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Unconscionability and Impracticability: Reflections on Two U.C.C. Indeterminacy Principles

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I. INTRODUCTION

In *The House at Pooh Corner*, Rabbit says of Owl, “[Y]ou can’t help respecting [some]body who can spell TUESDAY, even if he doesn’t spell it right”¹ While I would not go so far as to say that one should respect someone who can spell both “unconscionability” and “impracticability” and get their spellings right, I might go so far as to say that one should respect someone who can use both doctrines and use them correctly. Although Article 2 of the Uniform Commercial Code (“U.C.C.”) includes provisions covering both unconscionability² and impracticability,³ these provisions are not exactly blinding in their clarity.

This Article first briefly describes the analytical framework applied in Article 2 unconscionability cases. It demonstrates that a judicial determination of unconscionability is the product of a two-pronged analysis. The first prong of the analysis, usually referred to as “procedural unconscionability,”⁴ focuses on the contractual bargaining process to determine whether that process has been tainted by “bargaining naughtiness.”⁵ The second prong of the analysis, usually referred to as “substantive unconscionability,”⁶ focuses on the fairness of the actual terms of the contract. The Article will show that despite this analytical framework, unconscionability is an Article 2 doctrine that is essentially indeterminate in definition. The flexibility of unconscionability allows a court to excuse contractual performance when-

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1. A.A. MILNE, *THE HOUSE AT POOH CORNER* 76 (1928).

2. U.C.C. § 2-302 (1990). See also U.C.C. section 2A-108 (1990) for a similar provision on unconscionability that applies to leases of goods.

3. *Id.* § 2-615 (1990).

4. Arthur A. Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

5. *Id.*

6. *Id.* at 509.

ever, in its view, continued performance would be unfair or inequitable.

This Article next demonstrates that impracticability is likewise a doctrine that is essentially indeterminate in definition. The product of a two-pronged analysis not unlike the procedural-substantive analysis for unconscionability, impracticability also allows courts to excuse performance on the grounds of fairness and equity.

Finally, this Article concludes that even though unconscionability and impracticability are both indeterminate in definition, courts are far more willing to excuse performance on the ground of unconscionability than on the ground of impracticability, due mainly to the status of the parties seeking excuse in each case.

II. UNCONSCIONABILITY

A. Overview

The amount of scholarly literature in the United States on the topic of unconscionability is enormous.⁷ In a short reflective piece such as this, no attempt will be made to review this literature. Rather, knowledge of its contents will be assumed in the subsequent discussion.

U.C.C. section 2-302 is the Article 2 provision on unconscionability. It reads:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making

7. See, e.g., William B. Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967); M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); E. Alan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); Bruce W. Frier, *One Hundred Years of Uniform State Laws: Interpreting Codes*, 89 MICH. L. REV. 2201 (1991); Leff, *supra* note 4, at 485; Gerald T. McLaughlin & Neil B. Cohen, *Unconscionability and Consequential Damages*, N.Y. L.J., Jan. 15, 1992, at 3; Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI-KENT L. REV. 199 (1985); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

the determination.⁸

Section 2-302 tells us several things about the doctrine of unconscionability. First, section 2-302(1) demonstrates that unconscionability must exist at the time the contract for sale is made, not at some later time.⁹ Consequently, if a contract for sale is found to be fair and balanced at the time the contract is entered into, it will not be considered unconscionable, even if at the time of performance the contract is found to be unfair and unbalanced.¹⁰

Second, section 2-302(1) states that unconscionability must be found by the court "as a matter of law."¹¹ Unlike questions of good faith,¹² unconscionability is not a question of fact to be decided by a jury. Therefore, since unconscionability is a question of law, an appellate court can review a trial court's conclusion of unconscionability *de novo*,¹³ while a jury determination on the question would normally be respected. Reserving the question of unconscionability for court determination emphasizes the equitable origins of the doctrine of unconscionability.¹⁴

Third, section 2-302(2) provides that a court can raise the issue of unconscionability *sua sponte*.¹⁵ Specifically, the section states that "[w]hen [unconscionability] is claimed or *appears to the court*," the parties shall be afforded an opportunity to present evidence to aid the court in making its ultimate determination.¹⁶ Again, the flexibility

8. U.C.C. § 2-302.

9. *See id.* § 2-302(1).

10. In contrast, U.C.C. section 1-203, which governs the doctrine of good faith, provides that "every [U.C.C.] contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1990). Therefore, if a contract for the sale of goods is challenged on the ground that a seller or buyer acted in bad faith, the alleged bad faith must have existed at the time the sale contract was performed or enforced, not at the time the contract was signed. Thus, events that occur after a contract is made are relevant for the purpose of a good faith analysis, but irrelevant for the purpose of an unconscionability analysis. *Glopak Corp. v. United States*, 851 F.2d 334 (Fed. Cir. 1988); *see also* Ellinghaus, *supra* note 7, at 803.

11. U.C.C. § 2-302(1).

12. *See id.* § 1-203.

13. *See* ROBERT A. HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE U.C.C. ¶ 6.02(2)(d)(ii) n.11 (1985).

14. *Id.*

15. *See* U.C.C. § 2-302(2); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4-3, at 185 (3d ed. 1988). "*Sua sponte*" means that a court can raise the issue of unconscionability by its own will, without the motion of a party to the suit. BLACK'S LAW DICTIONARY 1424 (6th ed. 1990).

16. U.C.C. § 2-302(2) (emphasis added).

given courts in raising the question of unconscionability reflects its equitable origins.

Fourth, as mentioned above, section 2-302(2) requires that a court allow the parties to present evidence regarding the commercial setting, purpose, and effect of a contract in order to aid the court in determining whether unconscionability exists.¹⁷ This commercial evidence can give needed context to business practices that might otherwise appear harsh. For example, a price term in a contract for sale may appear excessive when viewed in isolation. A seller of goods, however, may be able to show that unusually high manufacturing or production costs justified the high price term in the sale contract.

Finally, section 2-302 gives a court a wide range of remedial options once it finds unconscionability. The court "may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."¹⁸ Courts that have construed this language have ruled that the section does not permit an award of money damages upon a finding of unconscionability.¹⁹ A court's inability to award money damages when a sale contract is held unconscionable leads to anomalous results. For example, if a party tries to enjoin enforcement of a letter of credit contract based on fraud, U.C.C. section 5-114(2) and its accompanying case law require the party to first prove that without an injunction the party will be irreparably injured by the letter of credit payment.²⁰ This usually requires the party seeking the injunction to prove that an award of money damages would not adequately remedy

17. *Id.* In this sense, U.C.C. section 2-302(2) seems to further one of the underlying policies of the U.C.C.: to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties. *See id.* § 1-102(2) (1990). If the commercial setting of a contractual term can be used to rebut an unconscionability challenge, permitting the use of such evidence in this context furthers the significance and importance of commercial practices as found in custom, usage, and agreement of the parties. Case law has held, however, that U.C.C. section 2-302(2) does not require a formal hearing on the question of unconscionability, so long as the necessary commercial evidence is in the record. *See, e.g., Golden Reward Mining Co. v. Jervis B. Well Co.*, 772 F. Supp. 1118 (D.S.D. 1991).

18. U.C.C. § 2-302(1).

19. *See, e.g., Galvin v. First Nat'l Monetary Corp.*, 624 F. Supp. 154 (E.D.N.Y. 1985); *Barco Auto Leasing Corp. v. PSI Cosmetics, Inc.*, 478 N.Y.S.2d 505 (App. Div. 1984).

20. *See* U.C.C. § 5-114(2) (1990); *see, e.g., Foxboro Co. v. Arabian Am. Oil Co.*, 805 F.2d 34 (1st Cir. 1986); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982); *Itek Corp. v. First Nat'l Bank*, 511 F. Supp. 1341 (D. Mass. 1981), *vacated*, 704 F.2d 1 (1st Cir. 1983), *on remand*, 566 F. Supp. 1210 (D. Mass. 1983), *aff'd*, 708 F.2d 19 (1st Cir. 1984).

the party's grievance.²¹ Since money damages will remedy most commercial contract-related grievances, the overwhelming majority of parties seeking injunctive relief under section 5-114(2) will fail to satisfy this irreparable injury requirement, and thus will not be awarded injunctions. However, if a party tries to convince a court to refuse to enforce a contract based on unconscionability, the section 2-302 judicial prohibition on awarding money damages effectively frees a party from satisfying the irreparable injury requirement. Therefore, if a party simply proves unconscionability by a preponderance of the evidence, a court has the power to refuse to enforce the tainted contract. The case law construing section 2-302 seems to require this result,²² although this may not have been the result intended by the U.C.C. drafters.

By now, however, one thing should be obvious. While section 2-302 reveals much about the clothing of unconscionability, it reveals little about the nature of the doctrine beneath that clothing. Section 2-302 does not contain a definition, or even a standard, to determine whether the terms of a contract are in fact unconscionable. In the Official Comments to section 2-302, the drafters did provide some guidance as to the nature of unconscionability, but even here the guidance is less than optimal. For example, Official Comment 1 states that the principle underlying unconscionability is "the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."²³ At another place in Official Comment 1, the drafters describe the "basic test" of unconscionability as whether the clauses are "so one-sided" as to be unconscionable.²⁴ In a third place, the drafters state that the underlying basis of U.C.C. section 2-302 is illustrated by the results in ten English and United States cases, mainly from the 1920s and 1930s.²⁵

21. See, e.g., *Sperry Int'l Trade, Inc. v. Israel*, 670 F.2d 8 (9th Cir. 1982); *Interco, Inc. v. First Nat'l Bank of Boston*, 560 F.2d 480 (9th Cir. 1977); *Shaffer v. Brooklyn Park Garden Apartments*, 250 N.W.2d 172 (Minn. 1977).

22. See, e.g., *Galvin*, 624 F. Supp. at 158 (stating that U.C.C. section 2-302 "merely gives the court the right of refusal to enforce an unconscionable contract. It makes no provision for damages, and none may be recovered thereunder.").

23. U.C.C. § 2-302 cmt. 1.

24. *Id.* Official Comment 1 states, "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." *Id.*

25. *Id.* (citing and discussing *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, 73 P.2d 1272 (Utah 1937); *Hardy v. General Motors Acceptance Corp.*, 144 S.E. 327 (Ga. Ct. App. 1928); *Andrews Bros. v. Singer & Co.*, [1934] 1 K.B. 17 (Eng.); *New Prague*

None of these explications, however, is particularly helpful in predicting the outcome of cases in which parties seek to be excused on the ground of unconscionability.

After reviewing section 2-302 and its Official Comments, it is evident that the drafters never intended to provide a definition of unconscionability. To the contrary, they wished to leave the doctrine of unconscionability essentially indeterminate—something to be defined in the context of each case.²⁶

B. *The Two-Pronged Analysis of Unconscionability*

If the drafters of the U.C.C. left the definition of unconscionability indeterminate, scholarly literature has at least provided an analytical framework to assist in applying unconscionability. Perhaps the most influential discussion of unconscionability is found in an article written by Professor Arthur Leff of Yale Law School, entitled *Unconscionability and the Code—The Emperor's New Clause*.²⁷ Leff interprets U.C.C. section 2-302 unconscionability as comprising two distinct components.

1. The First Prong: Procedural Unconscionability

The first prong of unconscionability analysis, referred to as “procedural unconscionability,” deals with what Leff calls “bargaining naughtiness.”²⁸ To determine whether procedural unconscionability exists, a court should consider various factors, including (1) the age, literacy, and business sophistication of the party claiming unconscionability (usually the buyer); (2) the bargaining tactics of the other party to the contract (usually the seller); and (3) the commercial setting of the sales contract, particularly whether the buyer could have obtained the goods from an alternative source.²⁹ Textual support for “procedural unconscionability” can be found in the Official Com-

Flouring Mill Co. v. G.A. Spears, 189 N.W. 815 (Iowa 1922); Kansas Flour Mills Co. v. Dirks, 164 P. 273 (Kan. 1917); Green v. Arcos, Ltd. [1931] 47 T.L.R. 336 (Eng.); Meyer v. Packard Cleveland Motor Co., 140 N.E. 118 (Ohio 1922); Austin Co. v. J.H. Tillman Co., 209 P. 131 (Or. 1922); Bekkevold v. Potts, 216 N.W. 790 (Minn. 1927); Robert A. Munroe & Co. v. Meyer, [1930] 2 K.B. 312 (Eng.) (cases listed in order of Official Comment discussion).

26. Indeed, some commentators argue that it is not even possible to define unconscionability because “[i]t is *not a concept but a determination* to be made in light of a variety of factors not unifiable into a formula.” WHITE & SUMMERS, *supra* note 15, § 4-3, at 186 (emphasis added).

27. Leff, *supra* note 4, at 485.

28. *Id.* at 487.

29. See HILLMAN ET AL., *supra* note 13, ¶ 6.02(2)(d)(iii).

ment's phrase "unfair surprise."³⁰ If age or literacy precludes a buyer from giving meaningful assent to the terms of a sale contract, then it is fair to conclude that the buyer will be unfairly surprised by the terms of that contract. Similarly, if a seller's boilerplate language is so deceptive or convoluted that it prevents a buyer from meaningfully assenting to the terms of the contract, then again it is fair to conclude that the buyer will be unfairly surprised.

2. The Second Prong: Substantive Unconscionability

The second prong of unconscionability analysis identified by Leff is "substantive unconscionability."³¹ Substantive unconscionability examines the nature of the terms that result from the bargaining process.³² Textual support for this second component is rooted in the words "oppression" and "one-sided" found in Official Comment 1 to U.C.C. section 2-302.³³ Most courts find excessively high prices and unfair remedy terms, including broad disclaimer of warranty provisions, substantively unconscionable because they are harsh and oppressive to buyers.³⁴

3. The Indeterminate Nature of the Two-Pronged Analysis

It is important to remember that this two-pronged analytical framework for unconscionability is just that—an analytical framework. It does not, and indeed cannot, substitute for a definition of unconscionability. In fact, the two prongs—procedural unconscionability and substantive unconscionability—are themselves indeterminate. For example, the existing case law on procedural unconscionability has not catalogued the factors that must be considered before a court will find "bargaining naughtiness."³⁵ Even when

30. U.C.C. § 2-302 cmt. 1; see Davenport, *supra* note 7, at 138.

31. Leff, *supra* note 4, at 509.

32. *Id.*

33. U.C.C. § 2-302 cmt. 1; 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-302:04 (1982 & 1992 Supp.).

34. See, e.g., Esquire Mobile Homes, Inc. v. Arrendale, 356 S.E.2d 250 (Ga. App. Ct. 1987) (disclaimer of warranties); Zepp v. Mayor & Council of Athens, 348 S.E.2d 674 (Ga. App. Ct. 1986) (excessively high prices); First Sec. Bank of Idaho, N.A. v. Mountain View Equip. Co., 730 P.2d 1078 (Idaho App. Ct. 1986) (waiver clause in guarantee agreement); Northwest Acceptance Corp. v. Almont Gravel, Inc., 412 N.W.2d 719 (Mich. App. Ct. 1987) (lease terms unreasonably favorable to lessor); see also 2 HAWKLAND, *supra* note 33, § 2-302:04. One should also note that U.C.C. section 2-719(3) states that limitations of consequential damages for personal injury in consumer goods cases are prima facie unconscionable. See U.C.C. § 2-719(3) (1990).

35. 2 HAWKLAND, *supra* note 33, § 2-302:04.

relevant factors are listed, the case law does not indicate what weight should be afforded to each of these factors.³⁶ Further, given that no precise definition of procedural unconscionability exists, courts are basically free to pick and choose among a range of factors in order to achieve a fair result.

The same can be said of substantive unconscionability. The Official Comment to U.C.C. section 2-302 states that the principle of unconscionability is "one of the prevention of oppression . . . not of disturbance of allocation of risks because of superior bargaining power."³⁷ Obviously, superior bargaining power can produce a one-sided allocation of risks. The Official Comment, however, fails to provide courts with a bright-line distinction between oppressive, and therefore unconscionable, contractual terms, and burdensome, but still acceptable, contractual terms resulting from superior bargaining power. Therefore, courts again have great freedom to determine when contractual terms are not only burdensome but oppressive, and thus substantively unconscionable.

The indeterminacy that exists when procedural and substantive unconscionability are considered separately also exists when they are considered in combination. Most courts and scholarly commentators are of the view that before there can be a finding of section 2-302 unconscionability, both procedural and substantive unconscionability must be present.³⁸ Others, however, believe that section 2-302 unconscionability can be found when substantive unconscionability alone is present.³⁹

In conclusion, it should be clear that the drafters of the U.C.C. intentionally left the definition of unconscionability indeterminate. Thus, unconscionability serves as a useful policing mechanism by al-

36. Cf. Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815, 816 (1987).

37. U.C.C. § 2-302 cmt. 1.

38. See, e.g., *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 114 (D.C. 1971) ("We hold that the two elements of which unconscionability is comprised; namely, an absence of meaningful choice and contract terms unreasonably favorable to the other party, must be particularized in some detail . . ."); *Kohl v. Bay Colony Condominium Inc.*, 38 So. 2d 865 (Fla. Dist. Ct. App. 1981); *Mobile Am. Corp. v. Howard*, 307 So. 2d 507, 508 (Fla. Dist. Ct. App. 1975) ("Of those cases dealing with price at all, most require in addition to a grossly excessive price, some element of nondisclosure, fraud, overreaching or manifestly unequal bargaining position."); HILLMAN ET AL., *supra* note 13, ¶ 6.02(1); WHITE & SUMMERS, *supra* note 15, § 4-8, at 199-200. *But see American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964); *Toker v. Westerman*, 274 A.2d 78 (N.J. Super. Ct. App. Div. 1970).

39. See, e.g., *Remco Enter. v. Houston*, 677 P.2d 567 (Kan. 1984); *American Home Improvement, Inc.*, 221 A.2d at 886; *Toker*, 274 A.2d at 78.

lowing courts to excuse consumers from contractual obligations whenever they perceive irregularities or substantive unfairness in the bargaining process.

III. IMPRACTICABILITY

A. Overview

Like unconscionability, impracticability is an important Article 2 policing provision.⁴⁰ It is defined in section 2-615 of the U.C.C., which provides in relevant part:

Except so far as a seller may have assumed a greater obligation . . .

(a) Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made⁴¹

Several initial observations can be made about the doctrine of impracticability. First, on its face, section 2-615 appears to apply only to sellers, as it begins with the words “[e]xcept so far as a *seller* may have assumed a greater obligation”⁴² However, courts and commentators have adopted the position that the impracticability defense is equally available to buyers.⁴³

Second, Official Comment 8 to section 2-615 states that “[t]he provisions of this section are made subject to assumption of greater liability by agreement.”⁴⁴ Consistent with this language, a seller can agree to deliver goods absolutely and unconditionally, regardless of any supervening contingency, and the impracticability defense will not apply.⁴⁵

Third, section 2-615 states that it is subject to the provisions of

40. “Impracticability” is a doctrine under which a party to a contract is relieved of his or her duty to perform when the premise upon which the contract was based no longer exists due to unforeseeable circumstances. BLACK’S LAW DICTIONARY 756 (6th ed. 1990).

41. U.C.C. § 2-615.

42. *Id.* (emphasis added).

43. *See id.* § 2-615 cmt. 9; *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744 (Iowa 1976); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986); WHITE & SUMMERS, *supra* note 15, § 3-9, at 157.

44. U.C.C. § 2-615 cmt. 8.

45. *See, e.g., Stewart v. Stone*, 127 N.Y. 500 (1891) (“[W]here an absolute executory contract is made, [a party] is not excused by an inability to execute it by unforeseen accident or misfortune.”). A court, however, using normal rules of contract interpretation, will have to determine whether contractual language containing words such as “absolute” and “unconditional” are, in fact, unambiguous expressions of the intent of the seller.

section 2-614 on substituted performance.⁴⁶ Thus, in a sale contract, a party will not normally be excused from performance if the agreed means or manner of delivery of the goods "becomes commercially impracticable but a commercially reasonable substitute is available."⁴⁷ In such instances, commercially reasonable substituted performances must be tendered and accepted by both parties to the sale contract.⁴⁸

B. *The Two-Pronged Analysis of Impracticability*

Even a cursory reading of section 2-615, however, reveals that the section does not provide a clear definition of impracticability. Still, when compared to the text of section 2-302, which fails to provide much guidance on the nature of unconscionability,⁴⁹ the text of section 2-615 at least provides an analytical framework that courts can use in applying the impracticability doctrine.

The analysis typically applied in impracticability cases can be illustrated by a hypothetical. Imagine a long-term sales contract in which the seller agrees to sell the buyer 200,000 copper widgets over a ten year period. In the first year, the contract price of a copper widget is \$30, with the price increasing by \$1 in each of the succeeding nine years. The seller agrees to this price structure, expecting that its present manufacturing costs of \$18 per widget will not exceed \$20 during the life of the ten-year contract. In the fourth year of the contract, however, when each copper widget is selling for \$33, the seller's manufacturing costs unexpectedly rise to \$40 per widget due to an embargo on copper shipments imposed by a cartel of copper-producing countries. The seller brings a declaratory judgment action to be relieved of its obligation to sell the buyer widgets at \$33 per widget. The seller argues that its dramatic rise in manufacturing costs was completely unforeseeable at the time the contract was executed and, therefore, could not have been guarded against in the sale contract.

Assuming the seller did not "assume a greater obligation"—that is, assuming the seller did not agree to sell the widgets at the stated price absolutely and unconditionally without regard to any future contingencies⁵⁰—a court will typically apply a two-pronged analysis to determine whether the seller should be excused from performance

46. U.C.C. § 2-615.

47. *See id.* § 2-614(1) (1990).

48. *Id.*

49. For a discussion of unconscionability under U.C.C. section 2-312, see *supra* notes 7-39 and accompanying text.

50. *See supra* notes 44-45 and accompanying text.

under U.C.C. section 2-615.⁵¹

1. The First Prong: An Unforeseeable Contingency

The first prong of the impracticability analysis asks whether the dramatic rise in the seller's manufacturing costs was "a contingency the non-occurrence of which was a basic assumption on which the contract was made."⁵² To determine this, courts typically consider whether the contingency was reasonably foreseeable at the time the contract was made.⁵³ If the contingency was reasonably foreseeable, the seller will not be excused from performance, because the seller could have guarded against the occurrence of the contingency by including appropriate exculpatory language in the contract.⁵⁴ To establish whether an increase in costs was foreseeable at the time the contract was made, courts will consider various factors, including the business sophistication of the seller and the specific risks to which the seller agreed in the sales contract.⁵⁵

With regard to the hypothetical at hand, given the price volatility of most commodities during the past several decades, it is unlikely that a court will find that a dramatic increase in manufacturing costs over a ten year period was unforeseeable to a sophisticated manufacturer of copper widgets. Therefore, since the seller-manufacturer could have foreseen the dramatic increase in costs but failed to guard against it in the contract, a court will likely rule that the seller-manufacturer *assented* to sell the goods at the price stated in the contract *despite* any increases in the costs of manufacturing the goods. If so, the seller-manufacturer will not be excused from performance. If, however, a court rules that the increase in the cost of manufacturing copper widgets was not reasonably foreseeable at the time the contract was made, it will likely find that the seller-manufacturer did not agree to sell at that price, and that, therefore, the seller-manufacturer

51. See Stephen J. Sirianni, *The Developing Law of Contractual Impracticability and Impossibility: Part II*, 14 U.C.C. L.J. 146, 157 (1981).

52. U.C.C. § 2-615(a).

53. See, e.g., *Bernina Distribs., Inc. v. Bernina Sewing Mach. Co.*, 646 F.2d 434 (10th Cir. 1981); *WHITE & SUMMERS*, *supra* note 15, § 3-9, at 129-30.

54. See, e.g., *Kel Kim Corp. v. Central Markets, Inc.*, 519 N.E.2d 295 (N.Y. 1987).

55. *Brooks Shoe Mfg. Co. v. Chesapeake Shoe Co.*, 21 B.R. 604 (E.D. Pa. 1982) (holding that a fall in shoe prices was a risk factored into contract price); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mont.) (holding that because the possibility of an oil embargo was discussed by the government, businesses, and media, it was common knowledge and thus foreseeable), *cert. denied*, 446 U.S. 865 (1979); see also *WHITE & SUMMERS*, *supra* note 15, § 3-9, at 161-64.

satisfied the first prong of the impracticability test. It would be unusual, however, for a court to find that a possible increase in costs over the life of a long-term contract was not a reasonably foreseeable contingency.⁵⁶

2. The Second Prong: The Fairness of Requiring Performance in Light of the Unforeseen Contingency

The second prong of the impracticability analysis considers whether performance of a contract has been made impracticable by the occurrence of an unforeseen contingency.⁵⁷ To meet this requirement, a seller must show more than the fact that performance has been made financially difficult or even onerous. Rather, a court will likely require the seller to show extreme financial difficulty.⁵⁸ However, the case law does not provide a standard to measure the precise level of financial difficulty that merits excuse. Ultimately, a court will have to decide whether, under the particular set of circumstances, it would be unfair to require continued performance on the part of the seller. In this regard, the second prong of the impracticability test is also indeterminate in nature.

IV. A COMPARISON OF UNCONSCIONABILITY AND IMPRACTICABILITY

Upon close examination, one discovers that the two prongs of the impracticability analysis⁵⁹ resemble the two prongs of the unconscionability analysis.⁶⁰ The first prong of the impracticability analysis, foreseeability, and the first prong of unconscionability analysis, procedural unconscionability, both focus on the *assent* of the party seeking to be excused from performance. In the case of impracticability, courts examine whether the supervening contingency was sufficiently foreseeable at the time the contract was signed.⁶¹ If it was, and if the party seeking excuse did not include appropriate exculpatory language in the contract, that party will be deemed to have assented to

56. As has been pointed out, it is difficult "to wield the sword of commercial impracticability." *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 438 (S.D. Fla. 1975).

57. U.C.C. § 2-615(a).

58. *Louisiana Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1324 (E.D. La. 1981).

59. For a discussion of impracticability under U.C.C. section 2-615, see *supra* notes 40-58 and accompanying text.

60. For a discussion of unconscionability under U.C.C. section 2-302, see *supra* notes 7-39 and accompanying text.

61. See U.C.C. § 2-615 cmt. 8; see also *supra* notes 52-56 and accompanying text.

perform despite the occurrence of the supervening contingency. In the case of unconscionability, courts look to see if, at the time the contract was signed, the party seeking excuse had a meaningful choice as to the terms of the contract.⁶² If the party did not have a meaningful choice and, therefore, did not assent to the terms of the contract, the party will be excused from performance.

The second prong of the impracticability analysis and the second prong of the unconscionability analysis both focus on whether it is fair to require continued performance by the party seeking to be excused.⁶³ Since these fairness analyses are essentially indeterminate, courts will necessarily act as chancellors, and apply their own views of what is fair and equitable under the particular set of circumstances.

Although unconscionability and impracticability are both doctrines of essentially indeterminate definition, courts apply them very differently. Courts frequently excuse performance on the ground of unconscionability, but rarely excuse performance on the ground of impracticability.⁶⁴ Three major differences between the doctrines of impracticability and unconscionability account for this distinction: (1) a difference in the typical type of transactions in which each doctrine is raised; (2) a difference in the conduct of the parties opposing excuse; and (3) the fact that a party can waive the impracticability defense, but cannot waive the unconscionability defense.

A. Type of Transaction

Unconscionability is usually claimed by buyers of goods in *consumer* sales transactions.⁶⁵ In such cases, courts have a natural tendency to find unconscionability because the party claiming unconscionability is a consumer, not a sophisticated business person.⁶⁶

62. See U.C.C. § 2-302 cmt. 1; see also *supra* notes 28-30 and accompanying text.

63. See *supra* notes 31-34, 57-58 and accompanying text.

64. See, e.g., *Eastern Air Lines, Inc.*, 415 F. Supp. at 438; *Louisiana Power & Light Co.*, 517 F. Supp. at 1319.

65. See 2 HAWKLAND, *supra* note 33, § 2-302:06.

66. See, e.g., *Keystone Aeronautics v. R.J. Enstrom*, 499 F.2d 146 (9th Cir. 1974). Courts do not usually excuse a party on unconscionability grounds in commercial contracts between merchants or experienced business entities. See, e.g., *Chatlos Systems, Inc. v. National Cash Register Corp.*, 635 F.2d 1081 (3rd Cir. 1980); *Golden Reward Mining Co. v. Jervis B. Webb Co.*, 772 F. Supp. 1118 (D.S.D. 1991); *Martin v. Shaffer*, 403 S.E.2d 555 (N.C. Ct. App 1991); *Gillman v. Chase Manhattan Bank*, 521 N.Y.S.2d 729 (App. Div. 1987), *aff'd*, 73 N.Y.2d 1 (1988); *K & C, Inc. v. Westinghouse Elec. Corp.*, 263 A.2d 390 (Pa. 1970). On occasions where courts do permit excuse on unconscionability grounds in a commercial contract, it is usually because one of the entities, while technically a merchant, is functionally a

The opposite frequently occurs in impracticability cases. Sellers usually claim impracticability in long-term *commercial* sales transactions.⁶⁷ In these cases, courts usually refuse to excuse performance because sellers in long-term sales contracts tend to be sophisticated parties.⁶⁸ As such, they could have dealt with the problem of unforeseen contingencies through exculpatory language in the sales contract. In addition, generally the seller prepares the sales contract. Therefore, in impracticability cases, courts often stretch to find that the seller has assumed the risk that the supervening contingency would not occur.

Thus, although both doctrines focus on the assent of the party seeking to be excused from the contract, courts rarely excuse performance based on impracticability, but frequently excuse performance based on unconscionability. The model paradigmatic unconscionability case versus the model paradigmatic impracticability case largely accounts for these different results. Social policy protects the imprudent consumer-buyer more readily than the imprudent merchant-seller. Similarly, the unconscionability doctrine is usually not raised in long-term sale contracts where certain and predictable contractual expectations are an important social policy. Impracticability, however, is frequently raised in long-term sale contracts where this same important social policy militates against granting excuse based on impracticability.

B. Conduct of the Party Opposing Excuse

Unconscionability cases often involve evidence that the party opposing excuse, normally a merchant-seller, has engaged in "sharp practices,"⁶⁹ such as misrepresentation and convoluted or inconspicuous boilerplate language in the seller's form contract.⁷⁰ However, there is usually no evidence of sharp practices in impracticability cases, since the party against whom the impracticability defense is raised typically has not contributed to creating the supervening con-

consumer. See, e.g., *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264 (E.D. Mich. 1976); *Moscatiello v. Pittsburgh Contractors Equip. Co.*, 595 A.2d 1190, 1196 n.3 (Pa. 1991).

67. 3 HAWKLAND, *supra* note 33, § 2-615:05.

68. See, e.g., *Eastern Air Lines, Inc.*, 415 F. Supp. at 429.

69. See, e.g., *Willie v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 906-07 (Kan. 1976) (examples of sharp business practices by merchants include skillfully drafted boilerplate provisions, penalty clauses, fine print, hidden clauses, and incomprehensible phrasing of contract provisions).

70. See, e.g., *Moscatiello*, 595 A.2d at 1190.

tingency. Therefore, given the existence of sharp practices in many unconscionability cases, and their absence in impracticability cases, courts will more likely balance the equities in favor of granting excuse in unconscionability cases than in impracticability cases.

C. Waiver

In an unconscionability case, a consumer-buyer cannot waive the defense of unconscionability.⁷¹ In an impracticability case, however, it is possible for a merchant-seller to assume a greater obligation by waiving the ability to plead excuse based on supervening circumstances.⁷² This again illustrates the reluctance of the law to allow unsophisticated consumers to waive valuable contractual rights.

V. CONCLUSION

Article 2 of the U.C.C. includes provisions covering both unconscionability and impracticability. A determination of unconscionability under U.C.C. section 2-302 is the product of a two-pronged analysis. The first prong focuses on procedural unconscionability, to determine whether the contract negotiation and execution process deprived a party from giving meaningful assent to the terms of a contract. The second prong focuses on substantive unconscionability, to determine whether the terms of a contract are unduly one-sided or oppressive.

Similarly, a determination of impracticability under U.C.C. section 2-615 is also the product of a two-pronged analysis. The first prong focuses on whether a contingency was foreseeable when the contract was signed. The second prong considers whether it is fair to require performance in light of an unforeseen contingency.

Although the two-pronged unconscionability and impracticability analyses appear notably similar, and although both doctrines are indeterminate principles used to police sale contracts, courts are far more likely to excuse performance on the ground of unconscionability than on the ground of impracticability. This is because, first, the unconscionability doctrine is usually raised by buyers in consumer transactions, whereas the impracticability doctrine is usually raised by

71. See WHITE & SUMMERS, *supra* note 15, § 4-6, at 194-98.

72. U.C.C. section 2-615 is limited in operation by the provision that its rules apply "except so far as a seller may have assumed a greater obligation." U.C.C. § 2-615; see also *Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992 (9th Cir. 1983); 3 HAWKLAND, *supra* note 33, § 2-615:03; *supra* notes 44-45 and accompanying text.

sellers in commercial transactions. Social policy in the United States dictates that imprudent buyer-consumers should be more readily protected than imprudent, but typically more sophisticated, seller-merchants. Second, unlike impracticability cases, unconscionability cases often involve evidence that the party opposing excuse engaged in sharp business practices, such as including inconspicuous boilerplate language in the sale contract. Finally, parties to a contract cannot waive the unconscionability defense, but can waive the impracticability defense by foregoing the right to plead excuse based on supervening circumstances.