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DEFINITION AND INTERPRETATION OF UNCONSCIONABLE CONTRACTS (Uniform Commercial Code)

The *Uniform Commercial Code* provides:

> "If the court finds the contract or any clause of the contract to be unconscionable, it may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed."[1]

"Again there is a provision in the Sales Article which permits a court to declare void an unconscionable contract.. But there is no satisfactory definition of what is unconscionableness. A comment in earlier drafts indicated that unconscionable and unreasonable were synonomous. . . . This one section of the code will create a tremendous amount of difficulty."[2]

This article and similar articles[3] in various law journals and reviews voice the doubts and fears which have arisen among many in the legal profession about the unconscionable contract provision of the *Commercial Code.* There are many problems latent in this section, but the primary problem seems to be the indefinable quality of the word "unconscionable." How will the courts apply it? What will be its scope? Will it be limited? Will it be definite and apply equally in all cases? How much discretion will the courts have in defining it? What will be the test? These are the questions that attorneys must ponder and the ones that the courts of Pennsylvania (the first state to adopt the *Code*) must begin to answer after July 1, 1954.

The unconscionable contract doctrine has been accepted by the equity courts since their inception.[4] The American courts of law have been applying the doctrine in a disguised manner on a case-to-case basis for many years.[5] Very few of the cases, in equity or in law, have attempted to define the word unconscionable. Thus, three sources are presented through which a definition may possibly be obtained—the equity decisions, the disguised opinions of the law courts, and the comments of the commissioners.

Perhaps the most authoritative definition came from the words of Chief Justice Fuller:[6] "It may be apparent from the intrinsic nature of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable

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1 Act of 1953, April 6, P.L.—No. 1, 12A—P.S. 2-302.

2 J. Francis Ireton, "The Commercial Code," 22 Miss. L.J. 273 (1950-51).

3 "Policing Contracts Under the Commercial Code", 18 Univ. Chi. L.Rev. 146 (1950). "It is doubtful whether any basis of predictability can be expected from such treatment; parties with particularly appealing arguments may be helped in forcing settlement because of the increased uncertainty of a court decision."

4 For a more recent case see Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1949); Friend v. Lamb, 152 Pa. 529, 25 A. 577 (1893).

5 See: Uniform Commercial Code 2-302 (Official Draft) Text and Comments Edition 1952, Comment 1.

6 U.S. v. Hume, 132 U.S. 406 (1889).

and unconscientious bargains." This definition has been quoted and used in substance in many cases.[7] In addition to this it has been said that it is "an inequality so strong, gross, and manifest that it is impossible to state it to a man of common sense without producing an exclamation of the inequality of it. Where the inadequacy of the price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind it."[8]

These decisions give some inkling as to what the court means by unconscionable, but still there are no bounds to the definition. Evidently what the courts mean to say is that any agreement in which the price is grossly unequal to the value received is unconscionable. But where is the line to be drawn? Is that to be the only test?

The National Commissioners on Uniform State Laws have said that "the basic test is whether in the light of the general commercial background and the commercial needs of the particular trade or case, the clause involved is so one sided as to be unconscionable under the circumstances existing at the time of the making of the contract. The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."[9] This comment narrows the interpretation slightly, but the authors, unavoidably perhaps, have tested the word in terms of itself. However, the fact that the commissioners were concerned in preventing oppression and unfair surprise and in not upsetting the allocation of risks in bargaining gives us an incisive insight into what they had in mind.

It would seem that by "oppression and unfair surprise" it is meant that any party who has had a chance to inquire into the merits and consequences of the bargain and who has the competency to understand it could not be a victim of oppression and unfair surprise. This theory is stated in a negative way in a recent Pennsylvania case.[10] There the decision was based upon a confidential relationship, but the court said that the decision would stand even without the relationship. The important part of the decision for our purposes is that part which emphasizes "the lack of opportunity to plaintiff to consult legal or business counsel."

The fact, however, that the commissioners were anxious not to disturb "the allocation of risks because of superior bargaining power" would indicate that an unequal bargain might be struck if no oppression or unfair surprise is involved. Of course, a bargain which is fair when made may turn out to be grossly unequal when the time for final execution arrives. The comment may be referring to this

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7 Canter v. Boone County Trust Co., 92 S.W. 2d 647,657,338 Mo. 629 (1935); Stiefler v. McCullough, 174 N.E. 823,826 (Ind. 1931); Hall v. Wingate, 159 Ga. 630, 126 S.E. 796,813(1924); Wenninger v. Mitchell, 139 Mo. App. 420, 122 S.W. 1130,1132 (1909); Ball v. Reyburn, 136 Mo. App. 546, 118 S.W. 524 (1909).

8 Stiefler v. McCullough, supra; 1 Elliott, Contracts, § 159. See: Kelley and McHale v. Caplice, 23 Kan. 474, 33Am. Rep. 179 (1880).

9 Uniform Commercial Code 2-302 (Official Draft) Text and Comments Edition 1952, Comment 1.

10 Sell v. Gup, 328 Pa. 134, 12 A.2d 1 (1940). The plaintiff in this case was a senile lady of 77, the defendant a law school graduate.

situation, but the entire comment refers basically to the circumstances existing at the time of the making of the contract; the most scrupulous reading cannot give a conclusive meaning to that phrase. It is just as possible that what is meant is that if, after having studied the bargain and having obtained legal or business advice or having taken the risk of doing without it, the party enters a bargain which would normally seem uneven, the court will not disturb the contract because of the advantageous terms gained through mere persuasiveness. After all, there are many reasons why a competent person may enter a seemingly unfair contract, many of these reasons being highly secretive and personal in nature. Should such a person be able to avoid that contract merely because the hidden reasons for entering that contract did not pan out?

The most lucid explanation of the above theory is found in a Pennsylvania case[11] involving a suit concerning the conveyance of land in which the consideration was grossly inadequate. There the court said:

> "Such gross inadequacy as there was in this case is very well calculated to fix upon the transaction a serious suspicion of its fairness. It is contrary to all our usual experience that a man should part with his property at five percent of its value, unless he was excessively weak or ignorant, or under the influence of some deception. But if the vendor was thoroughly acquainted with every fact which it was necessary for him to know; . . . if there were no circumstances which gave the vendee an improper control over him, amounting to mental imprisonment; if, in short, the vendee behaved honestly, and the vendor was able to act like a free man with his eyes wide open, then the one had a right to sell, and the other to buy, on any terms they saw proper to agree upon."

Combining the decisions of these cases with the manifested intention of the Commissioners on Uniform State Laws it is possible to evolve a series of questions to ask in every case of unconscionable contract which will limit the application of this doctrine to certain specific cases and which will particularly guarantee an equal application in all cases. The first question is this: (1) Is the agreement unfair on its face? This involves two sub-questions: (a) Is such a bargain within the realms of experience? If such bargains have been made before with any frequency, then it is not unusual for a man to make such an agreement. (b) Are there any peculiar customs in the trade or peculiarities in this particular bargain which would warrant the unequal agreement? Thus, so far, we have this much—if the agreement is grossly unequal to the extent that it is beyond the usual experience of people making such agreements and if there is nothing in the commercial background of such agreements or in the commercial needs of the particular case, then the court may suspect that there is an unconscionable contract, and thus proceed to the second question.

The second major question is: (2) Did the transaction involve any oppression and unfair surprise? Again, to determine the answer to this major question we must

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11 Davidson v. Little, 22 Pa. 245 (1853).

ask two sub-questions: (a) Was the complaining party competent enough to understand the implications of the bargain? If this person was of sound mind, sufficient intelligence, and free will then it seems that he could not have been a victim of oppression. (b) Did the party have a chance to consult legal or business advice? The answer to this question involves inquiring into the party's need of such advice and also an inquiry into the question of whether he passed up his opportunity for such advice.

Thus, the test seems to be this—if on the basis of our first question the bargain seems to be unconscionable, we must then ask if the party was competent enough to understand the bargain and if he had the opportunity of legal or business advice. The questions, it seems to the author, are in logical order, and the wrong answer to any of them would be enough for the court to strike the unconscionable clause or bargain.

Of course, this test is not definitive or foolproof, but it forms a skeleton to which the flesh and blood of court interpretation can be added.

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