meaning of default rules, or got the answer to the question on the meaning of default rules wrong, which, again, showed a lack of awareness about the basics of Default Rules Doctrine.

Table 25 Claimed v. Actual Knowledge of Meaning of Default Rules

Percentage Claiming Knowledge of Meaning of Default Rules (Q. XI)	Percentage of Respondents Choosing Correct Meaning of Default Rules (Q. XII)

77%	34%

Contrary to the claim of the respondents regarding the knowledge of the meaning of default rules at 77%, only 34% of the respondents were able to answer the meaning of default rules correctly, clearly pointing out the lack of awareness among the respondents as to the meaning of default rules as therefore the DRD.

7.6.2 Analysis and Inferences on Awareness of Meaning of Mandatory Rules

Question XIII was on the meaning of mandatory rules. The percentage of the responses are provided below.

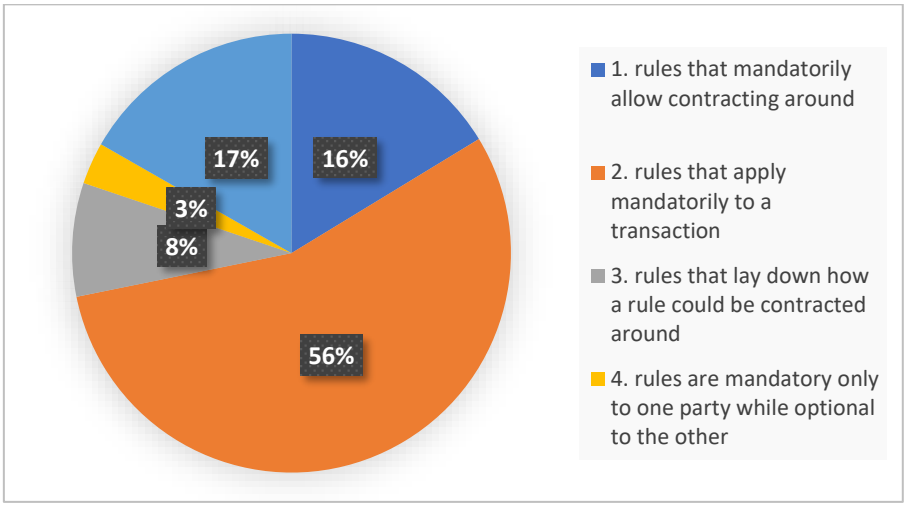

Figure 19 Meaning of Mandatory Rules

It may be recollected that as regards Question No. X, about 77% of the respondents stated that they were aware of the meaning of default, mandatory and altering rules. Responses in question XI were sought, among other things, on the meaning of mandatory rules, to which about 71% of the respondents stated that they were aware of the meaning of mandatory rules. However, only about 56% of the respondents answered the question regarding the meaning of mandatory rules correctly. This is surprising because the concept of mandatory rules is a basic and widely known concept in contract

law. The comparison between the claim of the respondents and actual knowledge of the respondents on the meaning of mandatory rules is given below:

Table 26 Claimed v. Actual Knowledge of Meaning of Mandatory Rules

Percentage Claiming Knowledge of Meaning of Mandatory Rules (Q. XI)	Percentage Choosing Correct Meaning of Mandatory Rules (Q. XIII)
71%	56%

The higher percentage of respondents who knew about mandatory rules vis-à-vis default or altering rules is not something of a surprise, owing to the literal meaning to the term "mandatory"- something that applies compulsorily. Despite the seemingly obvious explanation to the meaning of the term "mandatory rules", nearly about half of the responses were wrong, which is substantial, again pointing towards the lack of awareness of the most basic notions of the Default Rules Doctrine.

7.6.3 Analysis and Inferences on Awareness of Meaning of Altering Rules

Question XIV was on the meaning of altering rules. The percentage of the responses are provided below.

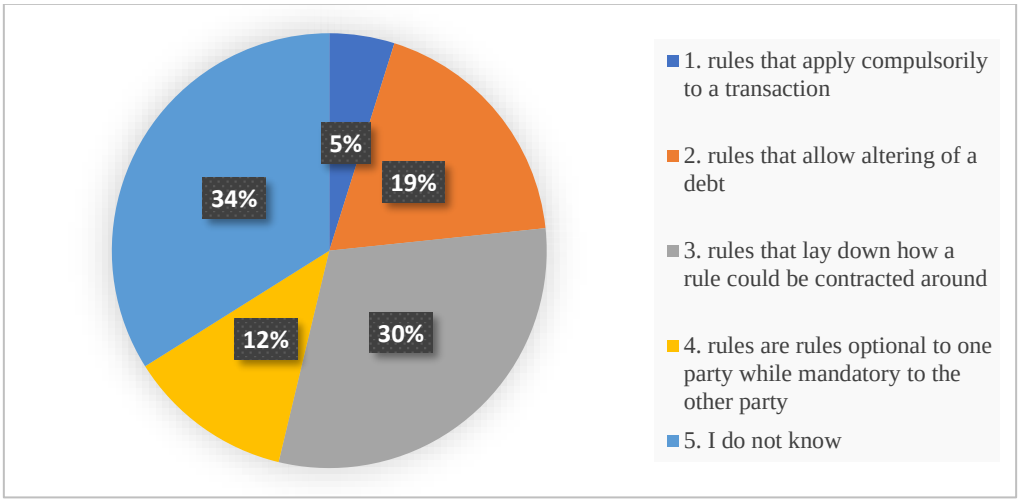

Figure 20 Meaning of Altering Rules

It may be recollected that as regards Question No. X, about 77% of the respondents stated that they were aware of the meaning of default, mandatory and altering rules. Responses in question XI were sought on the meaning of altering rules, to which about 56% of the respondents claimed that they were aware of the meaning of altering rules. However, only about 30% of the respondents answered the question (No. XIV) regarding the meaning of altering rules correctly. The comparison between the claim of the respondents and actual knowledge of the meaning of altering rules is given below:

Table 27 Claimed v. Actual Knowledge of Meaning of Altering Rules

Percentage Claiming Knowledge of Meaning of Altering Rules (Q. XI)	Percentage of Respondents Choosing Correct Meaning of Altering Rules (Q. XIV)
56%	30%

Thus, less than one-third of the respondents got the reply to the meaning of altering rules correctly, as against their claim that more than half of the respondents knew about the concept.

7.6.4. Inferences on the Meaning of Default, Mandatory and Altering Rules

A comparison of the claimed knowledge (Question XI) and the tested knowledge (Question XII to XIV) of the DRD are given below:

Table 28 Claimed v. Actual Knowledge of Meaning of Triumvirate of Rules

Type of Rules	Percentage of Knowledge Claimed	Percentage of Correct Responses	Difference
Meaning of Default Rules	77%	34%	43%

Meaning of Mandatory Rules	71%	56%	15%
Meaning of Altering Rules	56%	30%	25%

To summarise, majority of the respondents were not aware even of the basics of the DRD, except to an extent, about the meaning of mandatory rules.

Knowledge of altering rules constitute the least percentage of knowledge claimed (56%) as well as in the correct responses (30%). This is because of the recent vintage of the systematic exposition of altering rules in the last decade or so (Ayres, 2012). This is indicative of even courts not explicitly recognising altering rules. To illustrate, in Heaton-Sides v. Snipes[767], a a decision rendered in 2014, the Court of Appeals of North Carolina, US, recognised only two types of rules of contract law: "*In contract law there are generally two types of rules: default rules and immutable rules*."

Given the slight differences in the number of categories of sub-professions (law students, law teachers, in house counsels, etc.), it is possible that a higher percentage of one or some of the sub-professions might skew the data. Hence, the data was equalised in terms of the sub-professions and the level of awareness was gauged. The equalisation was done in the following manner: the sub-profession with the lowest responses was chosen and the response number was applied to the other sub-professions eliminating the later responses which were beyond the chosen response number. After so eliminating, the percentage of knowledge claimed for the meanings of each of the types of rules was pegged against the percentage of correct responses. The data, after equalisation, is provided below:

[767] 755 S.E.2d 648 (N.C. Ct. App. March 18, 2014)

Table 29 Claimed v. Actual Knowledge of Meaning of Triumvirate of Rules (after Equalisation)

Type of Rules (Corrected)	Percentage of Knowledge Claimed	Percentage of Correct Responses	Difference
Meaning of Default Rules	77%	35%	42%
Meaning of Mandatory Rules	72%	54%	18%
Meaning of Altering Rules	55%	32%	23%

It is observed that there is no substantial difference between the data before and after equalisation, as is apparent from the below table, which compares the difference in the percentage of knowledge claimed and percent of correct responses before and after equalisation:

Table 30 Difference between % Claimed and Correct Responses of Meaning of Triumvirate of Rules before v. after Equalisation

Type of Rules	Difference between percent of claimed and correct responses before equalisation	Difference between percent of claimed and correct responses after equalisation
Meaning of Default Rules	43%	42%
Meaning of Mandatory Rules	15%	18%
Meaning of Altering Rules	25%	23%

7.6.5. Inferences on Awareness of Types of Default Rules, Mandatory and Altering Rules

Although about 77% of the respondents claimed that they knew about the meaning of default rules, only 30% of the respondents claimed they were aware about the types of default rules. Only 34% of the respondents answered the question on the meaning of default rules correctly. If the respondents who answered the meaning of default rules correctly alone are taken into consideration, the respondents whose claim regarding

awareness of types of the default rules that could be right reduces from 28% to only about 11%.

Similar reduction in percentage is applicable to types of mandatory and altering rules because the claimed knowledge of altering and mandatory rules was substantially lesser than the tested knowledge.

7.7. Learning about the Default Rules Doctrine

As described earlier, about 72% of the institutions of the respondents did not teach the Default Rules Doctrine. Out of the 34 institutions from which respondents claim to have been taught the Default Rules Doctrine, only 10 institutions figure out in the correct responses to at least the default rules. This could possibly imply that the Default Rules Doctrine was taught in at these 10 institutions. Even assuming that these 10 institutions are duplicate entries which figure out in the list of 102 institutions where Default Rules Doctrine was not taught, the institutions where the Doctrine is not taught works out to 92 (out of 142 institutions), which represents about 65% of the institutions from which respondents responded.

As regards individual respondents, Question No. XV sought information on whether the DRD was taught in law school. Majority respondents (about 62%) stated that it was not taught in law school. Some of the respondents had stated that they did not remember while a minority (about 16%) of the respondents stated that the DRD was taught. This information is tabulated as under:

Table 31 Whether Default Rules Doctrine was Taught in Law School?

Whether DRD was taught in Law School?	Percentage (%)
Yes	16%
No	62%
I do not remember	22%

Total	**100.0%**

Pictorially, this is represented as below:

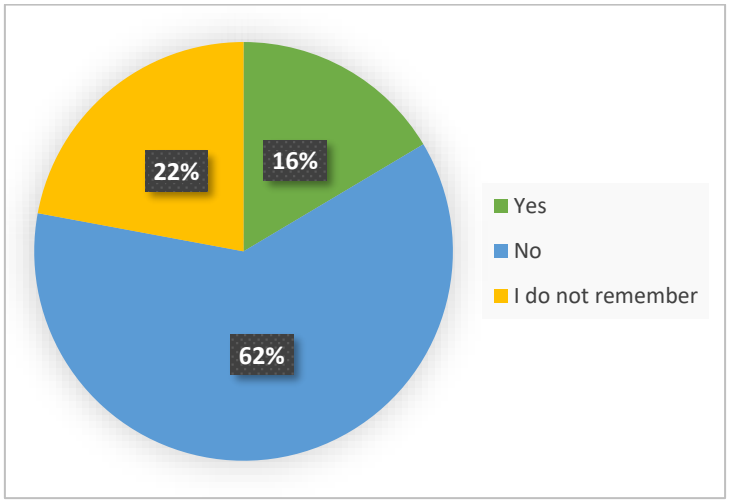

Figure 21 Whether Default Rules Doctrine was Taught in Law School?

Thus, only about 16% of the respondents were taught the DRD as opposed to a majority of them who were not taught (about 62%).

Question No. XVII queried as to the subject under which the Default Rules Doctrine was taught in the classroom. This question was designed as an open ended short answer. About 23% of the respondents chose contract law while about 3% chose legal method. 7% of the respondents chose jurisprudence while about 36% chose "other". One of the responses was "Elective Course on Commercial Remedies".

7.8. Teaching Default Rules Doctrine

The fourth section of the questionnaire was meant for law teachers who had taught contract law. The participants were asked to skip Section 4 if they were not law teachers who had taught contract law. Questions XIX to XXIV were meant for such law teachers. The core issue is whether Default Rules Doctrine is taught while teaching law.

This formed the subject of the XXI question. Questions XIX and X were preludes to the XXI question. Question XIX queried the type of law school where the respondent teaches. The following were the results of the study:

Table 32 Type of Law School where Respondent Taught

S. No.	Type of Law College	Percentage
1	National law university	10%
2	Central University	8%
3	State University (other than NLU) or its affiliated college	13%
4	Private University	27%
5	Other	42%
	Total	100.0%

Question No. XX related to the level at which the teacher taught. 45% of the respondents-teachers taught at the undergraduate level while 21% of the respondents taught at the postgraduate level. The remaining percentage taught in programmes other than undergraduate/ postgraduate programmes in law.

Question No. XXI, as stated before is the core question: "*Whether do you include the Default Rules Doctrine while teaching law?*" Only about 34% of the respondents stated that they included the DRD while teaching law, while an equal percentage (32%) of the respondents stated they did not and the remaining (34%) stated that they could not say. This is tabulated below:

Table 33 Whether Default Rules Doctrine was Taught by Respondent

S. No.	Whether DRD is Included While Teaching?	Percentage
1	Yes	34%
2	No	32%

3	Cannot say	34%

This is pictorially represented as under:

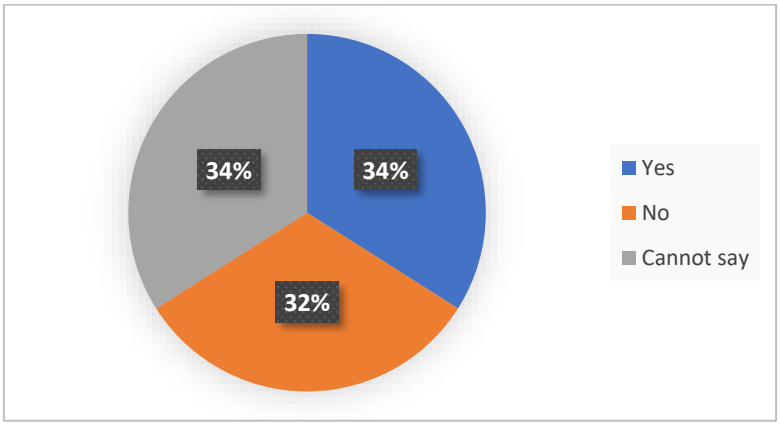

Figure 22 Whether Default Rules Doctrine was taught by Respondent

To explicate this statistic further, the next query post was whether the DRD was taught as a stand-alone topic or was integrated into teaching various aspects/ rules of law, or both. The following table depicts the percentage:

Table 34 Teaching Methodology of Default Rules Doctrine

S. No.	Teaching Methodology of DRD	Percentage
1	Taught as a stand-alone topic	13%
2	integrated into teaching various aspects/ rules of law	45%
3	Both	42%

This is pictorially represented as under:

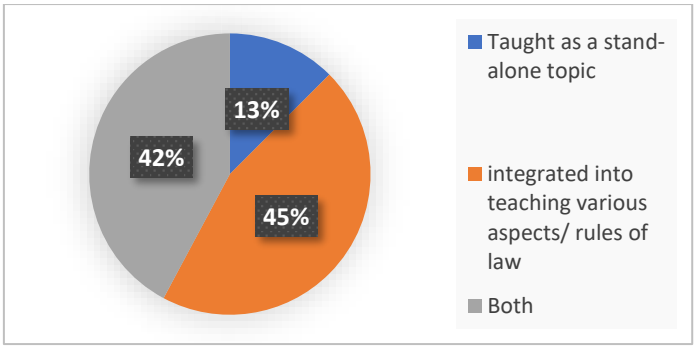

Figure 23 Teaching Methodology of Default Rules Doctrine

Question No. XXIII tried to gather the subject under which the DRD was taught: the question required a short answer as the response. Most responses were that the question was not applicable, some of the responses were meaningful to the question: the respondents stated that the DRD was taught in areas such as contract law, insurance law, legal language, corporate law, interpretation of statutes, etc.

7.9 Analysis and Inferences on Usefulness of the DRD

The final section related to the usefulness of the DRD in various facets of law. Question No. XXIV posed: "*Do you think the use of the Default Rules Doctrine in a systematic manner will make the Indian legal system better off?*" The respondents replied mostly in the affirmative. About 69% of the respondents responded affirmatively while only 3% replied in the negative. Interestingly, 28% of the respondents chose the neutral option, "Cannot say." The result for this question is tabulated below:

Table 35 Usefulness of Default Rules Doctrine

S. No.	Usefulness of DRD	Percentage
1	Yes	69%
2	No	3%
3	Cannot say	28%
	Total	**100%**

This statistic is depicted as under:

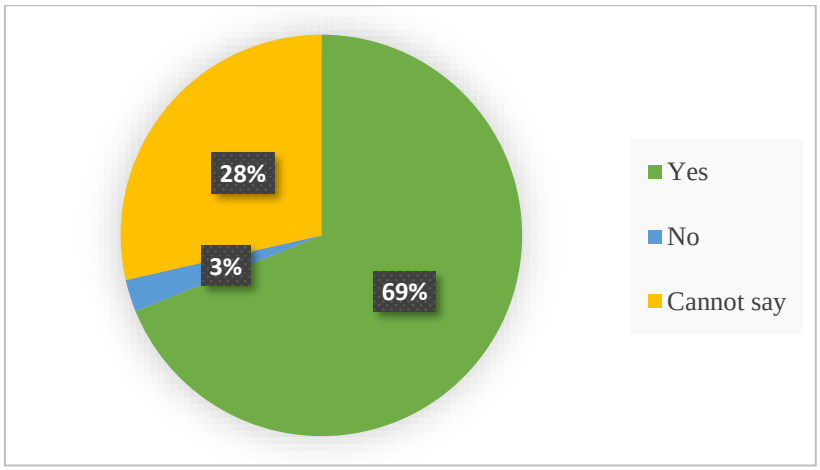

Figure 24 Usefulness of Default Rules Doctrine

Now, as regards how the Default Rules Doctrine would be useful, a multiple option query was posed as Question No. XXV: "*If answer is Yes, in which facet of law will the Default Rules Doctrine help?*" This led to interesting results and are summarised below through a chart:

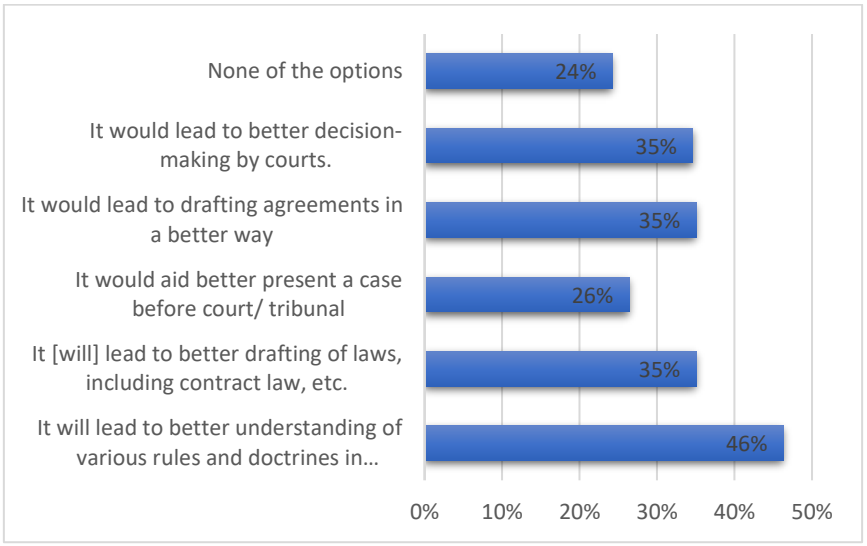

Figure 25 Utility of Default Rules Doctrine in Various Facets of Law

The aforesaid results are tabulated below:

Table 36 Utility of Default Rules Doctrine in Various Facets of Law

S. No.	Utility of DRD	Percentage
1	It will lead to better understanding of various rules and doctrines in contract law	46%
2	It [will] lead to better drafting of laws, including contract law, etc.	35%
3	It would aid better present a case before court/ tribunal	26%
4	It would lead to drafting agreements in a better way	35%
5	It would lead to better decision-making by courts.	35%
6	None of the above options	24%

Filtering out those respondents who answered the question regarding the meaning of default rules (Question XII) wrongly, the table reads as under:

Table 37 Usefulness of Default Rules Doctrine in Various Facets of Law (excluding wrong responses to meaning of Default Rules)

S. No.	Utility of DRD (excluding wrong responses to meaning of default rules)	Percentage
1	It will lead to better understanding of various rules and doctrines in contract law	56%
2	It [will] lead to better drafting of laws, including contract law, etc.	44%
3	It would aid better present a case before court/ tribunal	32%
4	It would lead to drafting agreements in a better way	49%
5	It would lead to better decision-making by courts.	42%
6	None of the options	21%

In case the wrong answers to questions on the meaning of default and mandatory rules are filtered out, the table reads as under:

Table 38 Usefulness of Default Rules Doctrine in Various Facets of Law (excluding wrong responses to meaning of Default and Mandatory Rules)

S. No.	Utility of DRD (excluding wrong responses to meaning of default rules and mandatory rules)	Percentage
1	It will lead to better understanding of various rules and doctrines in contract law	58%
2	It [will] lead to better drafting of laws, including contract law, etc.	49%
3	It would aid better present a case before court/ tribunal	33%
4	It would lead to drafting agreements in a better way	51%
5	It would lead to better decision-making by courts.	47%
6	None of the options	20%

In case the wrong answers to questions on the meaning of default, mandatory and altering rules are filtered out, the table reads as under:

Table 39 Usefulness of Default Rules Doctrine in Various Facets of Law (excluding wrong responses to meaning of Default, Mandatory and Altering Rules)

S. No.	Utility of DRD (excluding wrong responses to meaning of default rules, mandatory and altering rules)	Percentage
1	It will lead to better understanding of various rules and doctrines in contract law	63%
2	It [will] lead to better drafting of laws, including contract law, etc.	54%
3	It would aid better present a case before court/ tribunal	37%
4	It would lead to drafting agreements in a better way	60%
5	It would lead to better decision-making by courts.	54%
6	None of the options	14%

As can be observed, there is a relationship between increasing level of awareness about the DRD and better appreciation about the utility of the Default Rules Doctrine. This would be apparent in the below table that merges the data from the previous three tables provided above:

Table 40 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine

S. No.	Utility of DRD	% (excl. wrong responses to DR	% (excl. wrong responses to DR and MR	% (excl. wrong responses to DR, MR and AR
1	It will lead to better understanding of various rules and doctrines in contract law	56%	58%	63%
2	It [will] lead to better drafting of laws, including contract law, etc.	44%	49%	54%
3	It would aid better present a case before court/ tribunal	32%	33%	37%
4	It would lead to drafting agreements in a better way	49%	51%	60%
5	It would lead to better decision-making by courts.	42%	47%	54%
6	None of the options	21%	20%	14%

As is apparent the percentage of respondents increases as the wrong responses to default rules, mandatory rules and altering rules are eliminated. To illustrate, as regards the option that DRD will lead to better understanding of various rules and doctrine in contract law, if wrong responses to the meaning of default rules are eliminated, the percentage of respondents who had stated that DRD will lead to better understanding of contract law was 56%. If the wrong responses to the meaning of default rules and that of mandatory rules are filtered out, there is a better understanding of the DRD because of the increase in percentage of respondents regarding the DRD as useful for

that purpose. This is intuitive: if responses to the meaning of each basic concept of the DRD implies a better understanding. For instance, if a respondent knows the meaning of mandatory rules but not of default rules, this implies only a miniscule understanding of the basics of DRD.

On the other hand, if the respondent knows the meaning of mandatory rules as well as default rules, this implies a better understanding. However, if the respondent knows the meaning of the three concepts- default, mandatory and altering rules correctly, that implies a better understanding of the DRD. This idea is used to correlate with the percentage of respondents who responded to the question on the utility of the DRD on various facets of law.

At the same time, there is a decrease in the number of respondents who did not choose any of the options, signifying, again, the increasing appreciation utility of the Default Rules Doctrine. This is aptly captured by the below graphic, where there is an increase in all the lines except the last one, which decreases

The relationship can be clearly depicted in terms of the below figure:

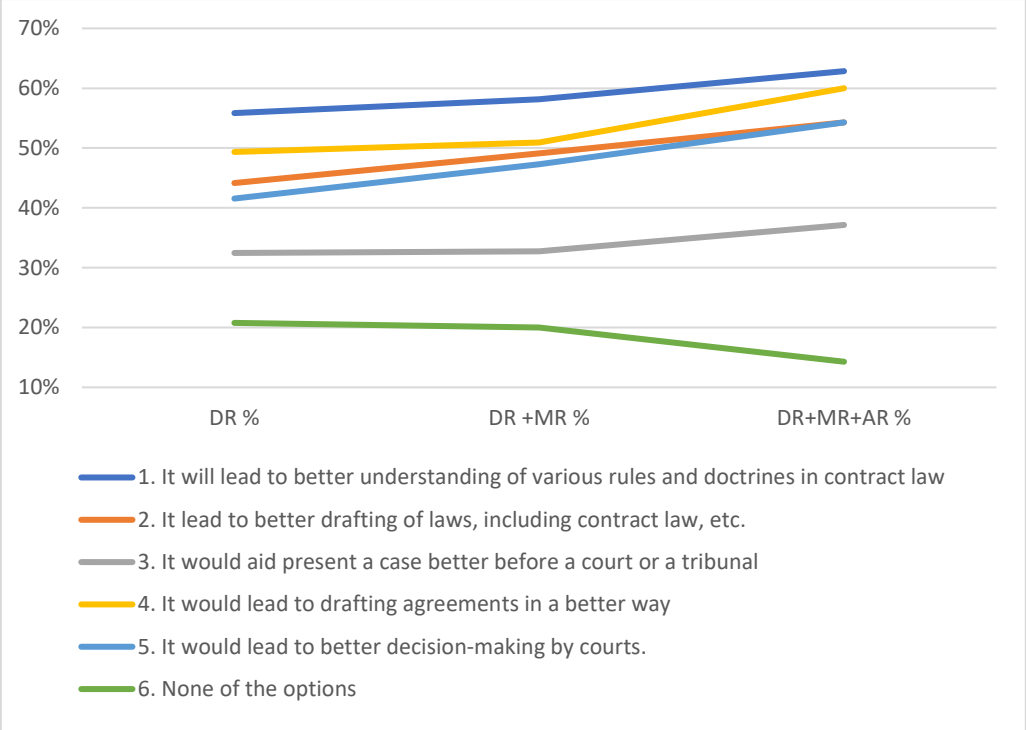

Figure 26 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine

The Y Axis of the above chart represents percentage and the X axis has three points: the first point from the left pertains to data which exclude wrong responses to the meaning of default rules (DR). The second point relates to data which exclude wrong responses to the meaning of default (DR) and mandatory rules (MR) and the third point relates to data which exclude wrong responses to the meaning of default (DR), mandatory (MR) and altering rules (AR).

As is apparent from the figure, there is an increasing percentage as the erroneous responses to the meaning of default, mandatory and altering rules are excluded step-by-step, the first step excluding erroneous responses to the meaning of default rules, the next step as regard mandatory rules and the third step as regards altering rules.

One could question the conclusion on relationship if the step-by-step process is interchanged or reversed. Hence, the step of elimination (default rules > mandatory rules (and default rules) > altering rules (and default and mandatory rules)) can be

altered/ reversed and seen if the relationship would still ensue. For instance, what would happen if the step of elimination is altered as mandatory rules > default rules (and mandatory rules) > altering rules (and mandatory and default rules)? The results in terms of positive relationship are the same: increased understanding of the DRD leads to increasing appreciation of its utility. This relationship for various permutations and combinations of the types of rules is captured in **Appendix 4** and the result is the same: a positive relationship between increasing knowledge of the DRD and a greater appreciation of its utility in law.

7.10. Findings and Conclusion of the Empirical Study

The first objective of the empirical study was: to explore if there is awareness among lawyers and law students about the basics of the default rules theory.

Levels of awareness of the theory may vary. Some might not even have heard of the theory while some may be informed about the theory, some may be conversant with the basics while some may have advanced knowledge of the theory. This exercise is perhaps the first empirical research on the DRD in India. Following are the major findings:

- About 76% of the institutions of the respondents did not teach the Default Rules Doctrine. Out of the 34 institutions from which respondents claim to have been taught the Default Rules Doctrine, only three institutions figure out in the correct responses to all the three concepts.
- Out of the 38 institutions from which respondents claim to have been taught the Default Rules Doctrine, respondents from only 10 institutions figure out in the correct responses to the meaning of default rules. This could possibly imply that the Default Rules Doctrine was taught in at these 10 institutions.
- When queried about the respondents' awareness of the meaning of default, mandatory and altering rules, about 78% of the respondents answered that they

had knowledge of the Default Rules Doctrine and only about 22% of the respondents acknowledged that they did not know about the said rules.[768]

- The respondents were then asked if they were aware of the meaning of default rules. About 77% of the respondents stated they knew about the meaning of default rules.[769] However, only about 34% of the respondents gave the correct response to the meaning of default rules, when queried in Question No. XII. Thus, the persons who knew about the meaning of default rules was substantially clearly indicating the lack of awareness of the DRD. Similarly there is a wide difference with the percentage of respondents who claimed they knew about mandatory and altering rules, and the percentage of their knowledge of the meaning mandatory and altering rules. A comparison of the claimed knowledge (Question XI) and the tested knowledge (Question XII to XIV) of the DRD are given below:

Table 41 Claimed v. Actual Knowledge of Meaning of Triumvirate of Rules

Type of Rules	**Knowledge Claimed (%)**	**Correct Responses (%)**
Meaning of Default Rules	77%	34%
Meaning of Mandatory Rules	71%	56%
Meaning of Altering Rules	56%	30%

To summarise, majority of the respondents were not aware even of the basics of the DRD, except to an extent, about the meaning of mandatory rules.

About 62% of the respondents stated that DRD was not taught in undergraduate or postgraduate course in law. About 16% were of the view that it was taught to them and about 22% stated that they did not remember if the doctrine was taught to them. This data is pictorially represented as under:

[768] Response to Question No. XI.
[769] Response to Question No. XII.

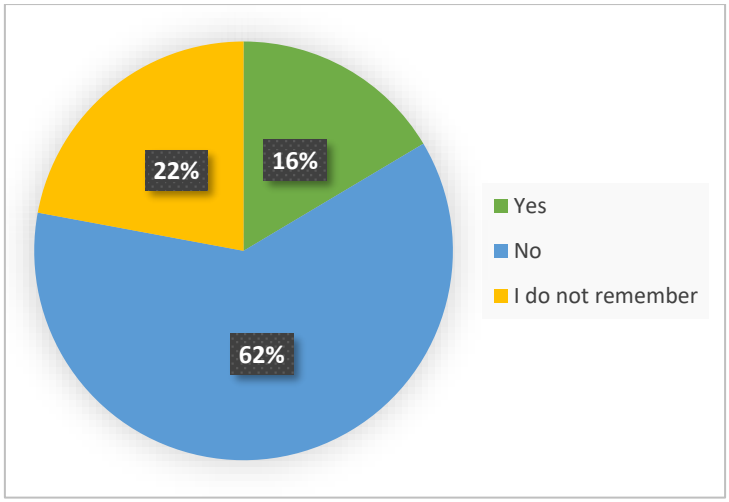

Figure 27 Responses on Whether Default Rules Doctrine was Taught

To conclude, there is not even a basic level of awareness of the respondents about the concept of default and altering rules and a little more than half of the respondents were aware of the meaning of mandatory rules.

Another objective of the empirical survey was: to obtain the views of lawyers and law students in India about the usefulness of default rules theory in understanding laws, making laws, drafting of agreements, advocacy and adjudication.

About 69% of the respondents were of the view that use of the DRD in a systematic manner in India would make the Indian legal system better off, as the below graphic shows:

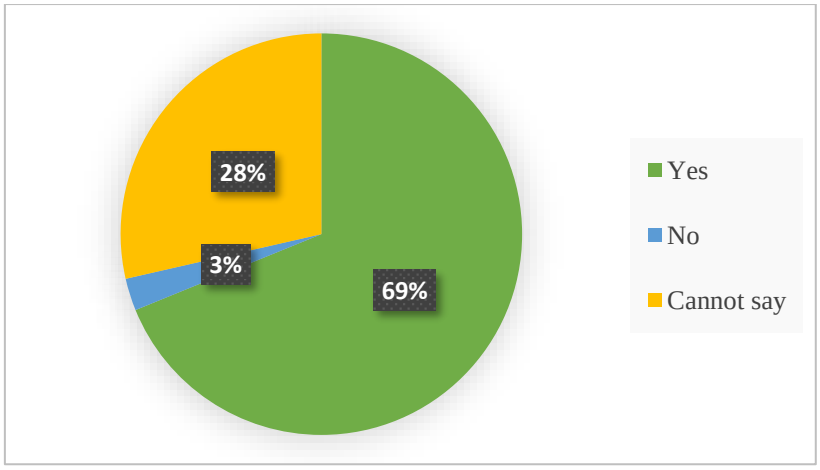

Figure 28 Usefulness of Default Rules Doctrine

While about 28% of the respondents chose the neutral option "cannot say", only about 3% of the respondents were of the view that a systematic approach in India of the DRD would not make the Indian legal system better off.

The study then went into the details of the utility of DRD for different facets of the legal system. The results are noted below:

Table 42 Utility of Default Rules Doctrine in Various Facets of Law

S. No.	Utility of DRD	Percentage
1	It will lead to better understanding of various rules and doctrines in contract law	46%
2	It [will] lead to better drafting of laws, including contract law, etc.	35%
3	It would aid better present a case before court/ tribunal	26%
4	It would lead to drafting agreements in a better way	35%
5	It would lead to better decision-making by courts.	35%
6	None of the options	24%

These results were further analysed after eliminating wrong responses to the meaning of default rules, then eliminating wrong responses default and mandatory rules and lastly after eliminating wrong responses to the meaning of default, mandatory and altering rules. The results are provided below:

Table 43 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine

S. No.	Utility of DRD	% (excl. wrong responses to DR	% (excl. wrong responses to DR and MR	% (excl. wrong responses to DR, MR and AR
1	It will lead to better understanding of various rules and doctrines in contract law	56%	58%	63%
2	It [will] lead to better drafting of laws, including contract law, etc.	44%	49%	54%
3	It would aid better present a case before court/ tribunal	32%	33%	37%
4	It would lead to drafting agreements in a better way	49%	51%	60%
5	It would lead to better decision-making by courts.	42%	47%	54%
6	None of the options	21%	20%	14%

This data shows that there is an increasing appreciation of the utility of DRD as there is an increased understanding of various facets of the DRD. At the same time, there is a decrease in the number of respondents who did not choose any of the options, signifying, again, the increasing appreciation utility of the Default Rules Doctrine. This is aptly captured by the below graphic, where there is an increase in all the lines except the last one, which decreases:

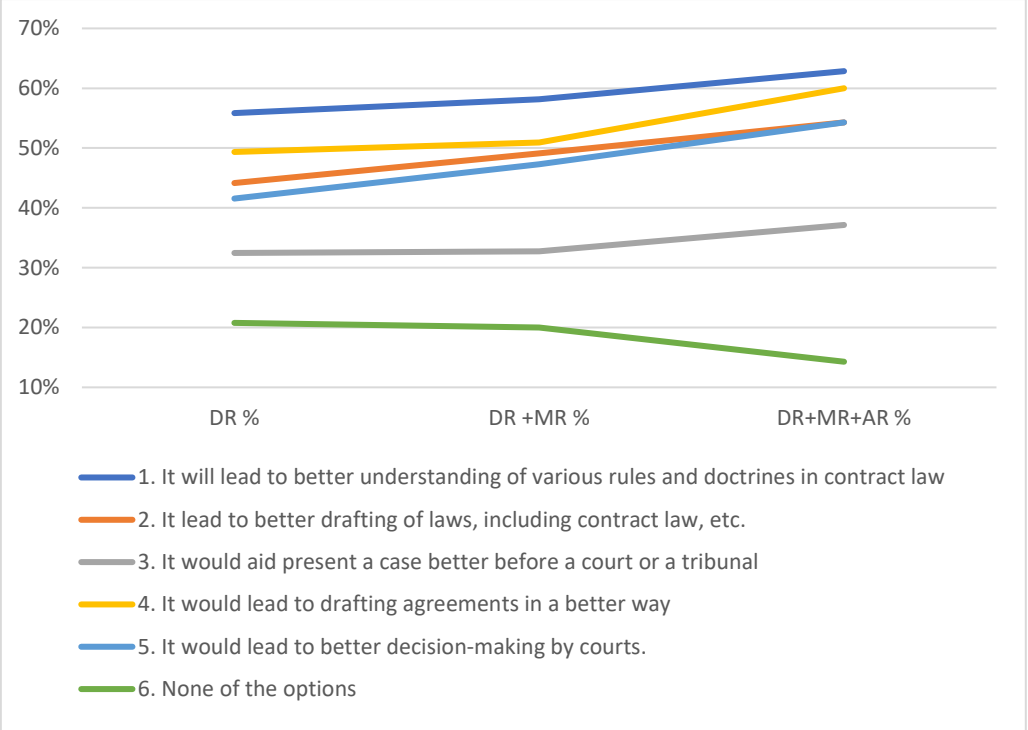

Figure 29 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine

These findings are valid even if the elimination of wrong responses begins from eliminating mandatory rules or altering rules, as noted in **Appendix 4**.

CHAPTER 8: CONCLUSION AND SUGGESTIONS

8.1 Conclusion

The Default Rules Doctrine encompasses several conceptions and ideas about contract law, including about the role of legislature and the judiciary in designing, construing and revising rules of contract law, the role of counsels, transactional lawyers, law academicians and law students in the legal system. It has two facets to it: the descriptive part explains the rationale for various rules of contract law. The normative side explicates how contract law rules should be designed and construed.

Default, mandatory and altering rules are of many types which are deployed depending on the need, especially to address information asymmetry, although they are predominantly drafted from a majoritarian perspective, that is what majority of the parties would choose. Mandatory rules are justified based on whether they protect against internalities (adverse effect on a party to the contract) or externalities (adverse effect on third parties).

The Default Rules Doctrine is well-entrenched in jurisdictions like USA, UK and European Union. It has been cited by courts in USA, UK, European Union as well as by arbitral tribunals. Even judicial bodies such as the International Court of Justice, Panels of World Trade Organisation, etc. have extensively used the concept of default rules in their jurisprudence in inter-state disputes and investor-State disputes.

As regards the Default Rules Doctrine in India, the Contract Act is the main contract law statute. There are other contract related statutes which are several decades old (Sale of Goods Act, Partnership Act, etc.). Most of these legislations were enacted during the pre-independence period. Their relevance to the present circumstances has to be explored. Unlike international instruments such as the CISG or PICC 2016 where there are clear-cut distinction between default and mandatory rules, these statutes do not have such clear-cut distinctions. Even so, in the Contract Act and other contract laws, the

difference between immutable and mutable rules is well-established through case-law in India.

At the same time, as noted above, the Default Rules Doctrine has not been taken up in a systematic or comprehensive manner in India. This is true with regard to legal education, legislative design, law practice or in adjudication. The judicial, legislative and academic legal discourse in India is characterised by absence of any substantial discussion or analysis of the Default Rules Doctrine or its application in analysing or critiquing contract law. There is hardly any academic writing in India on the doctrine. Empirical study in this work has revealed that majority law colleges in India do not teach the doctrine. Also, majority of the lawyers, law academicians and law students are also not aware of it.

Even with the evolution of the distinction between imperative and non-imperative provisions, the decisions have not had a consistency. Some decisions do not recognise implicit default rules while some do, although the former decisions generalise a literal reading of the statute. Some decisions call for restrictive construction even of explicit default rules.

Broadly, there have been three approaches of Indian courts on this issue. The first approach is that only when the Act expressly provides that a provision could be contracted around can it be contracted around. The first approach allows contracting out or around when expressly provided in the Contract Act. Examples of such provisions, which are in force, are, include Sections 163, 165, 170, 171, 174, 202, 219, 221, and 230.

The second approach entails a strict and restricted reading of explicit provisions of the Act allowing contracting around. Even if the Act expressly provides that a provision could be contracted around, such contracting around is limited.

The third approach allows implicit default rules: even if a provision is not expressly drafted as allowing contracting around, parties could do so in specific situations and except when law prohibits/ invalidates it for concerns of public policy.

These three approaches have been typified in several decisions of Indian courts in the last 150 years or so. Interestingly, even as early as in 1883, Mitter, J. discussed the idea that Section 152 prescribed how the default rule could be modified, which is nothing but an altering rule.

The third approach, which adopts the "public policy" test to recognise implicit default rules, where no "public policy" is involved does not adequately explain or justify mandatory rules. This is because mandatory rules seek to protect against internalities (which protects a contracting party) and externalities (which protect an external party).

It is the insight of the Default Rules Doctrine that mandatory rules are enacted to protect against both internalities and externalities that is capable of adequately explaining and justifying mandatory rules. While this insight of the DRD may seem almost intuitive, yet this has not attained critical mass even in contemporary legal discourse in India, be it in judicial decisions, reports or secondary literature. Hence, the Default Rules Doctrine has not been dealt with in a systematic manner in India. A systematic approach in this context is one where the organs of the Government, lawyers, teachers and law students are attuned to a default rule centric approach and include it in their process of operation. This entails, among other things, the following:

- Various subjects of contract law are to be taught in law schools integrating the Default Rules Doctrine in the methodology.
- Transactional lawyers and in-house counsels are conscious about the Default Rules Doctrine, including about the relevant rules of contract law could be contracted around, those that cannot be contracted around, and the manner of valid contracting around of default rules, while drafting agreements;

- Advocates present their cases by construing contract law provisions keeping in mind various aspects of the Default Rules Doctrine,
- Legislators design various contract law rules keeping a sense of the Default Rules Doctrine, and consciously drafting it in a way keeping in mind various ideas of the doctrine, and
- Adjudicators, including judges and arbitrators, construing contract law provisions, with the clear understanding of the rule, its objective and on whether the rule is a default, mandatory or altering rule, and using other insights of the DRD.

The preliminary task of a systematic analysis is the classification of the rules of contract law into default, mandatory and altering rules. A classification of the rules of general contract law reveals new insights. To illustrate, the provision on territorial extent, the Contract Act, which is considered as a mandatory rule, is not a mandatory rule in all contexts: in respect of international contracts even when arbitration is seated within India, parties could agree to apply a foreign substantive contract law, as per Section 28(1)(b)(ii), Arbitration Act.

Another illustration is the potential of certain rules to not fit in any of the three categories of rules, viz., default, mandatory and altering rules have been noted in this Chapter and have been regarded as formal or declaratory rules. These included definitions contained in Sections 2, 9, 13, 14, 15, 16, 17, 18, 31, 124, 126, 127, 129, 148, 173, 182, 186, 197, and 207, Contract Act, and Sections 1 to 3, Specific Relief Act.

Another important insight is that determination of whether a rule is mandatory, or default may not be straightforward in all situations. Mere reading of a particular rule, as Dasgupta (2010) contended, might not lead to the solution to the answer as to whether a particular rule is a default or a mandatory rule. An example is the mandatory requirement of notice of intended sale under Section 176, Contract Act.

Section 55, Para 1, is a sticky default rule, as was noted in the earlier part of Chapter 6. Para 2 to Section 73 is a penalty default rule. The Specific Relief Act consists mostly of mandatory rules while there are some provisions that could be default rules, especially in arbitrations. There are some provisions in the Specific Relief Act, especially rules of pleadings, which could be considered as default rules.

There were no terminological parallels to the default-mandatory dichotomy in the early 1980s in the West (Ayres, 2012, 2035). Apart from having a mutable-immutable dichotomy referenced peripherally, Indian contract law does not have a systematic analysis of the said dichotomy. The lack of legal discourse makes the Indian legal industry grapple with various issues in contract law and inhibits a comprehensive understanding of contract law. This can be explained using four different situations and how courts have dealt with those situations.

The first situation relates to the construction of time as essence clauses in construction contracts in India. Although Section 55 is a default rule, courts have, in effect, made it a sticky default rule, on account of construing time-as-essence clauses in an artificial manner. Excessive use of templates where such clauses, which have been rendered ineffective through sticky default rules, are also repeated by contracting parties. There should be sound policy reasons for making a rule sticky and in the absence of such reasons, making contracting around sticky would only result in inefficiencies.

Courts are to provide directions for future conduct: this is especially in situations where a contractual term does not produce the intended effect or did not comply with the relevant altering rule so as to displace the default. In this context, courts ought to have provided guidance on how the parties could effectively contract out of the default by agreeing to a term that time is essential, which the courts did not.

The second example relates to the issue of relevance of determination of essentiality of time in the contract which provides for liquidated damages. In *Welspun Specialty*, it was noted that reference to damages in Section 55 does not include liquidated damages,

which is not the correct approach. The damages provision in Section 73 can be viewed as a default rule, which could be contracted around through a liquidated damages provision, through which parties could agree a stipulated amount as damages for loss owing to a contractual breach.

In addition to the criticism that determination of time-as-essence is irrelevant for deciding whether agreed damages is to be paid for breach, the decision in *Welspun Speciality* undermined the choice of the parties in contracting around the court-determined damages default through the liquidated damages clause. The decision illustrated the perils of ignoring the party-chosen liquidated damages clause, which was apparent in the time taken for the dispute regarding liquidated damages to attain finality- two decades later.

Since the legislative intent is to prioritise contract enforcement, the clause in the contract regarding time being of essence could be declared legislatively as a default rule in the context of commercial contracts and parties could contract out the same if they do so intend. This is an aspect concerning the manner in which default rules could be designed.

The third situation relates to disability on unregistered partnerships as regards suing third parties through arbitration. Section 69 of the Partnership Act was enacted with a view to provide certain negative incentives for firms and partners which were not registered with the registrar of firms. Section 69 is a mandatory rule. Among many things mandatory rules serve the function of preventing externalities. In this case, section 69 is intended to protect the third parties against fraudulent conduct. Section 69 is in the nature of quasi-mandatory rule because it does not make registration a mandatory requirement but simply provided for negative incentives on the unregistered partnership. the purpose was to balance the requirements of transparency in the conduct of partnerships as well as the ability of small partnerships to register. Nevertheless, the provision is near the mandatory rules spectrum. This is because parties could not have contracted out section 69. Mandatory rules are always not designed to invalidate non-

compliance but may also create a constricting environment to the parties or at least one of them in order to achieve some objective.

In *Umesh Goel*, the Supreme Court ignored these aspects. Owing to a pro-arbitration approach, the court lost sight of the real nature of section 69 insofar as it applied as regards third parties. The consequence of *Umesh Goel* was to dilute the effect of the mandatory rule and instead convert it into a default rule through the use of an arbitration clause, which is exactly an effect noted by scholars in various academic writings. The aforesaid policy rationale in the substantive provision protected against internalities/ externalities and should have ideally triumphed over the pro- arbitration approach.

The corpus of the Default Rules Doctrine requires that policy makers keep reassessing mandatory rules and the policy rationale underlying those mandatory rules. Consistent with this approach, it is time for reassessing the efficacy of section 69 considering the liberal approach of enforcing arbitration clauses in the context of unregistered partnership and clarifying that section 69 would also apply to arbitrations and not merely to suits.

Another application of the Default Rules Doctrine relates to the enforceability of standstill agreements vis-à-vis Section 3 of the Limitation Act. A rule might, on first reading, seem to be a mandatory rule, may on a proper analysis, be a default rule. This is the case with Section 3 of the Limitation Act, which, on a bare perusal, seems to be a mandatory rule. A perusal of decisions on the issue reveals that at least in commercial disputes and family settlements, Section 3 does not operate as a mandatory rule: where parties entered into bona fide negotiations, till they reached the breaking point, they could ward off the rigours of Section 3, Limitation Act. A rule, standing alone, may read as a mandatory rule but its real nature can be gauged while reading it in conjunction with another rule which may influence that seemingly mandatory rule. This is the case with Section 3, Limitation Act, read with, Section 25(3), Contract Act. A rule could operate differently- as a mandatory rule or as a default rule- depending on different

transactions. Section 3 could be a mandatory rule in various situations but as a default rule in the context of commercial disputes and family settlements.

The larger point of the analyses of these four situations is that asking the questions about the nature of the rule (default/ mandatory rule) and if, it was a default rule, means for changing the default, throw a lot of light on the nature of the rule, and failure to ask those questions could lead to misunderstanding of the real purport of the rule.

The power of the Default Rules Doctrine lies in understanding the basis and rationale of a rule and how it operates. It provides scope for analysis of the rule in the overall framework of a particular law. Therefore, the legal system in India is worse off, without the Default Rules Doctrine part of its legal discourse.

Legislative design is not the exclusive domain of the legislature. The executive, which is endowed with the power of delegated legislation, is also empowered to make laws. The legislative function not only rests with the elected representatives in a democratic set-up but also in the officials of the Government as well as lawyers engaged by the elected representatives, who play a significant role in drafting legislations. Likewise, judiciary does not mean the judges alone but the adjudication system in its entirety, where the predominant players are judges, arbitrators and counsels. Only if the counsels are able to bring out the best of their side will judges be able to adjudicate properly. This prescriptive aspect is not merely restricted to the legislature and the judiciary but also to legal education. It is important for law schools to integrate the Default Rules Doctrine into their curriculum and find ways to teach contract law through the lens of the Default Rules Doctrine.

As results of the empirical study go to show, majority respondents stated that use of the Default Rules Doctrine in a systematic manner in India would make the Indian legal system better off. Also, there was an increasing appreciation of the utility of the doctrine when there is an increased understanding of various facets of the doctrine.

Thus, it is important for Default Rules Doctrine to become part of the legal discourse in India. The starting step to do so is Indian legal education. There is discordance between what is taught in Indian law schools and the law in practice in general terms and in contract law, in particular. Teaching Default Rules Doctrine and analysing legal rules through the lens of the doctrine could considerably address this gap. This is not just a matter of theory. Key areas where the theory could contribute to the legal industry were also noted, such as:

- Equipping law students with knowledge on when and how to contract around default rules, which is a key skill in transactional lawyering.
- Courts can point out how default rules could be contracted around, especially where they encounter failed attempts at contracting around default rules.
- Legislators can consciously design rules taking into consideration the triumvirate and how different types of the trio can have effects on choices by parties, including the informational effects that penalty default rules produce.
- Legal system would have a nuanced understanding of contract law
- By shifting the focus from merely looking at the *ratio decidendi* in contract law decisions to also perusing the relevant contractual clauses in decided cases, law students will learn key skills relating to drafting contracts and avoiding pathological clauses.

To realise the potential of the Default Rules Doctrine in contract drafting, contracting parties should:

- be aware of the existence of the clause in their agreement or standard forms;
- be aware of the trend of judicial decisions construing the clause in issue in a manner different from their literal understanding;
- take a conscious decision on how to alter the default in the manner prescribed by the altering rule, as laid down by the legislature and construed by the courts, literally or otherwise; and

- negotiate the clause to alter the default rule as construed by the courts and incorporate in their agreement.

Parties (through their legal advisors) should also know how to contract around a default rule. This is not just a matter of being aware of case-law regarding that clause but also consciously becoming aware of the exact altering rule that would be required to validly contract around the default.

Apart from integrating the doctrine while teaching using traditional teaching methods, the doctrine could best contribute to contract law teaching through simulation-based learning. Various contractual clauses could be used in simulations providing scenarios of choices of contracting around default rules, with some based on exact compliance of altering rules and some, in violation of altering rules. Similar exercises could also be used for designing rules and choices of default, mandatory and altering rules.

8.1.1. Answer to Research Questions

To sum up the above analysis, the research questions were dealt with in the following manner:

Table 44 Research Questions and the Structure of the Thesis

S. No.	Research Question	Chapter
1	What are the aims and objectives of the legislature as regards framing default, mandatory and altering rules and what are the various policy debates relating thereto? (Research Objective 1)	Chapter 2
2	What is the potential of the Default Rules Doctrine in relation to adjudication of contractual disputes and law reform? (Research Objective 2)	Chapter 2 Chapter 3

3	How has the Indian legal system dealt with the Default Rules Doctrine? (Research Objective 3)	Chapter 4 Chapter 7
4	What are the default, mandatory and altering rules in the Contract Act and the Specific Relief Act? (Research Objective 3)	Chapter 5
5	What are the adverse consequences of a lack of a systematic approach in India on the Default Rules Doctrine? (Research Objective 4)	Chapter 6

In view of the above discussions, the research questions have been answered in the following manner:

Research Question 1: What are the aims and objectives of the legislature as regards framing default, mandatory and altering rules and what are the various policy debates relating thereto?

Answer: The Default Rules Doctrine suggests that the lawmakers have considerable set of nuanced tools at their disposal to achieve the intended effects while designing default, mandatory and altering rules and in terms of rules or standards or a combination thereof. The simplest of tools is the language of the rule. The way a default rule is drafted provides considerable insight on the legislative intent as to the permitted range of contracting around. Legislators design various contract law rules keeping a sense of the Default Rules Doctrine, and consciously draft rules in a way keeping in mind various ideas of the said doctrine.

The Default Rules Doctrine suggests that lawmakers do not draft mandatory rules on the basis of the amorphous notion of "public policy" but in order to guard against an internality or an externality. Where there is potential that adverse effects could be caused by one party on another party to the contract or when the contract could produce

such adverse effects on third parties, mandatory rules are to be designed by law-makers. Such rules could be justified by legislators in order to preserve the bargain between parties, prevent market failures or on the basis of paternalism and wealth redistribution concerns. These rules are important in that they ensure justice in the legal system.

Default rules and altering rules go hand in hand. These rules are designed to ensure minimisation of transaction cost of parties, addressing information asymmetry, error reduction, and so on. Default rules fulfil not only the gap filling function thereby reducing transaction costs but also play a prominent role in supplying rules that are optimal. Proper design of default rules has enormous welfare implications.

Altering rules are important because they play important role for the parties. They perform the cautioning function in preventing parties from hastily contracting around the default rule. They require formalities as tools for this purpose. They provide clarity to the adjudicators and the legal system on when parties intend to contract around the default. Sometimes, by making contracting around difficult, i.e., sticky, they further policy objectives.

In sum, appropriate design of various rules of contract law promotes efficiency, minimises transaction costs between the parties, prevents internalities and externalities, prevent market failures and ensure justice in the legal system. Thus, these are the aims and objectives of the legislature in designing default, mandatory and altering rules.

These aspects were discussed in Chapter 2 and pertained to the first research objective.[770]

Research Question 2: What is the potential of the Default Rules Doctrine in relation to adjudication of contractual disputes and law reform?

[770] Research Objective 1: "*To analyse the role of the legislature with respect to default, mandatory and altering rules and discussing various policy debates relating to such rules*."

Answer: The Default Rules Doctrine enables better analyse rules of contract law and enables effective critique thereof, thereby enabling law reforms. The trio of mandatory, default, and altering rules is a key component that connects theoretical part of law and practical aspects of law in the context of contracts, or even law, in general. The DRD, at its most basic level, throws light on whether, and if so, how, a rule could be modified- it provides an answer to the question of whether a rule can be altered by parties.

The doctrine has two components: descriptive component, which enables understanding why a particular rule is drafted in a particular way, and normative component, which is prescriptive in nature.

Better understanding and appreciation of the design of a rule of contract law enables adjudicators (which includes courts, arbitral and other tribunals) to decide facts based on correct application of law. The rule in question may be a default, mandatory or an altering rule.

Given the potential of the theory in critiquing existing state of legal affairs, precedential courts could use the theory to correct law based on wrong legislative design, within permissible limits, and even correct erroneous construction of a rule which failed to take into consideration the objectives for which the rule was designed.

Where an adjudicating body fails to appreciative the purpose of designing a rule in a particular manner, the Default Rules Doctrine aids in critiquing the decision of the adjudicating body. Likewise, when the purpose of a rule is better served by designing a rule in the way the Default Rules Doctrine requires, one could question the legislative design of the rule through the lens of the doctrine. Thus, the Default Rules Doctrine helps not only in better understanding rules of contract law but also in effectively criticising the law when not in accordance with the doctrine.

Determining the manner in which, if at all, the law permits contracting parties to alter their affairs in deviation of a specific rule is a crucial component of transactional law.

Better understanding of default, mandatory and altering rules and how they operate in the legal system promotes better understanding, not only to dispute resolution lawyers but also to transactional lawyers. A better drafted transactional document potentially prevents disputes.

Better understanding and law reform do not emanate separately in the legal system. They arise in the context of the level of legal education. A DRD centric approach to teaching and learning contract law enables law students better understand contract law and bridges the gap between legal theory and law practice.

The Default Rules Doctrine has been extensively used in jurisdictions considered as advanced in contract law, including USA, UK and the European Union. The doctrine finds place even in international legal instruments and by international courts/ tribunals.

Thus, the Default Rules Doctrine is immensely important for adjudication of disputes relating to contract law and for undertaking law reform.

These aspects were discussed in Chapters 2 and 3 and pertained to the second research objective.[771]

Research Question 3: How has the Indian legal system dealt with the Default Rules Doctrine?

Answer: In India, the Default Rules Doctrine has not found its space in a systematic fashion. A systematic approach in this context is one where the organs of the Government, lawyers, teachers and law students are attuned to a default rule centric approach and include it in their process of operation. The judicial, legislative and academic legal discourse in India is characterised by absence of any substantial discussion or analysis of the Default Rules Doctrine or its application to analysing or

[771] Research Objective 2: "*To identify the potential of default, mandatory and altering rules in adjudication of disputes relating to contract law and in law reform.*."

critiquing contract law. There are hardly any academic writings in India on the doctrine. Empirical study in this work has revealed that majority of the law colleges in India do not teach the doctrine and majority of respondents (lawyers, law academicians and law students) are also not aware of it.

Even with the evolution of the distinction between imperative and non-imperative provisions, the decisions have not had a consistency. Courts have either leaned in favour of a literal reading of contract law to identify non-imperative provisions or have provided "public policy" as a rationale to identify mandatory provisions. However, public policy is an elastic concept and the proper rationale, it appears, for identifying a mandatory rule is whether the rule is intended to protect against an internality or an externality.

In effect, the Default Rules Doctrine is virtually non-existent in India, although mandatory, default and altering rules exist in the Indian legal system.

These have been dealt with in Chapters 4 and 7 and related to the third research objective.[772]

Research Question 4: What are the default, mandatory and altering rules in the Indian Contract Act, 1872 and the Specific relief Act, 1963?

Answer: The exercise in classification of rules of Contract Act and Specific Relief Act into default, altering and mandatory rules is possible. However, that exercise is not simplistic and straightforward as such and an analysis leads to some interesting conclusions, such as below:

- The potential of certain rules to not fit strictly within any of the three categories of rules, viz., default, mandatory and altering rules were noted and were

[772] Research Objective 3: "*To contextualise default, mandatory and altering rules in terms of Indian law and classify the statutory provisions in the Indian Contract Act, 1872 and the Specific Relief Act, 1963 into default, mandatory and altering rules.*"

regarded as formal or declaratory rules. These included definitions contained in Sections 2, 9, 13, 14, 15, 16, 17, 18, 31, 124, 126, 127, 129, 148, 173, 182, 186, 197, and 207, Contract Act, and Sections 1 to 3, Specific Relief Act.

- The provision on territorial extent, which was regarded as a mandatory rule, was not a mandatory rule, in respect of international contracts as well as in contracts between Indian parties providing for a foreign arbitral seat.
- Certain provisions such as Section 4, Para 1 of Section 5, Section 7(1), Section 11, Section 27, Section 28, Para 1 to Section 30, Section 71 and Section 72, which have been regarded as mandatory, contained default rules in specific situations.
- On the other hand, certain provisions, such as Sections 38, 57, and 58 which have been regarded as default rules are in the nature of mandatory rules.
- Para 1 to Section 55 is a sticky default rule, as was noted in the earlier part of Chapter 5. Para 2 to Section 73 is a penalty default rule.
- There have been calls for converting certain mandatory rules such as those in Section 26 to default rules, at least, partially.
- The Initial Position does not identify altering rules, whereas the present work identifies at least two altering rules in the general part, the Contract Act: Sections 43 and 52. In addition, Sections 171 and 202, Contract Act also contain altering rules.
- The Specific Relief Act consists mostly of mandatory rules while there are some provisions that could be default rules, such as in arbitrations. Some provisions in the Specific Relief Act, especially rules of pleadings, could be considered as default rules.

These conclusions were based on discussions in Chapter 5 and pertained to the third research objective.

Research Question 5: What are the adverse consequences of a lack of legal discourse in India on the Default Rules Doctrine?

Answer: The absence of legal discourse in India on the Default Rules Doctrine entails that the legal system effectively misses out in understanding the real nature of legal rules and the potential of designing such legal rules towards the aim of effective justice and reduce inefficiencies. The adverse consequences were studied through four situations where the legal system did not take cognizance of the Default Rules Doctrine.

Situation 1: Law on Time as Essence in Construction Contracts: Following adverse consequences were noted in the law on time-as-essence in construction contracts, which could have been averted through the use of Default Rules Doctrine:

- By requiring various conditions in an agreement that time would be of contractual essence, Indian courts had converted a default rule into a sticky default rule.
- The stickiness was contributed further by excessive use of contract templates, especially in Government contracts.
- In the absence of sound rationale, whether supplied by courts or legislature, there is no justification in making such clauses difficult to contract around.
- An express stipulation regarding time as essence would be undercut by a contractual term for extending time for performance and liquidated damages clause is against commercial contracting practices since most standard form contracts employ such clauses.
- Where courts disregard this choice of the parties, they are, in effect, defeating the act of contracting parties to contract around the default to specific circumstances, thereby exercising party autonomy.
- Courts are duty bound to provide directions as to future conduct, where a contractual provision did not comply with the altering rule for displacing the default. This is to enable contracting parties other parties in future to use the appropriate clause in their agreement to alter the default where it is intended so.

- The contradiction in approach of Indian courts in glorifying party autonomy in specific contexts such as arbitration while disregarding it in contexts like Section 55, the Contract Act absent policy reasons is mystifying.
- Equally mystifying is the lack of attempt by parties to displace the sticky default by changing the contracting language considering the judgments thereby reinforcing the stickiness of the rule. The absence of efforts by contracting parties to modify their contracting practices despite lapse of more than 43 years after *Hind Construction* (decided in 1979) is mystifying. Even in 2023, promisees have been making the same arguments before courts that time is of essence and courts have been rejecting such arguments.

Situation 2: Enforceability of Liquidated Damages and Law on Time as Essence: Courts have noted that determination of time-as-essence was relevant in a contractual dispute regarding LD clause and where time was not of contractual essence, liquidated damages was not enforceable and courts/ arbitral tribunals were to assess ex post the damages. This undermines the *raison d'etre* of an LD clause and leads to the following adverse consequences:

- It entails a substantial delay (of several years) in assessment of damages and award thereof;
- The assessment of damages runs counter to the reason for agreeing to the LD clause;
- The assessment of damages leads to considerable costs for the parties in litigation, occupies precious court time, and is ultimately a waste on public resources.

Situation 3: Right of Unregistered Partnerships to Enforce Contractual Obligations vis-à-vis Third Parties: Providing for registration coupled disabilities in Section 69 on unregistered partnership firms from suing third parties to enforce contractual obligations operated near the spectrum of mandatory rules. Decisions of the Supreme Court allowing unregistered firms to enforce third party contracts hit at the

efficacy of the constricting environment sought to be created by the aforesaid mandatory rule because it permitted circumventing of the bar through an arbitration clause. This reifies the dangers pointed out in various writings of using arbitration to dilute mandatory rules.

Situation 4: Enforceability of Standstill Agreements to Stop Time from Running in Limitation Law: There were some important lessons to be learnt owing to the Default Rules Doctrine on the enforceability of standstill agreements in view of Section 3(1), Limitation Act. What might, on a first reading, be a mandatory rule, may, on a proper analysis, be a default provision. This is especially so when decisions on that rule are analysed. Most implicit default rules are of this sort. A rule, standing alone, may read as a mandatory rule but its real nature can be gauged while reading it in conjunction with another rule which may influence that seemingly mandatory rule. Two, a rule could operate differently depending on different transactions. It may be a mandatory rule in some contexts and a default rule in others. The hitherto, misunderstood, Section 3(1), Limitation Act is an example because it seems, on the first reading, to be a mandatory rule but case laws suggest this to be near the default rules spectrum at least in the context of family settlements and settlements in commercial agreements, where courts have not sought to enforce Section 3(1) rigorously. This is a typical example where it is possible to misunderstand the real nature of a rule but for the insights of the Default Rules Doctrine.

These aspects have been discussed in Chapter 6 and related to the fourth research objective.[773]

As results of the empirical study show, there is an understanding the lawyers, law academicians and law students, that a systematic approach to the DRD in India would make the legal system better off. Also, as understanding about the doctrine increases, there is a better appreciation of its utility.

[773] Research Objective 4: "*To examine the problems owing to the absence of a systematic analysis of the Default Rules Doctrine through decided cases*."

All these aspects led to the conclusion that the failure to adopt a default, mandatory and altering rules centric approach to contract law in India hinders proper understanding of rules of contract law. The DRD is of considerable utility in Indian law. Effective utilisation of the Default Rules Doctrine in law practice and legal education would considerably improve clarity and certainty in Indian contract law. It would also contribute immensely in improving contract law education in India and bridging law theory and law practice.

As the Department Related Standing Parliamentary Committee on Personnel, Public Grievances, Law and Justice has noted in its Report on "Strengthening Legal Education in view of emerging challenges before the Legal Profession": "*The Committee feels that as legal practice becomes more interconnected and complex, legal education must adapt to prepare students for emerging challenges and opportunities. There is a pressing need to provide young law graduates with market-oriented and socially relevant legal education*." Including the Default Rules Doctrine as a part of the law curriculum would enable law students in India prepare for emerging challenges and opportunities.

8.1.2 Testing of Hypothesis

For the purposes of this research work, the following hypothesis was framed:

Failure to adopt a default, mandatory and altering rules centric approach to contract law in India hinders proper understanding of rules of contract law. Further, this doctrine is neglected in legal education in India.

The benchmark used for hypothesis testing in qualitative research was trustworthiness. The analysis in qualitative research should be auditable in that it should be possible to retrace the steps taken by the researcher which led to a particular interpretation/ theory/ conclusion so as to verify if there were no alternatives left without examination and if the researcher's biases had effect on the conclusions.

As the previous chapters showed, it is indeed possible to retrace the steps taken and verify if the conclusions were reachable. In addition, the empirical data collected and analysed also showed that the Default Rules Doctrine is neglected in India and that Indian law would be better off with the Default Rules Doctrine. To actualise the research objectives, five research questions were formulated. The aforesaid research questions were addressed in six chapters, barring the introductory and the concluding chapters.

To examine the correctness of the hypothesis, it was explored if and to what extent the Default Rules Doctrine has percolated the Indian legal system, including legal education in India. Next, if the Default Rules Doctrine is not a part of Indian legal discourse, the adverse consequences of the lack of such discourse was explored. The benefits that the Indian legal system would reap if Default Rules Doctrine is used was also analysed.

There are hardly any writings in India on the Default Rules Doctrine or attempts at analysing rules of contract law from that perspective.[774] It is not that in India, DRD is totally absent. For instance, Indian courts have maintained that contract law rules could be imperative and non-imperative. But there exists a tension between various distinct approaches to identify default rules: the first approach, a literal/ textual approach, is to go by the text, the Contract Act and identify when the Contract Act provided for contracting around or contracting out a rule. The approach is liberal to party autonomy and allows contracting around or contracting out even when the text of the rule does not explicitly so provide.[775] This approach entails analysis of a rule to see if there were elements of public policy or public interest involved.

This contradiction in approaches is still unresolved, for two reasons: one, there have not been frequent requirements for courts to have a look overall to examine the doctrinal

[774] See, Chapter 4.
[775] This is consonant to the idea that contract law mostly consists of default rules (Chen-Wishart, 2022; Geis, 2006).

consonance of these competing approaches. Two, disputes could be adjudicated based on reference to one or a few rules, the Contract Act without a need for examining various contract law rules *in toto*. Another problem is given the possibility that public interest or public policy could capture within its scope substantially all legal provisions.

Mere recognition of explicit default rules cannot be the only justification for disregarding implicit default rules in the Contract Act. There are umpteen judgments which recognised contract law provisions as default rules even when they did not expressly provide for contracting around. Therefore, the approach which merely relies on the text of the statute is not a correct approach. Another aspect supporting this conclusion is that statutes such as the Contract Act, the Transfer of Property Act, etc. were several decades old. So, the question as to whether a rule was a default rule or not could not be simply looked at based on decisions that were rendered, say, in 1900.

The test regarding determination of whether a rule is an implicit default rule or a mandatory rule devised by courts in India as public policy. This test is inadequate in justifying interference to party autonomy where the transaction involved is between two parties and the transaction is such that it does not affect the society at large.

To illustrate, the mandatory requirement of reasonable notice under Section 176, Contract Act, before the person to whom goods are pledged sells the goods pawned on default of the pawnor[776] was cited as an instance. It was argued that it would be stretching the limits of "public policy" too much to call for interference in an agreement wherein a pawnor and a pawnee agree that the pawnee need not give any notice to the pawnor for sale of pledged goods because the transaction does not really affect public at large or is not of such nature that public interest can be readily inferred to have been affected due to such an agreement. The requirement of notice was to protect the pawnor's right to redeem the goods pledged before it is sold. The provision really creates a balance: on the one hand, it allows the pawnor to redeem the goods sold by paying back the debt, and, in doing so, does not make the pawnee worse off: all the

[776] https://mynation.net/laws/bare-acts/contractact/ica-s172.htm (accessed 30.01.2024).

pawnee needs to do is give reasonable notice of sale. So, what this provision really does is to protect against an internality: the possibility of the pawnor being divested of the property wrongly. This is a typical example of an internality: an adverse effect produced by a contractual set-up on a party to the contractual set up.

It is the DRD, specifically, the insight that mandatory rules target internalities and externalities that can take place owing to a contractual arrangement, that could explain comprehensively and justify mandatory rules. The public policy test is not adequate to explain and justify mandatory rules and doing so would stretch the semantic content of public policy too far.

Another test employed by Indian courts to differentiate between contract law rules meant for the benefit of persons and those which require agreements to be made in a specific manner/ proscribe certain terms. According to courts, the former category could be waived while the latter category, could not be. Although this is a better test, it does not fully explain/ justify construing certain rules as mandatory rules in contract law because it does not deal with a situation that happens subsequent to formation of contract. For instance, Section 176 contains the mandatory notice requirement prior to sale by the pawnee. A literal reading of the provision will not signify proscription of a term waiving off the requirement. It is only an understanding of the idea that mandatory rules are meant to address the problems of internalities and externalities that will give a complete picture on the issue.

The second approach, albeit rare, is that even where the provisions of law allow contracting around, courts still limit the liberty to contract around to only certain situations. Examples of this approach include Section 152, Contract Act (regarding bailee's responsibility for loss caused to the goods bailed) and Section 106, Transfer of Property Act (quit notice). Courts have given the justification of public policy, but the justification is inadequate because the liberty to contract around is, in reality, constricted to protect against an internality or an externality.

Where there are no clear-cut recent precedents on the question whether a particular rule is could be contracted around or not, the better test is whether the rule proposed to be a mandatory rule addresses an internality or an externality.

Party sophistication may also be relevant in classifying a rule as a default rule in specific contexts. Since mandatory rules may be intended protect against internalities, sophisticated parties may be willing to contract around a rule. In such cases, it was argued that the judicial system must be responsive to make a proper choice because attributing weight to sophistication is a means to further competing values of contract law. However, it was also cautioned that courts should be careful in employing these criteria because the "bargaining power" criteria used in the context of government contracts is unsophisticated. There is a possibility of courts misbranding agreements involving unsophisticated parties as sophisticated. This would contribute immensely to predictability of law.

These aspects point out clearly that the lack of discourse in India on the Default Rules Doctrine. Empirically, most law schools in India do not teach the Default Rules Doctrine, either at the undergraduate or the postgraduate programme. Further, lawyers, whether in-house or advocates, law teachers and law students, are not aware even of the fundamental concepts of the doctrine.

It is clear from the above analyses that Default Rules Doctrine is not a part of the legal discourse and has been neglected in legal education in India. The Default Rules Doctrine has not been taken up in a systematic or comprehensive manner in India. This is true with regard to legal education, legislative design, law practice or in adjudication. The judicial, legislative and academic legal discourse in India is characterised by absence of any substantial discussion or analysis of the Default Rules Doctrine or its application to analysing or critiquing contract law.

The lack of a Default Rules Doctrine-centric approach in India leads to considerable problems. The adverse consequences are summarised below:

- The doctrinal inconsistency on the recognition and identification of mandatory rules. There is considerable confusion on whether the literal construction of a rule should be adopted to identify mandatory rules or the public policy test should be used. Courts have completely failed to use the internality/ externality test, which better explains and aids in identification of mandatory rules.
- There is a risk of conversation of a default rule into a sticky default rule without any policy reasons for doing so.
- Excessive use of contract templates, especially in government contracts, without taking into account judicial developments.
- Failure of courts to provide directions as to future conduct especially when a contractual provision did not comply with the altering rule for displacing the default. In such cases, courts ought to explain the contractual provision to be used to displace the default. This is to enable the parties to the relevant agreement as well as other persons wanting to contract around the said rule to use the appropriate language in their contract to displace the default where it is intended so.
- The doctrinal inconsistency owing to the contradiction in approach of Indian courts in glorifying party autonomy in specific contexts such as arbitration while disregarding it in other contexts (such as Section 55, Contract Act).
- Judicially created constraints in contracting around default rule have the effect of undermining the statutory intent. The result of doing so might have adverse effect on the rationale for designing the provision as a default rule.
- Failure to appreciate the real nature of a rule may lead to inconsistency in decisions or wrong results. For instance, the failure to appreciate that Section 74, Contract Act, allowing parties to alter in their agreement the provision on court determined damages (Section 73) had an effect on damages in Section 55 in that where parties had agreed for liquidated damages, damages in Section 55 would refer to such agreed damages and courts or arbitral tribunals cannot undermine such choice and determine damages. Disregarding it as such leads to adverse costs, both, on the legal system as well as on the parties.

- Proper appreciation of the nature of mandatory rules is important in its application in various contexts. Failure to do so will erode the basis for the provision in various contexts and allow contracting parties to get away with internalities or externalities that the mandatory rule may target.[777]
- One, what might, on a first reading, seem to be a mandatory rule, may on a proper analysis, turn out to be a default rule.[778] This is especially so when decisions on that rule are analysed. Most implicit default rules are of this sort. A rule, standing alone, may read as a mandatory rule but its real nature can be gauged while reading it in conjunction with another rule which may influence that seemingly mandatory rule. The failure to appreciate this could lead to decisions not in accord with the underlying rationale of the provision.

Thus, it has been established that the failure to adopt a default, mandatory and altering rules centric approach to contract law in India hinders proper understanding of rules of contract law. It has also been established empirically that this doctrine is neglected in legal education in India. The hypothesis, therefore, stands proved.

8.2. Recommendations and Future Work on the Default Rules Doctrine and the Way Forward

This section discusses the recommendations that the Indian legal system, including various stakeholders thereof. could employ so as to better integrate Default Rules Doctrine in the legal system.

[777] This is true with respect to Section 69, Partnership Act, where courts have stated that the disabilities on unregistered partnerships were inapplicable to arbitration.
[778] This is illustrated by the uncertainty around enforceability of standstill agreements.

8.2.1. Recommendations for Courts/ Arbitral Tribunals, Contracting Parties and Counsels on the Default Rules Doctrine

The below recommendations are addressed on the function of adjudication and those involved in the function of adjudication, viz., courts, arbitral tribunals, counsels and contracting practitioners:

- The topics dealt with in this work, viz., determination of contracts with time as essence in construction law, Liquidated damages in contract law, Disabilities of unregistered partnerships in partnership law, and Enforceability of standstill agreements in dispute resolution are those with far-ranging ramifications in contract law. Considerable insights can be proffered in litigations on contract law, especially where the issue involved relates to whether a deviation from the default position was valid or whether a particular rule has been validly contracted around. Hence, it is important that courts and arbitral tribunals are aware of various insights of the Default Rules Doctrine.

- Where courts decide that a rule has not been validly or properly contracted around, it is important, in the interest of certainty of law, that judges specify how the rule could be validly contracted around. Such insights would lead to better making of agreements.

- It is important for courts to analyse if a rule needs to be made or construed to be a sticky default, that is, a rule which is difficult to contract around. If there are sound policy reasons for doing so, then so be it. However, if not, courts should not come in the way of party autonomy. Unfortunately, by requiring various conditions in an agreement that time would be of contractual essence, Indian courts had converted a default rule into a sticky default rule. Where courts disregard this choice of the parties, they are, in effect, defeating the act of contracting parties to contract around the default to specific circumstances and hindering the exercising party autonomy. Courts need to explore the implications of making it difficult to contract around the default.

- Some defaults are allowed to prevent litigation and to enable parties settle their contractual issues within themselves. When liquidated damages are agreed upon, the promisee incurs a risk- she is disentitled from recovering any amount beyond the agreed damages, even if she suffers more loss than provided in the contract. The promisor's risk is addressed in the price but the promisee's risk of being disentitled from recovering an amount beyond the agreed damages is off-set by the possibility of realisation of liquid money when the damage takes place. The manner in which the law is set and construed: to make liquidated damages clause subject to reasonable damages is to destroy this risk matrix and to nullify the effect of allowing the parties to contract around the default: making ex post valuation of damages mandatory. The consequence of this is to severely inhibit party autonomy and increase litigation. The enforceability of liquidated damages clause and courts' approach needs a substantial rethink.

- Judges do not decide disputes in isolation but based on submissions/ arguments of counsels. Hence, it is important for counsels to be conscious of the Default Rules Doctrine, including the concepts of default rules and sticky default rules, to make appropriate submissions about the justifications for upholding the time as essence clauses as a regular default rule.

- When construing statutory provisions (such as Section 69, Partnership Act), courts should identify the typology of the rule (default, mandatory or altering rule, and its sub-classifications) and construe them accordingly. The objective behind the provisions is to enforce registration of partnerships through the bar in terms of Section 69. Consequently, the manner of enforcement of contract, whether through litigation or arbitration, is immaterial to its applicability. It is important for courts to employ the Default Rules Doctrine to better understand various rules of contract law.

- What might, on a first reading, seem to be a mandatory rule, may on a proper analysis, be, in reality, a default rule. This is especially so when decisions on that rule are analysed. Most implicit default rules are of this sort. A rule,

standing alone, may read as a mandatory rule but its real nature can be gauged while reading it in conjunction with another rule which may influence that seemingly mandatory rule. Two, a rule could operate differently depending on different transactions. It may be a mandatory rule in some contexts and a default rule in others. Chapter 6 cited Section 3(1), Limitation Act as an apt illustration. Courts and arbitral tribunals aspects ought to be kept in perspective as these would promote better understanding and appreciation of contract law rules.

- The manner of construing statutes will differ depending upon the age of the statute: for instance, in the absence of substantial jurisprudence, general contract law statutes such as the Contract Act may require various policy considerations as opposed to specific contract laws such as the Hire Purchase Act, the Arbitration Act, etc., which either have substantial jurisprudence or are of relatively recent vintage. While construing the former statutes, it would be important for the courts to identify whether, in a particular context, the rule is a mandatory or a default rule, and if it is a default rule, how the law permits it to be modified through contracts, that is, an altering rule.

- Courts would do well to revisit the classification of contract law rules and examine the same in a holistic manner. Specifically, the justification for classifying a particular rule in terms of mandatory rule cannot be based on amorphous notions of public interest or public policy as any rule of contract law could be made to fit in into the rubric of public policy/ public interest. Mandatory rules can be justified when they seek to protect internalities or externalities.

- The Default Rules Doctrine is perhaps the most important tool for transactional lawyers. They need to be aware of whether the relevant rules are mandatory or default rules and if they are default rules, what are the minimum required conditions to contract around those rules. Transactional lawyers must also be aware of the default setting of the law: they can avoid costly negotiations if the agreements are silent on a particular aspect: the default setting in law may take

care of a particular situation, which is in favour of such a party. If that party expects costly and time-consuming negotiations on those aspects, it is better not to deal with those clauses in the agreement.

- An analysis of the position regarding time as essence clauses in construction contracts revealed sticky contract drafting practices: parties are not attempting to follow judicial decisions making unenforceable time as essence clauses to displace the sticky default. The absence of efforts by contracting parties to modify their contracting practices despite lapse of more than 43 years after *Hind Construction* (decided in 1979) is mystifying. Even in 2023, promisees have been making the same arguments before courts that time is of essence and courts have been rejecting such arguments. Parties should consider use of appropriate contract language such as the use of non-obstante clause while using the time-as-essence clause.

These are some of the salient aspects that those parties in adjudication would do well to keep in mind.

8.2.2. Recommendations for Law-Makers on the Default Rules Doctrine

While framing rules of contract law, various aspects need to be considered by law-makers. At the broadest and the most general level, it must be understood that rules tend to considerably influence behaviour of parties not only when they proscribe certain conduct but also in other situations. Nudges and default rules are typical examples of this.

Various insights of Default Rules Doctrine offer a range of choices to law-makers on structuring a particular rule. Some of the choices include:

- Mandatory or default rules;
- If the rule is to be designed as a mandatory rule
    - Why should it interfere into the freedom of contract of the parties?

    - Whether it should be a procedural or a substantive mandatory rule?
    - Whether the rule that is designed as mandatory is for guarding against an internality or an externality?
    - What should be the sanction accorded to non-compliance of the mandatory rule?
- If the rule is to be designed as a default rule:
    - What should be the manner of designing the altering rule?
    - whether the rule should be a penalty / information-forcing or a majoritarian default rule?
    - Whether it should be tailored or untailored?
    - Whether the rule is to be designed to be a sticky default?
- If the rule is to be designed as an altering rule:
    - Whether the rule should be a necessary or a non-exclusive altering rule?
    - Whether the rule should be an ex ante/ ex post altering rules?
    - Whether the altering rule should be drafted as a standard or a rule (which is intended to apply in an all-or-nothing fashion)?
    - Whether the rule should be a sticky altering rule?
- Whether the rule- default, mandatory, altering rule- should be in the statute, delegated legislation or otherwise developed by the judiciary?
- Whether statutorily created mandatory rules need re-assessment?

These are some of the various considerations that law-makers should determine while choosing a default rule. Law-makers would do well to incorporate these aspects while considering the effects of default rules.

As noted earlier, liquidated damages (LD) are agreed upon to prevent litigation. Hower, the manner in which the law is set makes destroys the risk matrix of the parties in having the LD clause and nullifies the effect of allowing parties to alter the default, thereby making *ex post* valuation of damages seemingly mandatory. Apart from issues of party autonomy, this position increases litigation. The legislature needs to rethink whether Section 74 requires amendments, especially tailoring. The possibility of explicitly

recognising the enforceability of liquidated damages clauses in infrastructure projects where projects delay inherently cause damage to the public[779] may be explored.

Chapter 6 discussed the law on the interlink between time as essence clauses and liquidated damages and discussed the case of *Welspun Speciality.* Rather than having a liquidated damages or a damages option, the third option of Minimally Tolerable Arrangement (MTA) that has emerged in recent academic writings (Katz and Zamir, 2023, 781-782) as regards enforceability of liquidated damages clause is an aspect worth exploring in order to rationalise the Indian law on liquidated damages. Katz and Zamir (2023, 781-782) conclude that the use of MTA substitutes is not strong but this is a point exploring further based on empirical and other evidence (Katz and Zamir, 2023, 783).Law-makers could consider whether to rationalise the law on liquidated damages considering the advantages of such clause in preventing litigation.

8.2.3. Recommendations for Teaching on Contract Law

Chapter 6 highlighted how by not using the Default Rules Doctrine, the Indian legal system is unable to better understand/ explain/ analyse contract law. This portion of the concluding chapter positively proposes how the theory could be used in the classroom and draws upon "Default Rules Doctrine: Implications on Teaching Contract Law in India" ("Teaching Contract Law"), a paper published as a part of the present research work. Srinivasan and Yadav (2022, 212-213) noted the following ways in which the Default Rules Doctrine enriched contract law teaching:

- The knowledge of when and how parties could validly agree to contract around a particular rule was an important skill for transactional lawyers to enable them draft effective and enforceable agreements (Burnham, 2000, 1537). This skill is also important for litigating lawyers as well because they could base their cases on whether a clause could be contracted out and while arguing on the rationale behind contract law rules (Burnham, 2000, 1537).

[779] Construction Design Services v. Delhi Development Authority, MANU/SC/0099/2015.

- The DRD obligates the courts to specify the way parties could validly alter the default rule in circumstances where parties were unsuccessful in validly produce that effect. Where courts fail to undertake this duty, parties spend substantial time and money in engaging in constant litigation on the same issue, thereby leading to substantial social costs. Hence, it becomes the duty of legal academia to point out such situations and recommend remedial measures.
- The Default Rules Doctrine allows for a nuanced understanding of contract law and of how the rules operate practically (Srinivasan and Yadav, 2022, 211). Illustratively, Para 2 of Section 73 prohibits compensation for remote/ and indirect losses, unless parties contemplated while entering into the agreement that such damages would ensue owing to breach. This rule on remoteness of damages acts as a penalty (i.e., information forcing) default rule in that only if the promisee discloses the true value of the performance to the promisor, the former will be entitled to special damages even where the losses that could be suffered would be substantially more: revealing the actual value of the performance might mean that parties might negotiate for a higher price (Ayres and Gertner, 1989; Srinivasan and Yadav, 2022, 212). In case the promisee does not reveal the true value of performance, she would be entitled to only direct damages.
- Faulty design of rules can be identified through various insights into the Default Rules Doctrine thereby enabling critique of such rules.
- If courts are unable to gauge the reason for design of a rule in a particular manner, Default Rules Doctrine enables critique of such decisions. The third illustration presented in Chapter 6 relating to restrictively reading Section 69, Partnership Act in order to apply it only to suits and not arbitral proceedings is an example of how Default Rules Doctrine can enable critique of judicial decisions failing to gauge the design rationale of rules.
- The Default Rules Doctrine turns the focus from only the *ratio decidendi* to facts, including the contractual provisions that were the subject of dispute between contracting parties. The Default Rules Doctrine helps the law teacher to focus on these critical aspects, which, along with the choice of remedies opted

by a party, are often unjustifiably relegated to facts, but are important from a practice point of view (Burnham, 2000, 1536).

- Focussing on contract clauses and their design also enables the law student to gain practical understanding on drafting contracts (Srinivasan and Yadav, 2022, 212).
- The manner in which a particular contractual provision is drafted, how similar contractual provisions have evolved over the years and the development of standard form agreements provide important lessons in contract drafting and interpretation. Default Rules Doctrine offers a nuanced understanding of the interface between legal rules, these contractual provisions and case-laws that led to changes in these terms (Srinivasan and Yadav, 2022, 212).
- It leads an increased understanding of the role of lawyers in the legal process, although textbooks and casebooks on contract law are largely silent and also help raise ethical issues regarding lawyers' practices (Burnham, 2000, 1536). To illustrate, bringing focus on default rules in this research helped in identifying the problems in contracting practices in relation to the issue on time as essence of construction contracts.
- Incorporating transactions and real problems into doctrinal law teaching allows the law students to legal aspects prior to disputes which shift the focus from litigation exclusively to transaction as well as litigation, without making substantive changes to the curriculum (Arnow-Richman, 2009, 369).
- Increased focus on the DRD enables change of focus of law students from dispute resolution to drafting better contracts and better allocation of risks thereby mitigating the occurrence of disputes, which is an important objective of transactional lawyering (Burnham, 2000, 1537; Burnham, 2009, 253).
- Considering the importance and wide-ranging application of the DRD, it is important to teach it as a part of the subject of Legal Methods that most law colleges in India teach, in addition to contract law.

Teaching Contract Law also highlighted how all these aspects could be integrated in the classroom without making teaching unduly burdensome for law teachers, who have

to juggle law teaching, legal research, student evaluation and administrative duties (NKC, 2007, 11; Dasgupta, 2010, 443).

The interface between default rules and contract drafting and design is an important aspect to be considered from the legal education perspective. This works both ways: students in law school can be trained to look out for sub-optimal contract design in their internships with transactional lawyers and at the same time such training would prepare them as better transactional lawyers, which would enhance their prospects in the industry (Nyarko, 2021, 73-74). It is also in the interests of the legal system, especially the clients, that law students should be encouraged to look at contract law through the lens of the Default Rules Doctrine, as it will enable future lawyers perform better in their roles better.

Statistics in USA shows that at least half of the total number of lawyers engage in some form of transactional lawyering (Pantin, 2014-2015, 61-62), which includes planning, negotiating, drafting, vetting and closing deals (Pantin, 2014-2015, 62). By failing to equip law students to acquire skills relating to transactional lawyering, law institutions create lawyers with serious practical disability (Pantin, 2014-2015, 62). Teaching transactional lawyering not only helps develop transactional skills but also enables students understand concepts (Pantin, 2014-2015, 62). Accordingly, it has been argued that the law school curriculum should shift from a litigation-model to a model that effectively incorporates transactional skills (Burnham, 2000, 1544; Pantin, 2014-2015, 62).

Teaching Contract Law highlighted that no special teaching methodology was required to do so (Srinivasan and Yadav, 2022, 215). Chapter 7 of the present work presented the data in the survey and found that most law schools, whether national law schools or otherwise, hardly teach the Default Rules Doctrine either at the undergraduate or the postgraduate levels. This is something that requires reconsideration. **Lawrence Solum** (2022) has stated in his blog post titled "**Default Rules and Completeness**" as follows:

"*At some point in the introductory class in contract law, students are likely to encounter a very powerful idea--the distinction between "default rules" and "mandatory rules."... Once you have this ideas in your conceptual toolkit, you are likely to start noticing them in all kinds of contexts, not just in contract law, but in every legal subject you encounter. When you do, you might ask yourself, "Why is this a default rule rather than a mandatory rule?," or vice versa. And, "What normative legal theory or principle supports this choice?*""

The empirical analysis conducted in Chapter 7 revealed the state of affairs in law schools as regards Default Rules Doctrine: by the most conservative estimates, at least about 62% of the law schools did not teach the doctrine. Further, only about 16% of the individual respondents stated that they were taught the doctrine and about 61% stated that they were never taught it. About 23% stated that they did not remember the doctrine having been taught.

All the above aspects go to show the importance of teaching Default Rules Doctrine in law schools.

8.2.4. Recommendations on Future Research on Default Rules Doctrine

The Default Rules Doctrine is at its nascence in India. There is, therefore, immense potential for research in India on the Default Rules Doctrine. For instance, special contract law statutes such as insurance law, carriage law, sale of goods law, agency, indemnity, guarantee, partnership law, arbitration, etc. can be classified based on whether the rules contained therein are mandatory, altering or default rules. Further classification can be made by identifying the sub-type of the default, mandatory or altering rules. A similar exercise can be made in respect of fields of law that have been traditionally regarded more as regulatory but still contain default rules, such as corporate law (Manns and Robertson, 2020; Chase, 2020; Listokin, 2010; Listokin 2009; McDonnell, 2007, Millon, 1998), dispute resolution (Florou, 2019; Weidemaier

, 2010; Ware, 1999), family law (Ellickson, 2011; Ribstein, 2011; Davis, 2009), , law of succession (Poppe, 2021), dispute resolution, etc.

Another important and a potential area for research is a normative evaluation of the manner in which a particular default, mandatory or altering rule ought to be structured and a comparison of the same with how such a rule has been drafted.

Another area ripe for future research is comparative legal research on jurisdictions which are better designed towards protecting against internalities and/ or externalities as against the laws prevailing in India.

There is considerable ground for research on this topic of optimum design of contract law rules. Ian Ayres remarked in this regard: "*But the default rule revolution in part has been an attempt to show lawmakers that they can move the world without restricting contractual freedom.*" (Ayres, 2006, 4) These areas are ripe for inter-disciplinary research.

Various debates surrounding the theory such as whether default rules should be designed to promote efficiency or should be based on majoritarian choice or with some other objective would have to be analysed from the Indian context.

India, as noted in this PhD work, lacks a systematic approach to the DRD in legal research. As such, it would be useful not only list out some crucial topics illustratively as future areas of research in Indian law on the Default Rules Doctrine but also provide a framework of research. These topics are listed below:

Analytical Research

- In designing default rules, how granular should default rules be drafted, such as in a generalised way or whether these should be crafted leading to different outcomes for different contexts [such as the rule of *caveat venditor* for

consumer contracts and *caveat emptor* for commercial contexts] (Geis, 2006, 1111- 1112; Ayres, 1993). Contrary to the view that it would be better to design default rules to specific settings, it has been argued that contract law should use general default rules and let contracting parties to make detailed adjustment to such rules (Geis, 2006, 1114-1115). This applies to mandatory and altering rules as well.

- In terms of designing default rules, the level of complexity with which such rules are to be designed. This entails at least four choices: simple default rule, complex default rule, simple default standard and complex default standard (Geis, 2006, 1117- 1118).

- If optimal design of contract law requires lawmakers to take into consideration several factors, then the feasibility of judges promulgating judge-made rules may require proper analysis, from a public law perspective. Geis argues that judges will, as a matter of course, get the design wrong (Geis, 2006, 1126-1128).

- In addition to the triumvirate, are there other species of rules, such as declaratory rules discussed in this research? This thesis explored the possibility of declaratory rules and came to a conclusion, albeit tentatively, about their possibility. The existence of declaratory and other species of rules are important areas of research under the umbrella of the Default Rules Doctrine.

- Rules of various sub-fields of contract law, such as the guarantees, pledge, hypothecation, bailment, agency, sale of goods, Partnership, property law and its transfer, Insurance, carriage of goods, etc. are to be analysed and classified into one of the triumvirate and sub-classified into various sub-types in the triumvirate. How far the intent of the design of such rules are identified and implemented by courts and whether there is a requirement for redesign of such rules by legislature or by courts.

- Chapter 6 noted that damages on account of breach of Contract as per Section 73 (Contract Act) was a default rule and parties could agree *ex ante* the damages payable (as recognised in Section 74 of the said statute) as opposed to allowing courts to determine the damages. This perspective is important to have a re-look into the regime regarding liquidated damages in India. Once parties have agreed on a liquidated damages clause, giving a go-by to the choice by requiring a party to prove damages as per Section 73 needs re-examination.

- Chapter 4 noted the tension between the two approaches in identifying default rules: the literal approach, which looked at the text of the statute, and the public policy approach, which examined to see if a rule which did not explicitly permit contracting around furthered public policy. This tension requires resolution by identification of such rules and examination of whether those could be contracted around.

- The first research question framed for this PhD work relates to the aims and objectives of the legislature as regards framing of default, mandatory and altering rules. The second research question related to the potential of the Default Rules Doctrine in adjudication of contractual disputes and in law reform. In the government, the role of the executive is to implement the laws, while that of the legislature is to frame laws. Apart from interpreting laws, judiciary also makes laws, albeit in a limited way. The Default Rules Doctrine has focussed substantially on the legislature and the judiciary. The role of the executive in implementing laws has not been analysed in a comprehensive manner, which is a subject of future research on the topic.

- As against the expected trend that laws would move from mandatory to default rules, there has been a shift to higher amount of regulation. This is typified by the Arbitration Act where there an increasing regulation of arbitration and the consequent reduction of default rules.

Interdisciplinary Research

- There is considerable scope for interdisciplinary research in research under the Default Rules Doctrine in the Indian context. Take the case of design of default rules: there are three predominant strands of interdisciplinary research that have broadly emerged (Poppe, 2021, 111):

    - The first strand of research uses economic models to comment on superiority of one type of default rules over others and employs empirical research to establish validity of that choice;
    - The second strand focusses on using behavioural insights over the design of default rules and comments upon the optimum design; and
    - The third strand is relatively of recent vintage and uses insights from artificial intelligence, big data and technology to offer personalised default rules as a new form of default rules (Eidenmüller, 2022; Porat and Strahilevitz, 2014).

    These strands of interdisciplinary research are to be applied in the Indian context.

- Analysis on the optimal design of default/ mandatory/ altering rules may entail interdisciplinary research. For instance, for the lawmaker to choose between a penalty default rule or other types of default rules, economic analysis may be required to determine whether incentives under each default would lead to a socially preferable outcome (Geis, 2006, 1119- 1120). A substantial portion of the Default Rules Doctrine borrows heavily from law and economics.

- The building block of the Default Rules Doctrine are incentives. How people react to incentives is considerably influenced by psychology. Hence, the interface between psychology and behavioural sciences on the one hand and Default Rules Doctrine on the other is a ripe area for research.

Empirical Research

- There are several writings on the subject undertaking empirical research (Marotta-Wurgler, 2011; Listokin, 2010; Listokin 2009; Ayres, 2006; Bernstein, 1999). One of the basic issues in the theory is the choice of majoritarian default rules. The fact that these are majoritarian call for empirical analysis. So does the analysis of the need for complex default rules (Geis, 2006, 1129).[780]

- Research on the impact of various types of rules- default, mandatory or altering- is another important area for empirical research (Lin and Chan, 2018); Geis, 2006; Listokin, 2009).

- Change in Contract drafting practices based on legal developments such as legislations, judgments, etc.

- Another exercise in empirical research on the topic would be to obtain and study the curriculum of these law schools/ colleges see if and the extent to which law schools/ colleges in India teach the Default Rules Doctrine. This would not be an easy exercise considering that law colleges could be secretive about sharing their syllabus or reading materials.

- Empirical studies in foreign jurisdictions on the efficacy of the Default Rules Doctrine is also a method to better understand default, mandatory and altering rules.

Unless the Default Rules Doctrine is taken up in systematic and comprehensive manner, the Indian legal industry would be unable to utilise the deep insights from the theory in

[780] Geis (2006) argues that that identification of differences in behaviour and preferences of various market participants can enable law-makers design default rules catering to each group of market participants). On the other hand, Schwartz and Scott (2006) argue that that it is futile to find out the normal preferences of contracting parties.

Indian law. It is hoped that the legal industry- law practitioners, law schools, law researchers and law students- would take notice of the Default Rules Doctrine and use it in enabling a finer understanding and a more nuanced critique of contract law in India.

***

Appendix 1: Questionnaire of the Empirical Study on the Awareness and the Usefulness of the Default Rules Doctrine in India

Section 1

Consent to Use of Data

- □ I confirm that I have read the details provided regarding this research project and I understand the content.
- □ I understand that my participation is voluntary and I am free to withdraw at any time, without giving any reason
- □ I grant permission for the researcher to use my responses in aggregate or anonymous statements, but I prefer to maintain confidentiality and request that any comments are presented without attribution to me.
- □ I understand that anything I say will be treated confidentially and will be used only for research purposes
- □ I agree to take part in the research.

I. Name

_____

II. Town/ City of residence*

_____

III. Gender

1. Male
2. Female

3. Other Gender ___
4. Cannot say
5. Do not want to disclose.

IV. Educational qualifications.

1. Graduate in Law
2. Postgraduate in Law
3. Other

V. You are a/ an

1. Law student
2. Law academician/ Law Teacher/ Law Professor
3. Practising lawyer (advocate/ advisory practice, etc.)
4. In house counsel.
5. Others

VI. Income Range (per month) (optional)

1. No income
2. Up to Rs. 25,000 per month
3. Rs. 25,001 to Rs. 50,000
4. Rs. 50,001 to Rs. 75,000
5. Rs. 75,001 to Rs. 1 lakh
6. Above Rs. 1 lakh
7. Do not want to disclose.

VII. If you are a graduate in law, the law school from which you passed out was a:

1. National law university

2. Central University
3. State University (other than national law university) or its affiliated college.
4. Private University
5. Other
6. Not applicable.

VIII. If you have completed postgraduation in law, the law school from which you passed out was a:

1. National law university
2. Central University
3. State University (other than national law university) or its affiliated college.
4. Private University
5. Other
6. Not applicable.

IX. How many years of experience do you have in law?

1. 0 years
2. 1-3 years
3. 4-6 years
4. 7-9 years
5. 9- 12 years
6. Above 12 years

Section 2

Awareness of Default Rules Doctrine

This section is about your awareness of the Default Rules Doctrine. Please answer this section without reference to further material or any web or other search.

X. Are you aware of the meaning of default, mandatory and altering rules?

1. Yes
2. No

XI. If Yes, whether you are aware of the following?

1. meaning of default rules
2. meaning of mandatory rules
3. meaning of altering rules.
4. types of default rules
5. types of mandatory rules
6. types of altering rules
7. Various insights in the Default Rules Doctrine such as function of such rules, duty of courts vis-a-vis such rules, etc.

XII. What does "default rules" mean?

1. rules which apply in case of default by a party
2. rules which apply mandatorily to a transaction
3. rules that provide how one can contract around a compulsorily applicable rule
4. rules that fill gaps in incomplete contracts
5. I do not know.

XIII. What does "mandatory rules" mean?

1. rules that mandatorily allow contracting around
2. rules that apply mandatorily to a transaction
3. rules that lay down how a rule could be contracted around
4. rules are mandatory only to one party while optional to the other

5. I do not know.

XIV. What are altering rules?

1. rules that apply compulsorily to a transaction
2. rules that allow altering of a debt
3. rules that lay down how a rule could be contracted around.
4. rules are rules optional to one party while mandatory to the other party
5. I do not know.

Section 3

Learning About the Default Rules Doctrine

This section collects data about if and when the Default Rules Doctrine was taught in a systematic manner in the law school.

XV. Whether Default Rules Doctrine was taught to you in law school?

Yes
No
I do not remember

XVI. If answer to previous question was "yes", at which level was it taught to you?

1. undergraduate law degree
2. postgraduate law degree
3. Not applicable. It was not taught

XVII. If answer to question No. XV was yes, Default Rules Doctrine was taught to you as a part of ___?

1. Contract law
2. Legal method
3. Jurisprudence
4. Other

XVIII. If answer to the above question is "other", please describe:

_____

Section 4

Teaching Default Rules Doctrine

Section 3 is meant for law teachers who have taught or teach contract law, in its broadest sense, and includes areas of law where parties could order their relationship through consent, such as labour law, corporate law, dispute resolution, etc. and not just areas of law traditionally regarded as part of contract law (such as sale of goods, insurance, etc.). In addition, if you are teaching legal method or jurisprudence, please respond to this section. Go to Section 4 if you are not a law teacher who has taught the above subjects, please move to Section 4. An area of law that may not predominantly employ the Default Rules Doctrine is criminal law.

XIX. Where do you teach law?

1. National law university
2. Central university
3. State university (other than national law university) or its affiliated college
4. Private university
5. Others

XX. Which level do you teach?

1. Yes
2. No
3. Cannot say.

XXII. If answer to the previous question is “Yes”, whether you teach Default Rules Doctrine as a stand-alone topic or integrate it with other topics?

1. taught as a stand-alone topic
2. integrated into teaching various aspects/ rules of law.
3. both the above

XXIII. If answer to question no. XXI is yes, in which subjects do you teach the Default Rules Doctrine?

_____

Section 5
Usefulness of the Default Rules Doctrine

This section pertains to the usefulness or the utility of the default rules theory in various facets of law.

XXIV. Do you think the use of the Default Rules Doctrine in a systematic manner will make the Indian legal system better off?

1. Yes
2. No

3. Cannot say

XXV. If answer is Yes, in which facet of law will the Default Rules Doctrine help?

1. It will lead to better understanding of various rules and doctrines in contract law`
2. It lead to better drafting of laws, including contract law, etc.
3. It would aid present a case better before a court or a tribunal
4. It would lead to drafting agreements in a better way
5. It would lead to better decision-making by courts.

XXVI. Is there any comment you wish to make on the usefulness of the Default Rules Doctrine?

_____

[Note: The data, in anonymised form is available for viewing at request of the researcher.[781]]

[781] The anonymized data can be downloaded from https://docs.google.com/spreadsheets/d/17tceu7FF-n9OQuqv6ldvg9_DDV2VgFN9VW7zpDNMZCg/edit?usp=sharing (accessed 24.02.2024). The law colleges were determined further to confirmation from respondents, searches on social and professional networking websites.

Appendix 2: Default Rules in UNCITRAL Model Law

The below table depicts the default rules that are found in the Model Law.

Table 45 Default Rules in Model Law

Article	Summary of Provision
1(3)(c)	Parties can explicitly agree that the subject of arbitration goes beyond one country thereby making it an international commercial arbitration
3(1)	Receipt of written communications
10	Parties' right to decide on the number of arbitrators and Default number of arbitrators in case of absence of agreement
11(3)	Procedure for appointment of arbitrators
13(2)	Procedure for challenge of arbitrators
17	Tribunal's power regarding interim measures
19(2)	Tribunal's power to conduct arbitration in absence of party agreement on procedure
20(1)	Place of arbitration failing party determination
21	Determination of when arbitration proceedings commence
22(1)	Determination of language in case of failure by parties to determine language of arbitration
23(2)	Procedure for amendment of pleadings
24(1)	Power of tribunal to determine requirement of oral hearings
25	Party default
26(1)	Power of tribunal to appoint expert
26(2)	Appointment of experts in arbitrations proceedings
28(2)	Power of tribunal to determine law applicable to substance of dispute in absence of designation by parties
30(2)	Award to state reasons absent party agreement otherwise
33(3)	Right of a party to request for additional award from tribunal, except where they have agreed that no such right should exist

Appendix 3: Default Rules Doctrine in Various Jurisdictions

Papers in US Secondary Materials Using the Term “Default Rules” in LexisAdvance Database

Table 46 Year-wise No. of Papers in US Secondary Materials on "Default Rules"

Year	Number
1989	20
1990	40
1991	50
1992	56
1993	77
1994	122
1995	128
1996	184
1997	220
1998	226
1999	283
2000	284
2001	325
2002	312
2003	324
2004	346
2005	427
2006	442
2007	431
2008	423
2009	455
2010	493
2011	467

2012	449
2013	480
2014	457
2015	722
2016	1185
2017	921
2018	755
2019	686
2020	1144
2021	863
2022	546
2023	211
Total	14074

Papers in LexisAdvance database citing or mentioning “Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules” (Ayres and Gertner, 1989) in LexisAdvance (as on 08.02.2024)

Table 47 No. of Hits Mentioning Ayres and Gertner (1989) in Lexis Advance Database

Jurisdiction	**Database in LexisAdvance**	**Search Hits**
USA	Secondary Materials	1271
India	Analytical Materials	1
UK	Secondary Materials	38
Australia	Secondary Materials	0
Canada	Secondary Materials	0
Hong Kong	Secondary Materials	0
Malaysia	Secondary Materials	0
Singapore	Secondary Materials	0

Default Rules Doctrine in US Courts

The below table mentions decisions of US Courts citing Ayres and Gertner (1989) and dealing with various insights of the Default Rules Doctrine

Table 48 Decisions on Default Rules Doctrine in US Courts

Case & Citation	References to Default Rules Doctrine
Heaton-Sides v. Snipes, 755 S.E.2d 648 (N.C. Ct. App. March 18, 2014)	Contract law as consisting of two types of rules- immutable rules and default rules
City of Burlington v. Indem. Ins. Co. of N. Am., 332 F.3d 38, (2d Cir. Vt. June 9, 2003)	Courts construe insurance statutes in favour of broadening the coverage and such rules are penalty default rules.
Girolametti v. Michael Horton Assocs., 332 Conn. 67 (Conn. June 25, 2019)	Default rules help minimise transaction costs, increase efficiencies and resolve ambiguities. Designing of default rules- should reflect what parties would have chosen or which most reasonable parties would prefer.
Brady v. Park, 2019, 445 P.3d 395 (Utah May 8, 2019)	The endeavour of contract law should be to reflect the best assessment of contracting parties' likely preferences regarding contract interpretation, which is an important function of gap filling function of contract law. Deference is to be given to parties' choice of contracting around the default rule
Am. Airlines v. Wolens, 513 U.S. 219 (U.S. January 18, 1995)	Obligation of courts to supply reasonable terms to fill gap in contracts and the different policy considerations surrounding such choice.

Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Assoc. (In re Premier Entm't Biloxi LLC), 445 B.R. 582 (Bankr. S.D. Miss. September 3, 2010)	Nature of default rules
Harnischfeger Corp. v. Harbor Ins. Co., 927 F.2d 974 (7th Cir. Wis. March 18, 1991)	Informational effects of default rules in insurance law
Moreau v. Harris County, 158 F.3d 241 (5th Cir. Tex. October 19, 1998)	Court's task while construing a default rule. Construing untailored default rules.
United States v. Westlands Water Dist., 134 F. Supp. 2d 1111 (E.D. Cal. March 13, 2001)	In case of ambiguities, "*the court allocates the risk of the unforeseeable loss to the more efficient risk bearer*".
AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, 2020 Del. Ch. LEXIS 353 (Del. Ch. November 30, 2020)	Existence of common law related default rules on damages
Concord Real Estate CDO 2006-1 v. Bank of Am. N.A., 996 A.2d 324 (Del. Ch. May 14, 2010)	Common law rules form part of every contract as they fill gaps where the contract is silent.
American Nat'l Fire Ins. Co. v. Kenealy, 72 F.3d 264 (2d Cir. N.Y. December 13, 1995)	Effect of strategic withholding of information and the role of default rules
Coronet Ins. Co. v. GACC Holding Co., 1991 U.S. Dist. LEXIS 12120 (N.D. Ill. August 27, 1991)	Designing of appropriate default rules in specific situations
Duncan v. TheraTx, Inc., 775 A.2d 1019	Default damages rules were to reflect a term in the contract which most parties would have preferred when signing the agreement, that is, a majoritarian default rule. While majoritarian rules were preferable, there

	could be circumstances where penalty defaults were useful
Selvido v. Gillespie (In re Gillespie), 2012 Bankr. LEXIS 1261, 2012 WL 1021417 (Bankr. W.D.N.C. March 26, 2012)	Recognition of the legislative policy to afford maximum effect to freedom of contracts and therefore most of the rules were default rules and that the members of such a company could alter the default rules through operating agreement
Spyglass Media Grp., LLC v. Bruce Cohen Prods., 997 F.3d 497 (2021).	Recognition of concept of altering rules by holding that a default rule could be contracted around by appropriate language

Appendix 4: Increase in Knowledge of DRD and Increase in Appreciation of Utility of DRD

This appendix presents the results of the relationship between an increase in knowledge of the Default Rules Doctrine as reflected by the accuracy of the responses to the meaning of default, mandatory and altering rules, and the increase in appreciation of the utility of the Default Rules Doctrine.

Data analysed suggests a positive relationship between increase in knowledge of the DRD and the increase in appreciation of the utility of the DRD. The increase in knowledge is measured by accuracy of the responses of the meaning of default rules, mandatory rules and altering rules. This is undertaken by the following methodology:

- **Step 1**: Accurate responses for the meaning of default rules are chosen. The wrong responses on the meaning of default rules are eliminated.
- **Step 2**: Percentage of responses (after eliminating wrong responses for default rules) on the utility of each of the five facets of law- better understanding of law, better drafting of laws, better case presentation (advocacy), better drafting of contracts and better decision-making by courts- are arrived at.
- **Step 3**: Among the accurate responses to the meaning of default rules, wrong responses to the meaning of mandatory rules are filtered out.
- **Step 4**: Percentage of responses (after eliminating wrong responses for default and mandatory rules) on the utility of each of the five facets of law- better understanding of law, better drafting of laws, better case presentation (advocacy), better drafting of contracts and better decision-making by courts- are arrived at.
- **Step 5**: Among the accurate responses to the meaning of default rules and mandatory rules, wrong responses to the meaning of altering rules are filtered out.
- **Step 6**: Percentage of responses (after eliminating wrong responses for default, mandatory and altering rules) on the utility of each of the five facets of law-

better understanding of law, better drafting of laws, better case presentation (advocacy), better drafting of contracts and better decision-making by courts- are arrived at.

- **Step 7**: The percentage of responses are graphically represented to examine if there is an increase in percentage. Percentage is represented in the Y axis while each step of elimination of wrong responses to the relevant rules is represented in X axis.

Scenario 1 (Default rules> Default and Mandatory Rules > Default, Mandatory and Altering Rules)

In scenario 1, the elimination of wrong responses to default rules is followed by elimination of wrong responses to mandatory rules and is finally followed by elimination of wrong responses to altering rules. The elimination of wrong responses is undertaken on the previously obtained output. The final output and its graphical representation are provided below:

Table 49 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 1

S. No.	Utility of DRD	% (excl. wrong responses to DR	% (excl. wrong responses to DR and MR	% (excl. wrong responses to DR, MR and AR
1	It will lead to better understanding of various rules and doctrines in contract law	56%	58%	63%
2	It [will] lead to better drafting of laws, including contract law, etc.	44%	49%	54%

3	It would aid better present a case before court/ tribunal	32%	33%	37%
4	It would lead to drafting agreements in a better way	49%	51%	60%
5	It would lead to better decision-making by courts.	42%	47%	54%
6	None of the options	21%	20%	14%

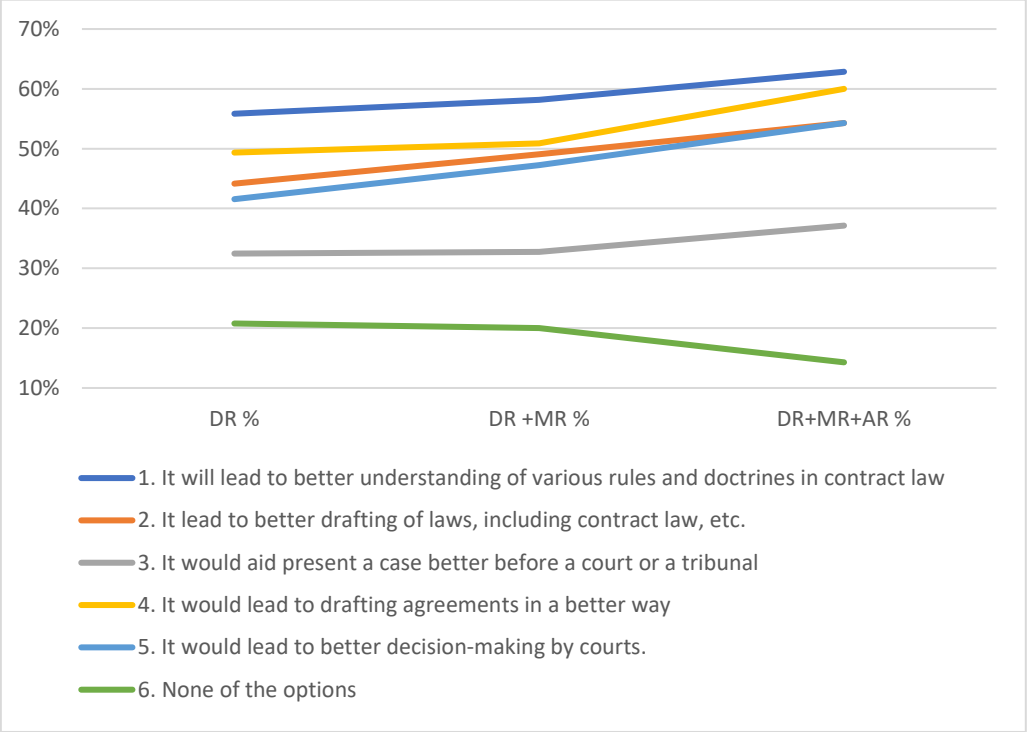

Figure 30 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 1

Scenario 2 (Mandatory Rules> Mandatory and Default Rules> Mandatory, Default and Altering Rules)

In scenario 2, the elimination of wrong responses to mandatory rules is followed by elimination of wrong responses to default rules and is finally followed by elimination

of wrong responses to altering rules. The elimination of wrong responses is undertaken on the previously obtained output. The final output and its graphical representation are provided below:

Table 50 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 2

S. No.	Utility of DRD	% (excl. wrong responses to MR	% (excl. wrong responses to MR and DR	% (excl. wrong responses to MR, DR and AR
1	It will lead to better understanding of various rules and doctrines in contract law	52%	58%	63%
2	It [will] lead to better drafting of laws, including contract law, etc.	40%	49%	54%
3	It would aid better present a case before court/ tribunal	31%	33%	37%
4	It would lead to drafting agreements in a better way	43%	51%	60%
5	It would lead to better decision-making by courts.	40%	47%	54%
6	None of the options	20%	20%	14%

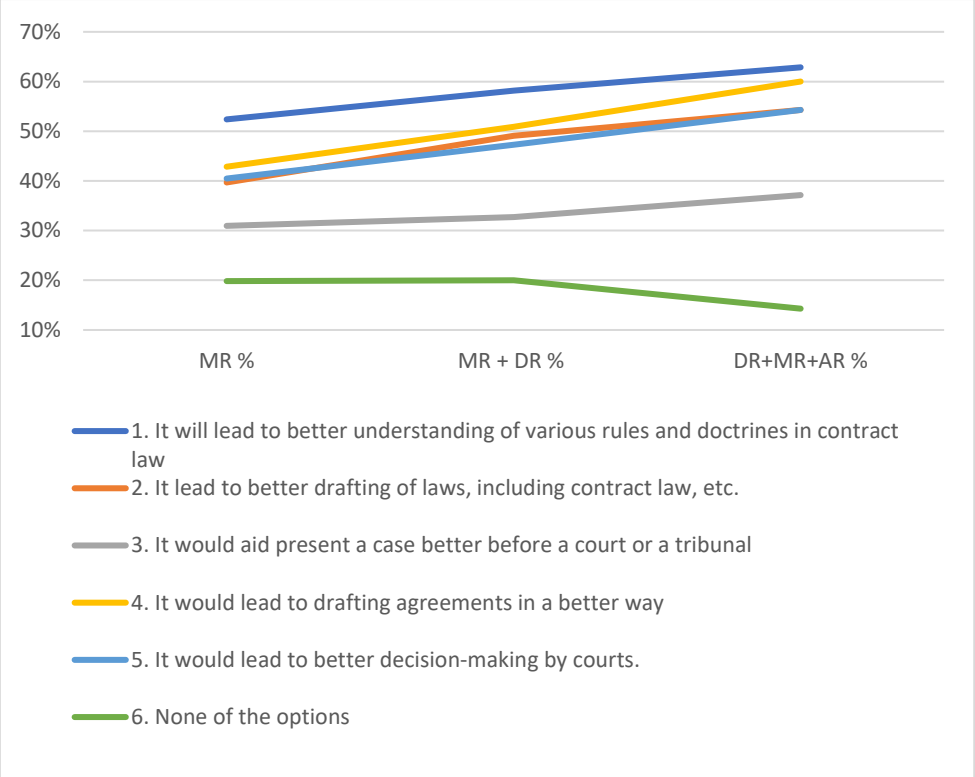

Figure 31 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 2

Scenario 3 (Altering Rules> Altering and Mandatory Rules> Altering, Mandatory and Default Rules)

In scenario 3, the elimination of wrong responses to altering rules is followed by elimination of wrong responses to mandatory rules and is finally followed by elimination of wrong responses to default rules. The elimination of wrong responses is undertaken on the previously obtained output. The final output is provided below:

Table 51 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 3

S. No.	Utility of DRD	% (excl. wrong responses to AR	% (excl. wrong responses to AR and MR	% (excl. wrong responses to AR, MR and DR
1	It will lead to better understanding of various rules and doctrines in contract law	57%	60%	63%
2	It [will] lead to better drafting of laws, including contract law, etc.	46%	46%	54%
3	It would aid better present a case before court/ tribunal	33%	33%	37%
4	It would lead to drafting agreements in a better way	51%	52%	60%
5	It would lead to better decision-making by courts.	46%	48%	54%
6	None of the options	13%	15%	14%

This trend also follows others in terms of increasing percentage of the utility of the doctrine but is interesting because unlike in other cases, here there is a slight increase in the respondents who chose the sixth option. It increased from 13% to 15% and reduced to 14%, while in other scenarios (not involving altering rules in the first step), there was a decrease observed. The above table can be graphically represented as below:

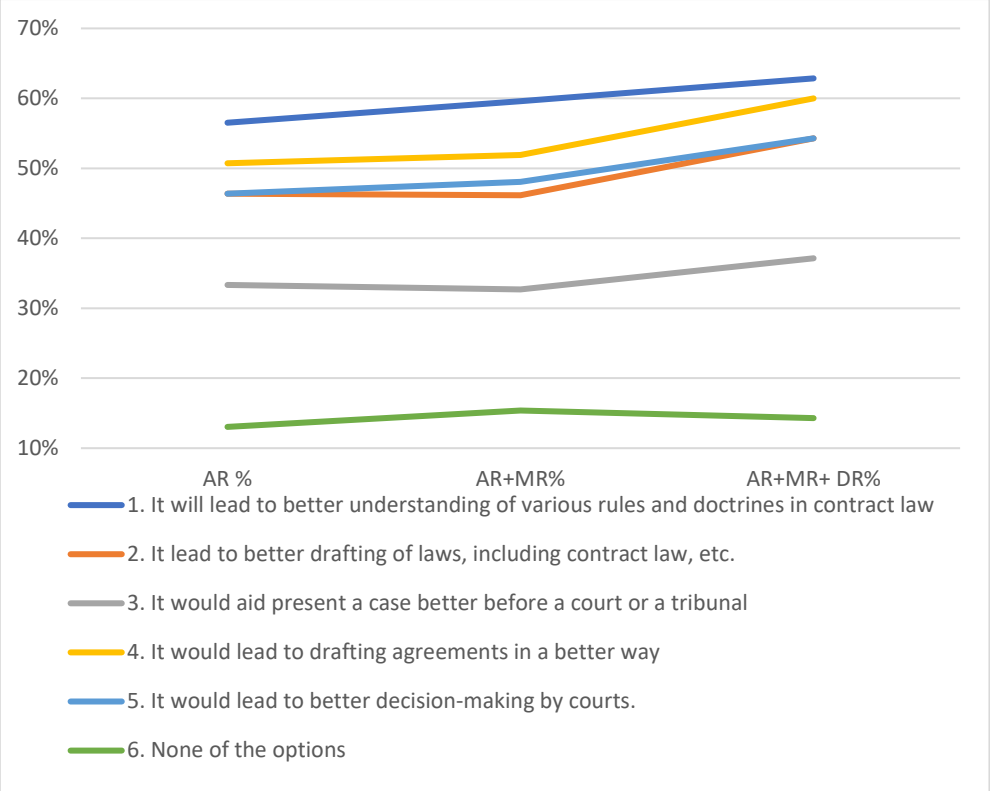

Figure 32 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 3

Scenario 4 (Mandatory Rules> Mandatory and Altering Rules> Mandatory, Altering and Default Rules)

In scenario 4, the elimination of wrong responses to mandatory rules is followed by elimination of wrong responses to altering rules and is finally followed by elimination of wrong responses to default rules. The elimination of wrong responses is undertaken on the previously obtained output. The final output and its graphical representation are provided below:

Table 52 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 4

S. No.	Utility of DRD	% (excl. wrong responses to MR	% (excl. wrong responses to MR and AR	% (excl. wrong responses to MR, AR and DR
1	It will lead to better understanding of various rules and doctrines in contract law	52%	60%	63%
2	It [will] lead to better drafting of laws, including contract law, etc.	40%	46%	54%
3	It would aid better present a case before court/ tribunal	31%	33%	37%
4	It would lead to drafting agreements in a better way	43%	52%	60%
5	It would lead to better decision-making by courts.	40%	48%	54%
6	None of the options	20%	15%	14%

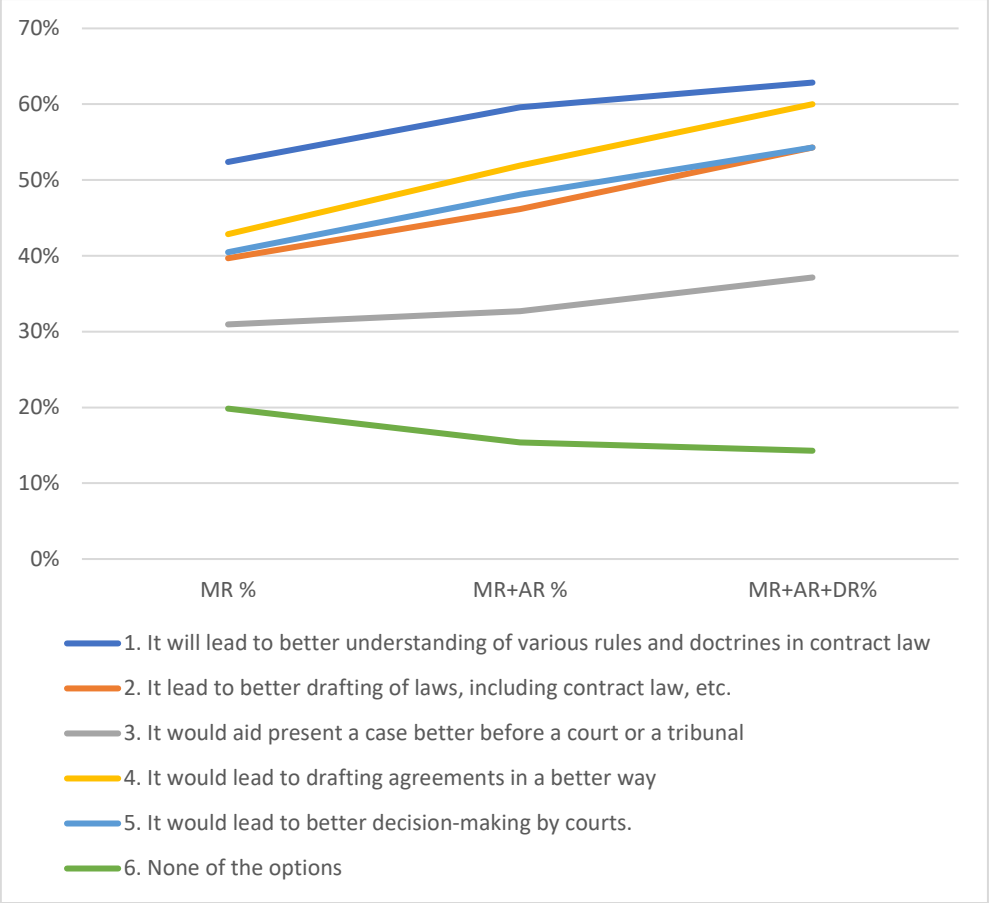

Figure 33 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 4

Scenario 5 (Altering Rules> Altering and Default Rules> Altering, Default Rules and Mandatory Rules)

In scenario 3, the elimination of wrong responses to altering rules is followed by elimination of wrong responses to default rules and is finally followed by elimination of wrong responses to mandatory rules. The elimination of wrong responses is undertaken on the previously obtained output. The final output and its graphical representation are provided below:

Table 53 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 5

S. No.	Utility of DRD	% (excl. wrong responses to AR	% (excl. wrong responses to AR and DR	% (excl. wrong responses to AR, DR and MR
1	It will lead to better understanding of various rules and doctrines in contract law	57%	58%	63%
2	It [will] lead to better drafting of laws, including contract law, etc.	46%	51%	54%
3	It would aid better present a case before court/ tribunal	33%	35%	37%
4	It would lead to drafting agreements in a better way	51%	58%	60%
5	It would lead to better decision-making by courts.	46%	51%	54%
6	None of the options	13%	14%	14%

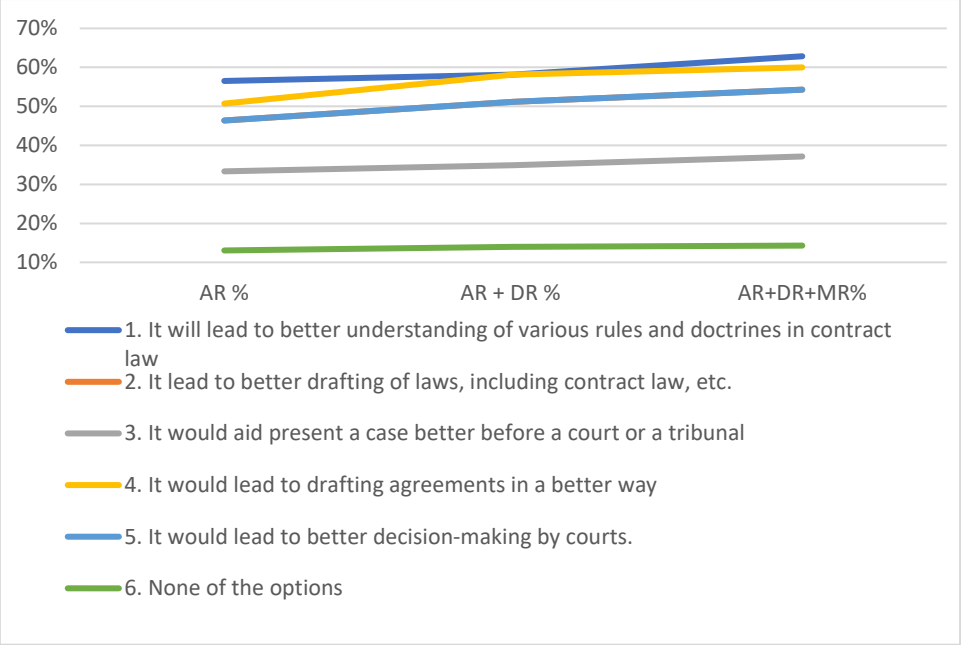

Figure 34 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 5

Here, it may be note that the red line (No.2) and the light blue line (No. 5) coincide and therefore the red line is not visible.

Scenario 6 (Default Rules> Default and Altering Rules> Default, Altering and Mandatory Rules)

In scenario 6, the elimination of wrong responses to default rules is followed by elimination of wrong responses to altering rules and is finally followed by elimination of wrong responses to mandatory rules. The elimination of wrong responses is undertaken on the previously obtained output. The final output and its graphical representation are provided below:

Table 54 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 6

S. No.	Utility of DRD	% (excl. wrong responses to DR	% (excl. wrong responses to DR and AR	% (excl. wrong responses to DR, AR and MR
1	It will lead to better understanding of various rules and doctrines in contract law	56%	58%	63%
2	It [will] lead to better drafting of laws, including contract law, etc.	44%	51%	54%
3	It would aid better present a case before court/ tribunal	32%	35%	37%
4	It would lead to drafting agreements in a better way	49%	58%	60%
5	It would lead to better decision-making by courts.	42%	51%	54%
6	None of the options	21%	14%	14%

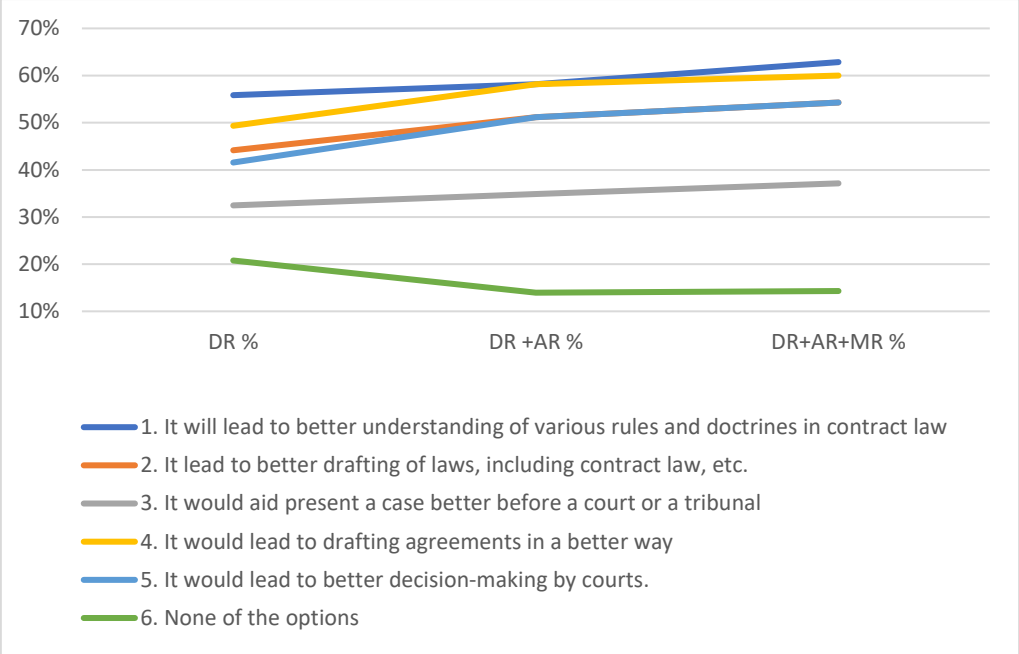

Figure 35 Relationship between Increasing Level of Awareness of Default Rules Doctrine and Better Appreciation of Utility of the Doctrine- Scenario 6

Thus, in whichever scenario one adopts, it is apparent that increase in knowledge of the Default Rules Doctrine leads to increase in appreciation of the utility of the Default Rules Doctrine. All six scenarios have been taken here and the result is the positive relationship between increase in knowledge of the DRD and the increasing appreciation of its utility.

BIBLIOGRAPHY

A. Primary Sources

1. (1947) Standstill Agreement between the Dominion of India and the Nizam of Hyderabad and Berar, p. 153, https://www.google.co.in/books/edition/British_Documents_on_Foreign_Affairs/_TvieqWAk2kC?hl=enandgbpv=1

2. (1957) Law Commission of India, Seventh Report on Partnership Act, 1932, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080541-1.pdf

3. (1958) Law Commission of India, 13th Report: Contract Act, 1872, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080532.pdf

4. (2001) University Grants Commission, Report of the Curriculum Development Committee: Law https://www.ugc.ac.in/oldpdf/modelcurriculum/law.pdf

5. (2001) University Grants Commission, Report of the Curriculum Development Committee: Law, https://www.ugc.ac.in/oldpdf/modelcurriculum/law.pdf

6. (2002) Law Commission of India, 184th Report on The Legal Education and Professional Training and Proposals for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956

7. (2005) Council of Australian Law Deans, Statement on the Nature of Legal Research, https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf.

8. (2007) National Knowledge Commission (NKC), Report of the Working Group on Legal Education, http://docshare01.docshare.tips/files/4958/49586475.pdf

9. (2009) Principles, Definitions and Model Rules of European Private Law, https://www.law.kuleuven.be/personal/mstorme/european-private-law_en.pdf

10. (2010) Bar Council of India, Report of the Curriculum Development Committee http://www.barcouncilofindia.org/wp-content/uploads/2010/06/CurriculumDevComdraftReport.pdf

11. (2015) Department of Expenditure, Office Memorandum: Re-classification/ Upgradation of Cities/ Towns on the basis of Census-2011,No. 2/5/2014-E(II)B dt. 21.07.2015, https://doe.gov.in/sites/default/files/21-07-2015.pdf

12. (2017) Scottish Law Commission, Report on Prescription (July 2017), http://www.bailii.org/scot/other/SLC/Report/2017/247.html.

13. (2024), Department Related Standing Parliamentary Committee on Personnel, Public Grievances, Law and Justice, One Hundred Forty-Second Report on the Subject "Strengthening Legal Education in view of Emerging Challenges Before The Legal Profession" (07.02.2024), https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/18/191/142_2024_2_12.pdf?source=rajyasabha

B. Secondary Sources: Books and Journals

1. Afolayan, Michael Sunday and Oniyinde, Omolade Adeyemi (2019), "Interviews and Questionnaires as Legal Research Instruments", 83, pp. 51-59.

2. Agius, Steven J. (2013), "Qualitative Research: its Value and Applicability, 37 The Psychiatrist, pp. 204-206.

3. Ajayi-Ore, Lilian (2022), "A Simple Approach to Using Simulations in Any Classroom", https://hbsp.harvard.edu/inspiring-minds/a-simple-approach-to-using-simulations-in-any-classroom

4. Al Amaren, Emad Mohammad *et al* (2020), "An Introduction to the Legal Research Method: To Clear the Blurred Image on How Students Understand the Method of the Legal Science Research", 1, International Journal of Multidisciplinary Sciences and Advanced Technology, pp. 50-55,

5. Arnow-Richman, Rachel, *et al* (2009), "Teaching Transactional Skills in Upper-Level Doctrinal Courses: Three Exemplars", Tennessee Journal of Business Law, pp. 367- 374.

6. Ayres, Ian and Fox, Edward (2019), "Strengthening the Passivity Default", 44, Actec law Journal, pp. 289- 295.

7. Ayres, Ian and Gertner, Robert (1989), "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules", 99, 1, Yale Law Journal, pp. 87-130;

8. Ayres, Ian and Gertner, Robert (1992), "Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules", 101, 4, Yale Law Journal, pp. 729- 773;

9. Ayres, Ian (1993), "Preliminary Thoughts on Optimal Tailoring of Contractual Rules", 3, 1, Southern California Interdisciplinary Law Journal, pp. 1-18

10. Ayres, Ian and Gertner, Robert (1999), Majoritarian vs. Minoritarian Defaults, 51, 6, Stanford Law Review, pp. 1591- 1613.

11. Ayres, Ian (2001), "Default Rules for Incomplete Contracts", https://ianayres.yale.edu/sites/default/files/files/Palgrave.pdf

12. Ayres, Ian (2006), “Menus Matter”, 73, 1, University of Chicago Law Review, pp. 3-15.

13. Ayres, Ian (2006), “Ya-Huh: There Are and Should Be Penalty Defaults”, 33, 3, Florida State University Law Review, pp. 589- 167;

14. Ayres, Ian (2012), “Regulating Opt-Out; An Economic Theory of Altering Rules”, 121, 8, Yale Law Journal, pp. 2032- 2116.

15. Bag, Sugata (2018), *Economic Analysis of Contract Law: Incomplete Contracts and Asymmetric Information*, Palgrave Macmillan.

16. Baker, Scott and Krawiec, Kimberly D. (2006), “Default Rules in Private and Public Law: An Exchange On Penalty Default Rules: Incomplete Contracts in a Complete Contract World”, 33, 3, Florida State University Law Review, pp. 725- 755;

17. Bakhoum, Mor, Gallego, Beatriz Conde, Mackenrodt, Mark-Oliver and Surblytė-Namavičienė, Gintarė (Eds.): *Personal data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach?*, Springer (2018).

18. Bangia, RK (2021), *Contract- I*, 8th ed, Allahabad Law Agency

19. Bar-Gill, Oren (2012), *Seduction by Contract: Law, Economics, And Psychology in Consumer Markets*, Oxford University Press.

20. Barnett, Randy E. (1992), “The Sound of Silence: Default Rules and Contractual Consent, 78 Virginia Law Review, pp. 821- 911;

21. Barnett, Randy E. (1994), “The Power of Presumptions”, 17, Harvard Journal of Law and Public Policy, pp. 613-625.

22. Beh, Hazel Glenn (2003), “Reassessing the Sophisticated Insured Exception”, 39, 1, Tort Trial and Insurance Practice Law Journal, pp. 85- 119.

23. Ben-Shahar, Omri and Porat, Ariel (2019), “Personalizing Mandatory Rules in Contract Law”, 86, The U. Chi. L. Rev., pp. 256- 282;

24. Ben-Shahar, Omri and Pottow, John A.E. (2006), “On the Stickiness of Default Rules”, 33, 3, Florida State University Law Review, pp. 651- 682.

25. Ben-Shahar, Omri (2004), “"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts”, 2004 Wisconsin Law Review, pp. 389- 428

26. Ben-Shahar, Omri (2009), “A Bargaining Power Theory of Default Rules”, 109, Columbia Law Review, pp. 396- 429;

27. Bender, Philip M. (2020), “Limits of Personalization of Default Rules: Towards a Normative Theory”, European Review of Contract Law, 16, 3, pp. 366-409.

28. Bennett, Steven C (2010), “When Will Law School Change?”, 89, 1, Nebraska Law Review, pp. 87- 130.

29. Bernstein, Lisa (1999), “The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study”, 66, 3, U. Chi. L. Rev., pp. 710-780.

30. Bhat, Ishwara P. (2019), *Idea and Methods of Legal Research*, Oxford University Press.

31. Bradlow, Daniel D. and Finkelstein, Jay Gary (2007), “Training Law Students to be International Transactional Lawyers-Using An Extended Simulation to Educate Law Students About Business Transactions”, 1, 1, The Journal of Business, Entrepreneurship and the Law, pp. 67- 87)

32. Burnham, Scott J. (2000), “Using Contracts to Teach Practical Skills”, 44, 4, Saint Louis University Law Journal, pp. 1535-1544.

33. Burnham, Scott J. (2009), “Transactional Skills Training: Contract Drafting-Beyond the Basics, Transactions”, The Tennessee Journal of Business Law, pp. 253-261.

34. Burnham, Scott J. (2016), *Drafting and Analysing Contracts: A Guide to the Practical Application of the Principles of Contract Law*, 4th edition, Carolina Academic Press.

35. Burton, Steven (2016), “Collapsing Illusions: Standards for Setting Efficient Contract and Other Defaults”, 91, 3, Indiana Law Journal, pp. 1063- 1080.

36. Bushaw, Amy and Katz, Howard E. (2012), *Strategies and Techniques for Teaching Contracts*, Wolters Kluwer.

37. Castello, James E (2019), “The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules”, in, Weigand, Frank-Bernd and Baumann, Antje, *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019 .

38. Cevc, Agata (2019), “Civil Liability of Arbitrators”, in Duić, Dunja and Petrašević, Tunjica, *EU and Comparative Law Issues and Challenges Series: EU and Member States – Legal And Economic Issues*, pp. 405- 421, University Josip Juraj Strossmayer of Osijek

39. Chase, Daniel L. (2020), “MandA after Eagle Force: An Economic Analysis of Sandbagging Default Rules”, 108, 5, California Law Review, pp. 1665- 1681.

40. Chen-Wishart, Mindy (2022), *Contract Law*, Oxford University Press, 7th edition.

41. Chigbu, Uchendu Eugene (2019), “Visually Hypothesising in Scientific Paper Writing: Confirming and Refuting Qualitative Research Hypotheses Using Diagrams”, 7, 1, Publications, pp. 22, https://www.mdpi.com/2304-6775/7/1/22

42. Choi, Jonathan H. (2022), Measuring Clarity in Legal Text, (forthcoming 2024)(2022), https://ssrn.com/abstract=4151849

43. Clarkson, Kenneth W., Miller, Roger Leroy and Muris, Timothy J., (1978), “Liquidated Damages v. Penalties: Sense or Nonsense?”, Wisconsin Law Review pp. 351-390.

44. Coase, Ronald H. (1960), “The Problem of Social Cost”, Journal of Law and Economics, 3, pp. 1-40

45. Coates IV, John C. (2001), “Explaining Variation in Takeover Defenses: Blame the Lawyers”, 89, 5, California Law Review, pp. 1301-1421;

46. Cohen, Amy B. (2004), “The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law”, 50, Loyola Law Review, pp. 623- 673.

47. Coleman, Jules L., Heckathorn, Douglas D. and M. Maser, Steven (1989), A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law, 12, 3, Harvard Journal of Law and Public Policy, pp. 639- 709;

48. Collins, Hugh (2021), "Employment as a Relational Contract", 137, Law Quarterly Review 426 (2021)

49. Coyle, John F. (2016), "Altering Rules, Cumulative Voting, and Venture Capital", 2016, 4, Utah L. Rev, pp. 595- 610

50. Coyle, John F., (2022) ""Contractually Valid" Forum Selection Clauses", 108, 1, Iowa Law Review, pp. 127- 173.

51. Craswell, Richard (1989), "Contract Law, Default Rules, and the Philosophy of Promising", 88, 3 Michigan Law Review, pp. 489- 529;

52. Craswell, Richard (2000), "Contract Law: General Theories", in Bouckaert, Boudewijn and De Geest, Gerrit (eds.), *Encyclopedia of Law and Economics Vol. III*, pp. 1-24;

53. Craswell, Richard (2005), "The Incomplete Contracts Literature and Efficient Precautions", 56, 1, Case Western Reserve Law Review, pp. 151- 168.

54. Cunningham HS and Shepherd HH (1878), *The Indian Contract Act, No IX of 1872*, Thacker, Spink and Company

55. Dasgupta, Lovely (2010), "Guest Post: Default Rules in the Indian Contract Act", The Practical Academic Blog, http://practicalacademic.blogspot.com/2010/09/guest-post-default-rules-in-indian.html

56. Dasgupta, Upasana (2019), "The Paradox of Elite Law Schools in India — A Comparison with Canadian Legal Education", Quebec Journal of International Law 147- 164, https://ssrn.com/abstract=3500048

57. Davis, Adrienne D. (2009), “Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality”, 110, 8, Columbia Law Review, pp. 1955- 2046.

58. Dick, Robert C. (1985), *Legal Drafting* 1 (2.d ed. 1985),

59. Dimatteo, Larry A. (2001), “A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages”, 38, 4, American Business Law Journal, pp. 633-733.

60. Dobinson, Ian and Johns, Francis (2017) “Legal Research as Qualitative Research”, in, McConville, Mike and Chui, Wing Hong, *Research Methods for Law*, pp. 18- 47

61. Doneff, Andrea (2010), “Arbitration Clauses in Contracts of Adhesion Trap "Sophisticated Parties" Too”, 2, Journal of Dispute Resolution, pp. 235- 269.

62. Dreifuerst, Kristina Thomas (2009), “The Essentials of Debriefing in Simulation Learning: A Concept Analysis”, 30, Nursing Education Perspectives, pp. 109-114.

63. Duncan, NJ and Hutchinson, T. (2012), “Defining and Describing what we do: Doctrinal Legal Research”, 17, 1, Deakin Law Review, pp. 83-119.

64. Dworkin, Ronald (1967), “The Model of Rules" The U. Chi. L. Rev., 35, 1, pp. 14-46.

65. Dworkin, Ronald (1973), “Legal Research”, 102, 2, Daedalus, pp. 53-64

66. Eidenmüller, Horst (2022), “Why Personalized Law?”, The University of Chicago Law Review Online (09.03.2022), https://lawreviewblog.uchicago.edu/2022/03/09/bp-eidenmuller/

67. Elhauge, Einer R. (2002), “Preference-Estimating Statutory Default Rules”, 102, 8, Columbia Law Review 2027.- 2290.

68. Ellickson, Robert C. (2011), “Comment on Ribstein's Incorporating the Hendricksons”, 35, Washington University Journal of Law and Policy 301, https://openscholarship.wustl.edu/law_journal_law_policy/vol35/iss1/14

69. Fajans, Elizabeth (2006), “Learning from Experience: Adding A Practicum to a Doctrinal Course”, 12 The Journal of the Legal Writing Institute 215- 228

70. Fédération Internationale Des Ingénieurs-Conseils, *FIDIC Red Book: Conditions Of Contract For Construction* (2017)

71. Fleischer, Victor (2002), “Deals: Bringing Corporate Transactions into the Law School Classroom”, 2002 Columbia Business Law Review, p. 475

72. Florou, Aikaterini (2019), “Adverse Inferences and Penalty Default Rules in International Investment Arbitration: A Policy Approach to the Production of Evidence”, 10, 3, Journal of International Dispute Settlement, pp. 423- 442

73. Franklin, Kris and Phillips, F. Peter, Pass the Salt: Problem Resolution Lawyering Across the 21st Century Law Curriculum (August 9, 2022). Pepperdine Dispute Resolution Law Journal, Forthcoming, NYLS Legal Studies Research Paper No. 4186053, Available at SSRN: https://ssrn.com/abstract=4186053 or http://dx.doi.org/10.2139/ssrn.4186053

74. Fredericks, Marcel and Miller, Steven (1988), “Some Notes on Confirming Hypotheses in Qualitative Research: An application”, 2, 4, Social Epistemology: A Journal of Knowledge, Culture and Policy, pp. 345-352.

75. Fuller, Lon L. (1941), “Consideration and Form”, Columbia Law Review, 41, 5, p. 799- 824

76. Garg, Priya and Hablani, Vishal (2018), “The Legislative Vacuum on the Honorary Position of a Chairman Emeritus: Assessing the Need to Introduce Statutory Regulations”, 11, 4, NUJS Law Review 667 (2018);

77. Garrett, Elizabeth (1999), “Legal Scholarship in the Age of Legislation, 34, 4, Tulsa Law Journal, pp. 679- 698.

78. Gautam, Atipriya (2018), “A Comparative Study of the Law of Contract under the Civil Law and the Common Law System via India and France, 4, 7, Journal on Contemporary Issues of Law.

79. Geis, George S. (2006), “An Experiment in the Optimal Precision of Contract Default Rules”, 80, 4, Tulane Law Review, pp. 1109- 1159.

80. Gelo, Omar, Braakmann, Diana and Benetka, Gerhard (2008) “Quantitative and Qualitative Research: Beyond the Debate”, 42, 3, Integrative Psychological and Behavioral Science, pp. 266-290.

81. Ghosh, Amrita and Kar, Pratyusha (2019), “Pre-Nuptial Agreements in India: An Analysis of Law and Society, 12, 2, NUJS Law Review. http://nujslawreview.org/wp-content/uploads/2019/12/12-2-Ghosh-and-Kar.pdf

82. Godwin, Andrew and Wu, Richard Wai-sang (2017), “Legal Education, Practice Skills, and Pathways to Admission: A Comparative Analysis of Singapore”, Hong Kong, and Australia, 66, 2, Journal of Legal Education, pp. 212-236

83. Goetz, Charles J. and Scott, Robert E. (1981), “Principles of Relational Contracts”, 67, 6, pp. 1089- 1154.

84. Goetz, Charles J. and Scott, Robert E. (1983), “The Mitigation Principle: Toward a General Theory of Contractual Obligation”, 69, 6, Virginia Law Review pp. 967-1024;

85. Goldford, Zackary (2021- 2022), “Penalty Default Rules in Quebec Contract Law”, 14, 1, Journal of Civil Law Studies, pp. 5- 34.

86. Goldford, Zackary (2022), “Penalty Default Rules in French, German and Louisianan Contract Law”, 9, European Journal of Comparative Law and Governance, pp. 358-384.

87. Grigoleit, Hans Christoph (2012), “‘Mandatory Law (Fundamental Regulatory Principles)”, in Basedow, Jurgen, *et al*, *Max Planck Encyclopedia of European Private Law*, Oxford University Press.

88. Grossman, Sanford J. and Hart, Oliver D. (1986), “The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration, 94, 4, Journal of Political Economy, pp. 691-719;

89. Greenfield, Kent and Smith, D. Gordon (2008), “Debate: Saving the World with Corporate Law?”, 57, Emory law Journal, pp. 947- 984;

90. Guha, Supratim and Kannan, Amudavalli (2017), ‘Best Efforts’: Search for the Optimal Performance Standard- An Economic Analysis, Patel, Bimal N, Nagar, Ranita and Thakker, Hiteshkumar, *Law and Economics in India: Understanding and Practice*;

91. Gupta, Suvrajyoti and Moti, Shireen (2024), "Missing the Wood for the Trees: How Indian Legal Education Fails to Deliver the Professional Lawyer?", Asian Journal of Legal Education, https://doi.org/10.1177/23220058231220247

92. Gutman, Kathleen (2014), *The Constitutional Foundations of European Contract Law: A Comparative Analysis*,

93. Guzman, Andrew T. (2000), "Arbitrator Liability: Reconciling Arbitration and Mandatory Rules", 49, 5, Duke Law Journal, pp. 1279-1334;

94. Hamilton, Neil and Bilionis, Neil W (2022), Law Student Professional Development and Formation: Bridging Law School, Student, and Employer Goals, Cambridge University Press.

95. Hayes, Adam (2022), "Standstill Agreement: Definition, How Contract Works, and Example", https://www.investopedia.com/terms/s/standstill_agreement.asp

96. Hermalin, Benjamin E., Katz, Avery W. and Craswell, Richard (2007), "Contract Law", in Polinsky, A. Mitchell and Shavell, Steven (ed.), Handbook of Law and Economics Vol. 1, pp. 1-128.

97. Hesselink, Martijn W. (2005), "Non-Mandatory Rules in European Contract Law", 1, 1, European Review of Contract Law

98. Hill, Claire A. (2001), "Why Contracts Are Written in "Legalese", 77, 1, Chicago-Kent Law Review, pp. 59- 85;

99. http://practicalacademic.blogspot.com/2010/09/guest-post-default-rules-in-indian.html

100. Hodges, Paula (2023), "Time to Stand Up for Immunity", Arbitration International, 39, 2, pp. 234-245

101. Hviid, Morten 1996), “Default rules and Equilibrium Selection of Contract Terms”, 16, 2, International Review of Law and Economics 233-245 (1996).

102. Hwang, Cathy (2022), “Collaborative Intent”, 108, 3, Virginia Law Review, pp. 657-708

103. International Federation of Consulting Engineers (2017), *Red Book: Conditions of Contract for Construction*, 2nd ed.

104. International Institute for the Unification of Private Law (IIUPL)(2016), *UNIDROIT Principles of International Commercial Contracts 2016.*

105. Jain *et al* Chirayu (2016), “The Elusive Island of Excellence: A Study on Student Demographics, Accessibility and Inclusivity at National Law School 2015-16”, https://images.assettype.com/barandbench/import/2016/06/SSRN-id2788311.pdf

106. Jha, Sukriti and Mehta, Saara (2018), “Contra Proferentem : A Necessary Evil”, 2, 2, Indian Journal of Law and International Affairs 64- 78 (2018).

107. Johnson, Jr., Alex M. (1991), “Think Like A Lawyer, Work Like A Machine: The Dissonance Between Law School and Law Practice”, 64, Southern California Law Review, pp. 1231- 1260.

108. Jonathan H. Choi, Measuring Clarity in Legal Text, 91 U. Chi. L. Rev. (forthcoming 2024)(2022), https://ssrn.com/abstract=4151849 (accessed 23.02.2023)

109. Lye, Kah Cheong (2013), "Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement", Kluwer Arbitration Blog (17 January 2013), https://arbitrationblog.kluwerarbitration.com/2013/01/17/institutional-overreach-institutional-arbitral-rules-versus-parties-express-agreement/

110. Kapoor, Rajesh (2021), *Avtar Singh's Law of Contract and Specific Relief*, Eastern Book Company, 13th edition.

111. Karlsaune, Hanne, Antonsen, Therese and Haugan, Gørill (2023), "Simulation: A Historical and Pedagogical Perspective", pp. 1-11, in Akselbo, Iben and Aune, Ingvild (ed.), "How Can we Use Simulation to Improve Competencies in Nursing?", Springer.

112. Katz, Ori and Zamir, Eyal (2023), "Substituting Invalid Contract Terms: Theory and Preliminary Empirical Findings", 48, 3, law and Social Inquiry, pp. 780 - 818

113. Kennedy, D (1982), "Distributive and Paternalistic Motives in Contract and Tort Law: With Special Reference to Compulsory Terms and Unequal Bargaining Power", 41, 4, Maryland Law Review, pp. 563-657.

114. Keeter, Scott (2018), "Evidence About the Accuracy of Surveys in the Face of Declining Response Rates", in Vannette, David L. and Krosnick, Jon A., *Palgrave Handbook of Survey Research*, Palgrave Macmillan.

115. Kiff, John (2012), Back to Basics: What Is LIBOR?, 49 Finance and Development No. 4 (2012), https://www.imf.org/external/pubs/ft/fandd/2012/12/basics.htm

116. Kirkby, Coel (2022), "How to Do Things With Legal Theory", 18, International Journal of Law in Context, pp. 373-382.

117. Klass, Gregory (2012), “Interpretation and Construction in Altering Rules”, Georgetown Law Faculty Publications and Other Works 1104, https://scholarship.law.georgetown.edu/facpub/1104

118. Klass, Gregory (2023), “Contract Exposition and Formalism”, Georgetown Law Faculty Publications and Other Works 2554, https://scholarship.law.georgetown.edu/facpub/2554/

119. Korobkin, Russell (1998), “The Status Quo Bias and Contract Default Rules”, 83, 3, Cornell Law Review, pp. 608- 687.

120. Kostritsky, Juliet P. (2004), “Taxonomy for Justifying Legal Intervention In An Imperfect World: What To Do When Parties Have Not Achieved Bargains Or Have Drafted Incomplete Contracts”, 2004 Wisconsin Law Review, pp. 323- 377.

121. Krosnick, Jon A. and Presser, Stanley (2010), “Question and Questionnaire Design”, in Marsden, Peter V. and Wright, James D., *Handbook of Survey Research*, Emerald, 2nd edition.

122. Krosnick, Jon A. (2018), “Improving Question Design to Maximize Reliability and Validity”, in Vannette, David L. and Krosnick, Jon A., *Palgrave Handbook of Survey Research*, Palgrave Macmillan.

123. Kumar, Manasi (2023), “The “Positive Law” of Impossibility in the Indian Contract Act”, Indian Law Review, https://doi.org/10.1080/24730580.2023.2173834

124. Lau, Martin (1994), *Introduction to the Pakistani Legal System, with special reference to the Law of Contract*, Yearbook of Islamic and Middle Eastern Law Online.

125. Lemley, Mark A. (2022), "The Benefit of the Bargain", Stanford Law and Economics Olin Working Paper No. 575 (08.08.2022), https://ssrn.com/abstract=4184946

126. Listokin, Yair (2009), "What Do Corporate Default Rules and Menus Do? An Empirical Examination", 6, 2, Journal of Empirical Legal Studies, pp. 279- 308.

127. Listokin, Yair (2010), "If You Give Shareholders Power, Do They Use It? An Empirical Analysis, 166, 1, Journal of Institutional and Theoretical Economics / Zeitschrift für die gesamte Staatswissenschaft, pp. 38- 53;

128. Macneil, Ian (1978), "Contracts: Adjustment of Longterm Economic Relations Under Classical, Neoclassical and Relational Contract Law", 72, Northwestern University Law Review 854.

129. Macpherson, William (1864), *Outlines of the Law of Contracts as Administered in the Courts of British India*.

130. Macrae, Charles Colin (1874), *The Indian Contract Act, Act IX of 1872: With a Commentary, Critical, Explanatory, and* Illustrative, Spink Thacker.

131. Malterud, Kirsti (2001), "Qualitative Research: Standards, Challenges, and Guidelines", 358, 9280, The Lancet, pp. 484-488.

132. Manns, Jeffrey and Anderson, Robert (2020), “Contract Design, Default Rules, and Delaware Corporate Law”, 77, 3, Washington and Lee Law Review, pp. 1197- 1267.

133. Markanda, PC (2017), *The Law of Contract Vol. I and II,* LexisNexis, 4th edition.

134. Marotta-Wurgler, Florencia (2011), “Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts””, 78, 1, U. Chi. L. Rev., pp. 165- 186.

135. Maskin, Eric (2006), “Default Rules in Private and Public Law: An Exchange on Penalty Default Rules: on the Rationale for Penalty Default Rules”, 33, 3, Florida State University Law Review, pp. 557- 562;

136. Mathew, Daniel (2014), “Conceptualizing Legal Education in India: Refocusing on Forgotten Stakeholders”, https://ssrn.com/abstract=2479150,

137. McDonnell, Brett H. (2007), “Sticky Defaults and Altering Rules in Corporate Law”, 60, South Methodist University Law Review, pp. 383- 439;

138. Miller, Meredith, R. (2010), “Contract Law, Party Sophistication and the New Formalism”, Missouri Law Review, 75, 2, pp. 493- 536.

139. Miller, Meredith, R. (2013), “Party Sophistication and Value Pluralism in Contract”, Touro Law Review, 29, 3, pp. 659- 679.

140. Michaelsen, Patrick and Sunstein, Cass R (2023), *Default Nudges: From People’s Experiences to Policymaking Implications*, Palgrave Macmillan.

141. Millon, David (1998), "Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security", 146, University of Pennsylvania Law Review, pp. 975- 1041.

142. Minow, Martha (2013), "Archetypal Legal Scholarship: A Field Guide", 63, 1, Journal of Legal Education, pp. 65- 69.

143. Moitra, AC (2012), *The Law of Contract and Specific Relief*, 6th edition.

144. Mustafa, Faizan, Sohi, JS *et al* (2018), "Suggestions for Reforms at the National Law Universities Set Up Through State Legislations", https://ssrn.com/abstract=3171842

145. Nagar, Ranita and Thakker, Hiteshkumar (eds.), *Economic Analysis of Law and Governance*, Eastern Book Company (2022);

146. Nagar, Ranita, Prasad, P. Murali and Mamidi, Pavan (eds.), *Law and Economics: Breaking New Grounds*, Eastern Book Company (2017);

147. KC Gopalakrishnan, *Legal Economics: Interactional Dimensions of Economics and Law* (1st ed. 1998)(2016 Reprint), National Law School of India University: Bar Council of India.

148. Narang, Radhika (2016), "A Study of Contemporary Issues and Challenges faced by India in Investment Treaty Arbitration", Dissertation, National Law University, Delhi, http://14.139.58.147:8080/jspui/bitstream/123456789/205/1/20LLM15.pdf;

149. Newman, Peter (ed.) (1998), *The New Palgrave Dictionary of Economics and the Law*, Palgrave Macmillan.

150. Nirmal, BC, Singh, Rajnish Kumar and Nirmal, Arti (2019), *Legal Research and Methodology: Perspectives, Process and Practice*, Satyam Law International.

151. Nyarko, Julian (2021), "Stickiness and Incomplete Contracts", 88, 1, The U. Chi. L. Rev., pp. 1-79.

152. Pantin, Lynnise (2014-2015), "Deals or No Deals: Integrating Transactional Skills In the First Year Curriculum", 41, Ohio Northern University Law Review, pp. 61- 90.

153. Peden, John R., (1971- 1972), "Goals for Legal Education", Journal of Legal Education, 24, 4, pp. 379-396.

154. Phull, Chetan (2010), "Bridging the Gap Between Indian and North American Legal Education in the Boom of Legal Process Outsourcing", pp. 241-246, https://ssrn.com/abstract=1310005

155. Pietrunko, Stephanie and Richter, Gesa (2019), "The Draft Common Frame of Reference (DCFR) as a Basis for a Modern Codification – The Revised Moldovan Civil Code", 65, 2, OER Osteuropa Recht, pp. 173- 206)

156. Pollock, Sir Fredrick and Mulla, Dinshaw Fardunji (1909), *The Indian Contract Act*, 2nd ed., Sweet and Maxwell Limited,

157. Poppe, Emily S. Taylor (2021), "Choice Building", 63, 1, Arizona Law Review, pp. 103- 155.

158. Porat, Ariel and Strahilevitz, Lior (2014), "Personalizing Default Rules and Disclosure with Big Data", 112, 8, Michigan Law Review, pp. 1417- 1478

159. Posner, Eric (2006), “Default Rules in Private and Public Law: An Exchange On Penalty Default Rules: There Are No Penalty Default Rules in Contract Law”, 33, 3, Florida State University Law Review, pp. 563- 587;

160. Pryles, Michael (2007), “Limits to Party Autonomy in Arbitral Procedure”, 24, 3, Journal of International Arbitration, pp. 327- 339.

161. Rachlinski, Jeffrey J. (2023), “Nudges, Defaults, and the Problem of Constructed Preferences”, 72, 8, Duke Law Journal, pp. 1731-1770.

162. Ramasubramanian, Vigneshwar (2020) Guest Post: Are Standstill / Tolling Agreements recognised in India? (23.11.2020), http://practicalacademic.blogspot.com/2020/11/guest-post-are-standstill-tolling.html

163. Ribstein, Larry E. (2011), “Incorporating the Hendricksons”, 35, 1, Washington University Journal of Law and Policy, pp. 273- 300, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1173andcontext=law_journal_law_policy

164. Riley, CA (2000), “Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency, 20, 3, Oxford Journal of Legal Studies, pp. 367- 390

165. Roy, Tirthankar and Swamy, Anand V (2021), *Law and Economy in Colonial India*, The University of Chicago Press.

166. Sapre, Akshay (2021), *Pollock and Mulla: The Sale of Goods Act*,11th edition, LexisNexis.

167. Saville, Lord Justice (1996), “Departmental Advisory Committee: 1996 Report on the Arbitration Bill”, 13, 3, Arbitration International, pp. 275- 316.

168. Saxena, Namit and Chopra, Sonali (2022), *Pollock and Mulla: The Specific Relief Act, 1963*, 16th edition, Lexis Nexis.

169. Schwartz, Alan and Scott, Robert E. (2003), “Contract Theory and the Limits of Contract Law”, 113, 3, Yale Law Journal, pp. 541-619;

170. Schwartz, Alan and Scott, Robert E. (2016), “The Common Law of Contract and the Default Rule Project”, 102, 6, Virginia Law Review, pp. 1523-1588.

171. Schwartz, Alan (1988), “Proposals for Products Liability Reform: A Theoretical Synthesis”, 97, 3, Yale Law Journal pp. 353- 419;

172. Schwartz, Alan (1992), Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies, 21, 2, Journal of Legal Studies, pp. 271- 318;

173. Schwartz, Alan (1993), “The Default Rule Paradigm and the Limits of Contract Law”, 3, Southern California Interdisciplinary Law Journal, 389-419.

174. Scott, Robert E. and Triantis, George G. (2005), “Symposium: Incomplete Contracts: Judicial Responses, Transactional Planning, and Litigation Strategies: Incomplete Contracts and the Theory of Contract Design”, 56, 1, Case Western Reserve Law Review, pp. 187- 201.

175. Scott, Robert E. (2000), “The Case for Formalism in Relational Contract”, 94, 3, Northwestern University Law Review 847- 876;

176. Scott, Robert E. (2000), “The Uniformity Norm in Commercial Law”, in JODY S. KRAUS and STEVEN D. WALT, THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW, pp. 149-92;

177. Scott, Robert E. (2003), “A Theory of Self-Enforcing Indefinite Agreements, A Theory of Self-Enforcing Indefinite Agreements”, 103, 7, Columbia Law Review, pp. 1641- 1699;

178. Setalvad, Atul (2015), Contracts, in *Halsbury’s Laws of India*, Volume 9, 2nd ed., LexisNexis

179. Seymour, JM and Schwarcz, SL (2021), “Corporate Restructuring under Relative and Absolute Priority Default Rules: A Comparative Assessment”, 2021, 1, University of Illinois Law Review, pp. 1-36.

180. Shelton, Dinah (2021), *Jus Cogens,* Oxford University Press.

181. Smits, Jan M (2017), “What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research”, in van Gestel, Rob, Micklitz, Hans-W. and Rubin, Edward L. (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, New York, pp. 207-228, https://ssrn.com/abstract=2644088

182. Solum, Lawrence (2022), “Legal Theory Lexicon: Default Rules and Completeness” (last updated on 16 January 2022), https://lsolum.typepad.com/legaltheory/2022/01/legal-theory-lexicon-default-rules-and-completeness.html

183. Sood, Mansi (2017), “Legal Education and Its Outcomes: Digging Deeper into the Successes and Failures of India's National Law Schools”, https://ssrn.com/abstract=3062519

184. Srinivasan, Badrinath (2008), “Public Policy and Setting Aside Patently Illegal Arbitral Awards in India”, https://ssrn.com/abstract=1958201

185. Srinivasan, Badrinath (2010), “Trimex v. Vedanta”, The Practical Academic Blog, https://practicalacademic.blogspot.com/2010/03/trimex-v-vedanta_02.html

186. Srinivasan, Badrinath (2012), “Appeal Against the Order of the Chief Justice Under Section 11 of the Arbitration and Conciliation Act, 1996: An Empirical Analysis”, 1, 1, Indian Journal of Arbitration Law, pp. 18-35

187. Srinivasan, Badrinath (2015), “Defective Arbitration Clauses: An Overview”, Indian Institute of Quantity Surveyors Annual Insight, https://www.excelenciaglobal.com/galimg/200320190231571IQS%20Magazine_Final_4.pdf

188. Srinivasan, Badrinath (2017), “Costs Allocation Under the Amended Indian Arbitration Law, https://ssrn.com/abstract=2971999

189. A Critique”, (15.04.2017), Proceedings of the Conference on Dispute Management in Infrastructure Projects: New Challenges, May 19-20, 2017, Vigyan Bhawan, New Delhi, https://ssrn.com/abstract=2971999;

190. Srinivasan, Badrinath (2018), “Substituted Performance in Contract Law: An Analysis”, Proceedings of the 4th International Conference on International and Domestic Arbitration: Current Scenario and Way Ahead, https://ssrn.com/abstract=3274210;

191. Srinivasan, Badrinath (2019), “Can Parties Give Up Limitation by Consent?” (05.03.2019), https://www.linkedin.com/pulse/can-parties-give-up-limitation-consent-badrinath-srinivasan/?trackingId=Lebl8Zq6SjSeSlQrCXD%2BGQ%3D%3D

192. Srinivasan, Badrinath (2021), “The Law on Time as Essence in Construction Contracts: A Critique”, VIII, 1, RGNUL Financial and Mercantile Law Review, pp. 1-36

193. Srinivasan, Badrinath and Yadav, Seema (2022), “Default Rules Theory: Implications on Teaching Contract Law in India”, 9, 2, Asian Journal of Legal Education, pp. 200–215.

194. Srinivasan, Badrinath and Yadav, Seema (2023), “Time as Essence and Liquidated Damages Clauses: A Critique of Welspun Specialty v ONGC”, Australian Journal of Asian Law, 24, 2, pp. 119-126.

195. Srivatsava, Ajendra (2019), “Principal Methodological Approaches to Legal Research”, in, Normal, BC, Singh, Rajnish Kumar and Arti Nirmal, *Legal Research and Methodology: Perspectives, Process and Practice*.

196. Stipanowich, Thomas J. (2001), “Contract and Conflict Management”, 2001 Wisconsin Law Review, pp. 831-917.

197. Storme, Matthias E. (2007), “Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law”, 15, 2, European Review of Private Law, pp. 233- 250.

198. Strine, Jr., Leo E. (2006), “Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America”, 119, Harvard law Review 1759

199. Sukul, Shivankar and Bansal, Devang (2021), “Indus Biotech v. Kotak India Venture - Failed Attempt to Reconcile Insolvency and Arbitration Regime”, 8, 2, GNLU Law Review, pp. 274- 291.

200. Sunstein, Cass R. (1999), “Must Formalism Be Defended Empirically?, 66, 3, U. Chi. L. Rev., pp. 636- 670

201. Sunstein, Cass R. (2016), “The Ethics of Influence: Government in the Age of Behavioral Science”, Cambridge University Press.

202. Swaminathan, Shivprasad (2020), “The Travails of Teaching ‘Offer’ and ‘Acceptance’ in Contract Law”, India Corp Law Blog (20.02.2020), https://indiacorplaw.in/2020/02/the-travails-of-teaching-offer-and-acceptance-in-contract-law.html

203. Taekema, S. (2021), “Methodologies of Rule of Law Research: Why Legal Philosophy Needs Empirical and Doctrinal Scholarship” 40, 1, Law and Philosophy, pp. 33–66, https://doi.org/10.1007/s10982-020-09388-1

204. Terryn, Evelyne (2010), “The Common Frame of Reference: An Optional Instrument?”, https://www.europarl.europa.eu/document/activities/cont/201004/20100430ATT73925/20100430ATT73925EN.pdf (accessed 10.02.2024).

205. Tirole, Jean (1999), Incomplete Contracts: Where do we Stand?, 67, 4, Econometrica, pp. 741-781

206. Tourangeau, Roger (2018), “Choosing a Mode of Survey Data Collection” in Vannette, David L. and Krosnick, Jon A., *Palgrave Handbook of Survey Research*, Palgrave Macmillan.

207. Toussaint, Etienne C. (2023), “The Purpose of Legal Education”, 111, 1, California Law Review, pp. 1-69;

208. Triantis, George G. (1992), “Contractual Allocation of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability”, 42, 4, University of Toronto Law Journal, pp. 450- 483.

209. van Gestel, Rob and Micklitz, Hans-Wolfgang (2014), “Why Methods Matter in European Legal Scholarship”, 20, 3, European Law Journal 292-316

210. Van Hoecke, Mark (ed.) (2010), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline*, Hart Publishing.

211. Vardhan, Yashod R. *et al* (2018), *Pollock and Mulla: The Indian Contract Act 1872 Vol. I and II*, LexisNexis

212. Varghese, John (2010), “Global Legal Education and India- A Blueprint for Raising Indian Legal Education to Global Standards”, https://ssrn.com/abstract=1728451

213. Varottil, Umakanth (2009) “A Cautionary Tale on the Transplant Effect on Indian Corporate Governance”, 21, 1, National Law School of India Review, pp. 1-49

214. Varottil, Umakanth (2011), “Independent Directors and their Constraints in China and India”, 2, Jindal Global Law Review, pp. 127-155;

215. Verma, SK (2017), “Doctrinal Legal Research: Methods and Methodology, in Sinha, Manoj Kumar and Kharb, Deepa (eds.), *Legal Research Methodology*.

216. Vermeule, Adrian (2000), “Interpretive Choice”, 75, New York University Law Review, pp. 74- 149.

217. Villiger, Mark E. (2009), *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff.

218. von Bar, Christian, Clive, Eric and Schulte-Nölk, Hans, *et al* (2009), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__DCFR_.pdf

219. Vranken, JBM (2010) "Methodology of Legal Doctrinal Research", in Hoecke, M. A. A. (Ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline*, pp. 111-121

220. Walt, Steven (2011), "Penalty Clauses and Liquidated Damages", in De Geest, Gerrit (ed.), *Encyclopedia of Law and Economics: Contract Law and Economics*, 2nd ed.,

221. Ware, Stephen J. (1999), "Default Rules from Mandatory Rules: Privatizing Law Through Arbitration", 83, Minnesota Law Review, p. 703.

222. Weidemaier, W. Mark C. (2010), "Toward a Theory of Precedent in Arbitration", 51, 5, William and Mary Law Review, pp. 1895-1958.

223. Weisbord, Reid Kress and Horton, David (2018), "Boilerplate and Default Rules in Wills Law: An Empirical Analysis", 103, 2, Iowa Law Review, pp. 663- 711;

224. Wood, Robert E., Beckmann, Jens F., Birney, Damian P. (2009), "Simulations, Learning and Real World Capabilities", 51, pp. 491-510.

225. Yu-Hsin Lin and Yun-chien Chan (2018), “An Empirical Study of Corporate Default Rules and Menus in China, Hong Kong, and Taiwan”, 15, 4, Journal of Empirical Legal Studies, pp. 875-915

226. Zamir, Eyal (1998), “The Efficiency of Paternalism”, 84, 2, Virginia Law Review, pp. 229- 286;

227. Zamir, Eyal and Medina, Barack (2010), *Law, Economics, And Morality,* Oxford University Press.

228. Zamir, Eyal and Teichman, Doron (2018), *Behavioral Law and Economics,* Oxford University Press.

229. Zamir, Eyal and Ayres, Ian (2020), “A Theory of Mandatory Rules: Typology, Policy and Design”, 99, 2, Texas Law Review, pp. 283- 340.

230. Zamir, Eyal and Katz, Ori (2020), “Do People Like Mandatory Rules? The Impact of Framing and Phrasing”, 45, 4, Law and Social Inquiry, pp. 1052-1092.

231. Zamir, Eyal (2022), “Default Rules: Theoretical Foundations”, in Chen-Wishart, Mindy and Saprai, Prince (eds.), Research Handbook on the Philosophy of Contract Law, Edward Elgar Publishing, https://ssrn.com/abstract=3829366

C. Secondary Sources: Newspaper Reports and Other Materials

1. Rapalje, Stewart and Lawrence, Robert L. (1997) *A Dictionary of American and English Law II*

2. Singh, Manmohan, PM's Inaugural Address at the Conference of National Consultation for Second Generation Reforms in Legal Education (01.05.2010), <https://archivepmo.nic.in/drmanmohansingh/speech-details.php?nodeid=889>

3. Hindustan Copper, Bank Guarantee Format for Performance Guarantee, <https://www.hindustancopper.com/Content/PDF/BG_Format_PBG.pdf>

4. Nikhil Kanekal, Law Education: Islands of Excellence, The Mint (January 13, 2012), https://www.livemint.com/Politics/R3SB5J0qpaL20O78Y3k85K/Law-education-islands-of-excellence.html accessed (30.12.2021);

5. The Economic Times, From 1,095 days to 306: Govt data shows quicker disposal of commercial disputes (22.08.2021), https://economictimes.indiatimes.com/news/india/from-1095-days-to-306-govt-data-shows-quicker-disposal-of-commercial-disputes/articleshow/85533708.cms (accessed 02.01.2023)

6. Mittal, Raman *et al*, Principles of Contract (General Principles) (January 2021), http://lawfaculty.du.ac.in/files/course_material/I_Term/LB%20102%20Law%20of%20Contract.pdf (accessed March 31, 2022);

7. The Business Standard, Time taken to resolve commercial cases in India down nearly 50%: Report 22.08.2022), https://www.business-standard.com/article/current-affairs/time-taken-to-resolve-commercial-cases-in-india-down-nearly-50-report-122082200304_1.html#:~:text=It%20takes%20626%20days%20on,within%20306%20days%2C%20on%20average.

8. Ohri, Ashima (2022), Three Things That Need To Change In The Sphere Of Legal Education In India: Interview with Dr. Ghayur Alam (21.10.2022),

https://bwlegalworld.businessworld.in/article/Three-Things-That-Need-To-Change-In-The-Sphere-Of-Legal-Education-In-India/21-10-2022-451376/

9. Van Dam, Andrew (2023), The Happiest, Least Stressful, most Meaningful Jobs in America, The Washington Post (06.01.2023), https://www.washingtonpost.com/business/2023/01/06/happiest-jobs-on-earth/

10. Kumar, C. Raj (2023), India at 2047: Building the Future of Legal Education and Legal Profession, The Daily Guardian (02.01.2023), http://surl.li/isjrk

Profile of Supervisor

Dr. SEEMA YADAV

Professor (Former)

Address: A-8/302 Gardenia glory Sector 46 Noida (U.P)

Mobile no: 91-9990048429

Email : sy643@rediffmail.com

Objective

To be associated with organisation that gives me the opportunity to apply my knowledge and skills in Law with a challenging career with efficiency.

Summary

A self-motivated professional with almost 10 years of experience in Academics fulfilling the UGC norms for Teaching.

Academic Credentials

- **LLB** from Maharishi Dayanand University, Rohtak in July 2003.
- **LLM** in **Commercial Law** from Kurukshetra University, Kurukshetra in August 2005.
- **UGC NET** Qualified.
- **Ph.D.** from B.P.S. University Khanpur Kalan (Sonepat),Haryana in March ,2017

Professional Experience

ADVOCATE: (Sept. 2005 – Jan 2007)

- One and half years as an independent lawyer in District Court, Bhiwani (Haryana). During this time, I have handled consumer cases, civil cases and negotiable cases.

IMS LAW College, Noida: (July 2007 – March 2013)

- ~6 years in Academics. The subjects taken for teaching are: Law of Tort, Consumer Protection, Professional Ethics, Administrative Law, Arbitration and Conciliation, Contract, Sales and Goods Act, Partnership Act.

- Organized seminars on Arbitration, Women and Law and Media and Law.

- As Class In-charge, managed the attendance and progress report of the class.

- Setting of the question papers for internal examinations and evaluations of answer sheets.

- Invigilation during internal and external examination in Institution.

- Organized visits for students to Cyber Appellate Tribunal, Parliament, Supreme Court, High Court Delhi, Lok Adalats.

- Organized Excursion Trips.

- Organized Moot Court Competition on hypothetical Facts.

- Organized Educational programmes like Quiz, Encounter Legal Programme.

- Participation in Faculty Development Programme.

- Coordination and Logistic Arrangements for Academic Events like Law advisory Committee meets, Workshops, Orientation.

- Organized Legal Aid and Awareness Programmes for students.

- Knowledge of Computer Usage.

IPEM College, Ghaziabad: (July 2013 – May 2016)

- Handling of all administrative(HOD) and academic activities in the department for **LL.B. (3 year)** and **B.A., LL.B**.

- Organized visits for students to Cyber Appellate Tribunal, Parliament, Supreme Court, High Court Delhi, Lok Adalats.

- Initiation of Law Advisory Committee and successfully co-ordinated its annual meetings.

- Worked as Coordinator for NAAC Peer Team.

IMS LAW College, Noida: (April 2017 – June 2017)

Galgotias University ,Greater Noida: (June 2017 – April 2023)

Publication

Published following articles in the college magazine:

- Article on "Present Scenario of Lok Adalat in India", Research Discourse-An International Refereed Research Journal, July-Sep 2013 ISSN-2277-2014.

- Article on "Freedom of Speech and Expression", JOURNAL OF IPEM, JANUARY-JUNE 2014, ISSN 0974-8903

- National Seminar on "Justice Delayed Justice Denied", Organised by IPEM Law Academy, 22March 2009.

- Attended a Workshop on "International Business Etiquette" Organised by Sri Sanskar School of Etiquette and career Development, 25th Nov, 2011.

- Organised National Law seminar on " Women and law: Emerging Trends in 21st Century" on 16th April,2011 by IMS Law College Noida

- Attended a Workshop on Contract Labour Organised by Noida Management Association, 13th Dec 2012.

- Attended and Paper Presented "Private insurance companies : Issues and challenges" Organised by Reliable Institute of Management and Technology on Development of life Insurance sector in globalies Era: Issues and Challenges on 11th -12th January, 2014.

- Paper presentation, National Seminar on "Sensitization on Gender issues to Curb the Growing Violence against Women" organised by Bhagat Phool Singh Mahila Vishwavidyalya, Sonipat on 24- 25th March, 2015.

- Paper presentation, National Seminar on "Consumer Welfare: Issues, Challenges and Opportunities" topic "Consumer Welfare Statutes in India" Organised by MMH GZB, on 16th Dec., 2016.

- Paper presentation, National Seminar on "Impact of Terrorism on International Relations: A legal Insight", Paper entitled Effect of Terrorism in India", Organised by Ideal Institute of Management and Technology and School of Law on 21th January., 2017.

- Organized and Paper presentation, National Seminar on "Food Governance: Efficacy of Existing Legal Regime", topic "Analytical Study of Food Safetyand Security Laws in India", Organised by IMS Noida on11th May, 2017.

- FDP on "Innovation Teaching learning Methods and Research in Law" organized by school of law, Sharda University from 29th May- 2nd June,2017.

- Paper presentation, 2nd International Conference on " Contemporary Legal Issues ", topic "Analysis the Arbitration and Conciliation Act, 1996 with reference to 2015 Amendment" , conducted by School of Law , Galgotias University, Noida on March 24, 2018. (ISBN: 78-3-8710-06-5,Book Code:5151)

- Paper presentation, National seminar on " Emerging Trends of Alternative Dispute Resolution in India ", topic "Alternative Dispute Resolution in India :Various Legislations " , conducted by Faculty Law, Jamia Millia Islamia, New Delhi on October 9, 2018

- Resource Person for National Youth conference on "Alternative Dispute Resolution Mechanisms" held on 13th January'2019 organized by Spectrum , Delhi based NGO.

- Attended 7 Days Workshop on "Contemporary Research Methodology andInnovative Pedagogical Tools" Organised by Galgotias University, Noida, 17th January to 23rd January, 2019.

- Resource Person for International Seminar on "Criminal Law and Adminstration of Criminal Justice System; National and International Commitments" held on 10th March '2019 organized by Babu Banarsi Das University, Lucknow.

- Organized and Paper presentation, 3rd International Conference on " Contemporary Legal Issues ", topic "Origin and Development of Arbitration in India" , conducted by School of Law , Galgotias University, Noida on March 9, 2019. (ISBN: 78-3-8710-06-5,Book Code:5151)
- Research paper on "Media Trial effects upon Human rights and Judiciary" WWJMRD 2019; 5(7): 18-22,E-ISSN: 2454-6615
- Attended 40 Hours of Integrated Certificate in **Mediation"on "Mediation" Conducted by Indian Law Institute** , Delhi, 22nd to 24 Novemberand 6th to 8th December 2019.
- Participated in 5th National FDP on Interdisciplinary Teaching: Innovation and Development organized by GSOL from 16th Jan- 22 January 2020.
- Participated in 7 Days FDP organized by GSOL on "Contemporary Research methodology and Innovative Pedagogical tools" from 17th -23rd January 2019.
- 8 days Training Programme on Outcome Based Education, 13-20 December, 2017.
- 7 (seven) days Faculty Development Programme on Understanding Contemporary Legal Issues and Challenges in India, 26th December 2017- 1st January 2018.
- 7 Days Faculty Development Programme (FDP) on Contemporary Research Methodology and Innovative Pedagogical Tools, 17th to 23rd January 2019.
- **Publication under Scopus** "Commercial Mediation: with special reference to India", Journal of advance Research in Dynamical and control system (JARDCS),ISSN 1943-023X Volume 12 under 07 Special Issue Page:2410-2416 DOI:10.5373/JARDCS/VI12SP7/20202370

- Research Paper on "Default, mandatory and altering rules in law: An Indian perspective", Company law Journal 2021 Vol. III, Issue 27, July2021 Page Nos. 1-9, ISSN - ISSN 0 010-4019

- **Publication under Scopus** "Default Rules Theory: Implications on Teaching Contract Law in India" Asian Journal of Legal Education 1–16 © 2022 The West Bengal National University of Juridical Sciences Reprints and permissions:in.sagepub.com/journals-permissions-india DOI: 10.1177/23220058221099820 journals.sagepub.com/home/ale.

- **Publication under Scopus** "Literature Paving the Way for Law: ADR as an Idea in Munshi Premchand's Panch Parmeshwar" Journal of Positive School Psychology http://journalppw.com 2022, Vol.6, No.4, 1929-1937

- Research Paper on "Surrogacy in India : Comparative Analysis of Surrogacy (Regulation) bill 2019 and 2020", SHODH SARITA Vol. 7, Issue 27, July-September, 2020 Page Nos. 82-86, ISSN - 2348-2397

- **Publication under Scopus** "Time as Essence and Liquidated Damages Clauses: A Critique of Welspun Specialty" Australian Journal of Asian Law 1839-4191

- **Research Paper on** "THE FUTURE OF EUROPEAN REFUGEES BETWEEN CLIMATE CHANGE AND EUROPE'S CLOSING DOOR POLICIES; AN ANALYTICAL STUDY" SHODH PRABHA Vol. 48, Issue-3 (July-September) 2023 ISSN: 0974-8946) A REFERRED and PEER-REVIEWED QUARTERLY RESEARCH JOURNAL
- **Research Paper on** "THE EUROPEAN UNION REFUGEE CRISIS; APOSING THREATS THREAT TOEUROPEAN NATIVES." SHODH PRABHA Vol. 47, Issue-4 (October - December) 2022 ISSN : 0974-8946

- **Research Paper on** "THE CONTEMPORARY STATUS OF REFUGEE WOMEN IN EUROPEAN UNION: AN ANALYTICAL STUDY" NIU International Journal of Human Rights ISSN: 2394 – 0298 Volume 10, (III) 2023

Personal Details

Gender	:	Female
Date of Birth	:	1st August 1980
Nationality	:	Indian
Marital status	:	Married
Languages	:	Can speak, read and write English and Hindi

Profile of Candidate

S. Badrinath, LL.M., CIPPE/E, F.I.I.I., M.C.I.Arb.

WORK EXPERIENCE

Directorate General of Hydrocarbons, Government of India (July 2019- till date)
(on deputation from **Bharat Petroleum Corporation Limited**)
Current Position: Senior Manager (Legal)
Industry: Upstream Petroleum Regulator/ Advisor
Practice Areas: International Commercial Litigation and Arbitration, Drafting/ Vetting International and Domestic Contracts, Sexual Harassment Laws and Legal Advice.

Bharat Petroleum Corporation Limited, Noida (March 2019-June 2019)
Last Position: Manager (Legal)
Industry: Downstream Petroleum
Practice Areas: Commercial Litigation and Arbitration, Drafting/ Vetting Contracts, Legal Advice, and Legal Compliances.

Bharat Heavy Electricals Limited, Ranipet (November 2010- February 2019)
Last Position: Senior Executive (Law)
Industry: Manufacturing, Power and Renewables
Practice Areas: Commercial and Construction Litigation and Arbitration, Labour and Service Litigation, Drafting/ Vetting Contracts, Legal Advice, and Legal Compliances.

Gujarat State Petroleum Corporation Group, Gujarat (June 2008 – November 2010)
Last Position: Senior Officer (Secretarial and Legal Department.)
Industry: Upstream Petroleum
Practice Areas: International Commercial and Domestic Arbitration, Commercial Litigation, Drafting/ Vetting International / Domestic Contracts, and Legal Compliances.

INSTITUTIONAL MEMBERSHIP/ EDUCATIONAL QUALIFICATIONS

- Pursuing PhD (Law) from Galgotias University, Greater Noida (since 2020)
- Member, International Association of Privacy Professionals (CIPP/E)
- Member, Association of Association of International Energy Negotiators (*formerly* Association of International Petroleum Negotiators)
- Member, Chartered Institute of Arbitrators, U.K

- Fellow, Insurance Institute of India, Mumbai
- Certificate in Insolvency and Bankruptcy Laws and Procedure, Indian Institute of Corporate Affairs, 2021
- UGC- National Eligibility Test (Law), December 2009
- LL.M., WB National University of Juridical Sciences, India, 2008 (Gold Medal)
- B.A. (Law), LL.B., S.D.M. Law College, Mangalore, 2006, India (Gold Medal)

PUBLICATIONS (ILLUSTRATIVE- SEE ANNEXURE)

- Energy Law as an Area of Law in India, RGNUL Students Research Review, Volume 9, Issue 1, 50-93 (2023), ISSN(O): 2349-8293.Default Rules Theory: Implications on Teaching Contract Law in India (lead author), Asian Journal of Legal Education (Scopus), 9(2) 200–215, 2022
- Mediating Government Disputes (lead author) in, Gracious Timothy Dunna, Mediation and Conciliation in India, Kluwer Law International (2021)(ISBN 9789403520155)
- Law on Time as Essence in Construction Contracts: A Critique, RGNUL Financial and Mercantile Law Review, Volume 8, Issue 1 (2021).
- Take of Pay Clauses in Fuel Supply Agreements in India: An Overview, Dr. Ram Manohar Lohiya National Law University Journal, Volume 12 (2020)
- Arbitrability of Intellectual Property Disputes in India: A Critique, NLS Business Law Review, Volume 6, p. 29-60 (2020)
- Start-ups and International Dispute Resolution: Challenges and Possible Solutions, in, Franco Giovanni Mattedi Maziero, International Arbitration in the Age of the Technological Revolution (2020), ISBN: 978-65-5510-130-0
- Hardship and Substituted Performance Defences against Specific Performance: Critique of the Recent Developments, 31 National Law School of India Review 53-71 (2019)
- Enforceability of S. 17 of the Arbitration and Conciliation Act, 1996: A Reply, (2016) 5 Supreme Court Cases J-16
- UNCITRAL Arbitration Rules, Comment on Certain Revisions, Indian Journal of Arbitration Law, Vol. 2, Issue 2 (2013).
- Appeal against the Order of the Chief Justice under Section 11 of the Arbitration and Conciliation Act, 1996: An Empirical Analysis, Indian Journal of Arbitration Law, Vol. 1, Issue 1, p. 21-40 (2012).
- Arbitration and the Supreme Court: A Tale of Discordance between the Text and Judicial Determination, National University of Juridical Science Law Review, Vol. 4, p. 639, 2011.

CONFERENCE PAPERS PRESENTED (ILLUSTRATIVE- SEE ANNEXURE)

- "Substituted Performance in Contract Law: An Analysis" 4th International Conference on International and Domestic Arbitration: Current Scenario and Way Ahead, Chennai, 26-27 October 2018.
- "Costs Allocation Under the Amended Indian Arbitration Law: A Critique", National Conference on Dispute Management in Infrastructure Projects: New Challenges, May 19-20, 2017, Vigyan Bhawan, New Delhi
- "Developing India as a Hub of International Arbitration: A Misplaced Dream?", International Conference on Challenges in Domestic and International Arbitration, Chennai, 23-24 September 2016.

GUEST/ VISITING FACULTY (ILLUSTRATIVE)

- **Manipal Law School** (August 2023): Advanced Certificate in Dispute avoidance and Claims management
- **EBC Learning** (Jan 2023): Contract Drafting: Diploma in Advanced Corporate Law
- **Introduction to Law for Construction Managers**, Indian Institute of Technology, Kanpur (December 2021)
- **Tamil Nadu National Law School, Trichy, India (**20-22 October 2019**)**
  Law and Practice of Public Procurement: An Overview (One Credit Course)
- **EBC Learning** (2018): Course: Contract Drafting Essentials
- **Tamil Nadu National Law School, Trichy, India (**21-23 July and 2-3 September 2017**)**
  Introduction to Contract Drafting (One Credit Course)
- **School of Law, Pondicherry University, Puducherry, India** (February 2015-2016)
  International Commercial Arbitration, Comparative Contract Law, Trademark Law

PERSONAL INFORMATION

- Age and Date of Birth: 39 years and 05.06.1984
- Languages Known: English and Tamil (Read, write and speak), Hindi (Read and write).

Annexure to Profile of Candidate
List of Publications

S. No.	Particulars	Number
1.	Book Chapter	02
2.	Journal/ Law Review	26
3.	Conference Papers Presented/ Published	05
	Total	**33**

1. Energy Law as an Area of Law in India, RGNUL Students Research Review, Volume 9, Issue 1, 50-93 (2023), ISSN(O): 2349-8293.

2. Case Note: Time as Essence and Liquidated Damages Clauses: A Critique of Welspun Specialty v ONGC (lead author in co-authored paper), Australian Journal of Asian Law, 24, 2, pp. 119- 126, 2024 (Scopus indexed)

3. Default Rules Theory: Implications on Teaching Contract Law in India (lead author in co-authored paper), Asian Journal of Legal Education 9(2) 200–215, 2022, ISSN: 1839-4191 (Scopus Indexed)

4. Default, Mandatory and Altering Rules in Law: An Indian Perspective (lead author in co-authored paper), Company Law Journal, July 2021, ISSN: 0010-4019

5. Mediating Government Disputes (lead author in co-authored chapter) in, Gracious Timothy Dunna, Mediation and Conciliation in India, Kluwer Law International (2021)(ISBN 9789403520155)

6. Law on Time as Essence in Construction Contracts: A Critique, RGNUL Financial and Mercantile Law Review, Volume 8, Issue 1 (2021)(p. 1-36)

7. Take or Pay Clauses in Fuel Supply Agreements in India: An Overview, Dr. Ram Manohar Lohiya National Law University Journal, Volume 12, ISSN: 0975 – 9549

8. Arbitrability of Intellectual Property Disputes in India: A Critique, 6 NLS Business Law Review 29-60 (2020), ISSN: 2456-1010

9. Start-ups and International Dispute Resolution: Challenges and Possible Solutions, in, Franco Giovanni Mattedi Maziero, International Arbitration in the Age of the Technological Revolution (2020), (ISBN 978-65-5510-130-0)

- Hardship and Substituted Performance as Defences Against Specific Performance: Critique of the Recent Developments 31 National Law School of India Review 53-71, 2019: ISSN No. 0972-6543 (cited in Pollock and Mulla's Commentary on Specific Relief Act, 1963)

10. Substituted Performance in Contract Law: An Analysis, Proceedings of the 4th International Conference on International and Domestic Arbitration: Current Scenario and Way Ahead (2018)

11. Costs Allocation Under the Amended Indian Arbitration Law: A Critique, Proceedings of the Conference on Dispute Management in Infrastructure Projects: New Challenges, May 19-20, 2017, Vigyan Bhawan, New Delhi

12. Is Stamp Duty Payable for Work Orders?, Current Tamil Nadu Cases, 2016 (6) CTC 111-113 (Journal Section)

13. Failures in Law Making: The Case of Arbitration Law in India, National Seminar on Law and Practice of Arbitration in India as per the Amended Law, Indian Institute of Technical Arbitrators, Kolkata Chapter, 9th December 2016

14. Developing India as a Hub of International Arbitration: A Misplaced Dream?, International Conference on Challenges in Domestic and international Arbitration (Chennai, 23-24 September 2016)

15. LL.M. in India: A Critical Review, Proceedings of the National Conference on Contemporary Legal Education in the Globalized World, The Central Law College, Salem (17 and 18 September 2017)(ISBN 978-93-5265-308-9)

16. Enforceability of Orders Under Section 17 of the Arbitration and Conciliation Act, 1996: A Reply, (2016) 5 Supreme Court Cases J-16

17. Defective Arbitration Clauses: An Overview, Indian Institute of Quantity Surveyors Annual Insight 2015, p. 52-53

18. Case Comment: South Delhi Municipal Corporation v. Radhey Shyam, Journal of Law and Public Policy, Volume II, Issue 1, pp. 255-264 (lead author in co-authored paper), ISSN 2394-2657

19. Supreme Court Upholds Arbitration Clause Referring to Non-Existent Arbitration Rules, SEBI and Corporate Laws, [2015] 130 SCL 11 (Mag.)

20. Is the Arbitrator Obligated to Frame Issues?, Current Tamil Nadu Cases, Volume 20, Issue 36, Journal Section, pp. 162-167

21. Anugraha Engineers and Contractors V. Union of India, 2014 (3) CTC 116: A Critique, Current Tamil Nadu Cases, Journal Section, Issue 3, 2014, pp. 133-138

22. Appointment of Arbitrators by the Designate Under the Arbitration and Conciliation Act: A Critique, Economic and Political Weekly, Vol. XLIX, No. 18, May 2014, ISSN No. 0012-9976

23. Setting Aside Foreign Seated Arbitral Awards: Indian Supreme Court Introspects, Kathmandu School of Law Review, Volume 2, Issue 1, pp. 191-206, 2013, ISSN No. 2091-2110

24. UNCITRAL Arbitration Rules, 2010: Comment on Certain Revisions, Indian Journal of Arbitration Law, Volume 2, Issue 2 (2013), ISSN No. 2320-2823

25. Liberal Approach in Construing Arbitration Clauses: Comment on the Louis Dreyfus Case, ICA Arbitration Quarterly, Vol. 178 (July-September, 2013)

26. Registration of Factory of a Public Sector Undertaking Under the Contract Labour (Regulation and Abolition) Act, 1970, Labour Law Notes, Vol. 42, Issue No. 5, pp. 49-52, May 2013

27. UNCITRAL Arbitration Rules: A Review, Christ University Law Journal, Volume 2, Issue 1, pp. 117-152 (2013), ISSN No. 2278-4322

28. Case Comment: Undue Delay in Passing Arbitral Award as a Ground for Challenge?, International Journal of Law and Policy Review, Volume 2, Issue 1, pp. 185- 195, January 2013, ISSN No. 2278-3156

29. Appeal Against the Order of the Chief Justice Under Section 11 of the Arbitration and Conciliation Act, 1996: An Empirical Analysis, Indian Journal of Arbitration Law, Volume 1, Issue 1, pp. 21-40, ISSN No. 2320-2823

30. Formation of Contract Through Emails in India: A Case Comment on Trimex v. Vedanta, Corporate Professionals Today, March 2011, ISSN 0975-9948

31. Scope of Power to Grant Interim Measures Against Third Parties Under the Arbitration and Conciliation Act, 1996, (2011) Practical Lawyer November S-15

32. Arbitration and the Supreme Court: A Tale of Discordance between the Text and Judicial Determination, National University of Juridical Science Law Review, Vol. 4, p. 639, 2011, ISSN No. 0975 - 0029

List of Publications

As a part of the PhD, the following works were published:

1. Srinivasan, Badrinath and Yadav, Seema (2021), “Default, Mandatory and Altering Rules in Law: An Indian Perspective”, Company Law Journal, July 2021.

2. Srinivasan, Badrinath and Yadav, Seema (2022), “Default Rules Theory: Implications on Teaching Contract Law in India”, 9, 2, Asian Journal of Legal Education, pp. 200–215. (Scopus)

3. Srinivasan, Badrinath and Yadav, Seema (2023), “Time as Essence and Liquidated Damages Clauses: A Critique of Welspun Specialty v ONGC”, Australian Journal of Asian Law, 24, 2, pp. 119-126 (Scopus).