

Washington Law Review

Volume 58 | Number 2

4-1-1983

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Steven Goldberg, *Unconscionability in a Commercial Setting: The Assessment of Risk in a Contract to Build Nuclear Reactors*, 58 Wash. L. Rev. 343 (1983).

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UNCONSCIONABILITY IN A COMMERCIAL SETTING: THE ASSESSMENT OF RISK IN A CONTRACT TO BUILD NUCLEAR REACTORS

Steven Goldberg*

Eighty-eight Pacific Northwest public utilities in 1976 contracted with the Washington Public Power Supply System ("WPPSS") for the construction of two nuclear power plants.¹ The contract, or Participants' Agreement, contained a so-called "hell-or-high-water" clause which obligated the utilities to pay for the construction of the nuclear plants whether or not any electricity was ever produced.² This article explores the possibility that such a clause might be unenforceable because of its unconscionability.

The article demonstrates that, contrary to popular belief, unconscionability has often been found in non-consumer commercial settings. It considers several common avenues to finding substantive and procedural unconscionability and shows that the most likely defect in the Participants' Agreement was a failure to disclose vital information to the utilities—not about technical details of design and construction, but about the risks involved. Thus the utilities may have been ill-prepared to make a rational judgment to assume the risk of noncompletion. This distinction between technical information and risk information mirrors a similar distinction in such public-policy areas as deciding whether to permit nuclear weapons testing. The relevant inquiry when determining whether procedural un-

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I would like to thank Joy A. Archer and Stephen Vajtay for their excellent research assistance. I would also like to thank Professors Girardeau Spann and William Vukowich of the Georgetown University Law Center for their helpful comments on an earlier draft of this article. Portions of this article are based on a speech I gave April 24, 1982, to the Northwest Utilities Conference at Eastsound, Washington.

1. WPPSS is a joint operating agency formed under the Joint Operating Agency Act. WASH. REV. CODE ch. 43.52 (1981). The Participants' Agreement discussed herein is a contract involving the construction of two nuclear power plants (WPPSS plants Nos. 4 and 5). The Participants' Agreement was executed separately with each of 88 public utilities; the terms of the Agreement in each case are identical except for the fractional share of the entire project each utility purchased. Washington Public Power Supply System Nuclear Projects Nos. 4 & 5, Participants' Agreement, Apr. 15, 1976 [hereinafter cited as Participants' Agreement]. See generally 1 WASHINGTON STATE SENATE ENERGY AND UTILITIES COMMITTEE WPPSS INQUIRY, 47th Leg., CAUSES OF COST OVERRUNS AND SCHEDULE DELAYS ON THE FIVE WPPSS NUCLEAR POWER PLANTS, at 8-9 (1981); *infra* text accompanying notes 3-15.

2. Clauses of this nature are often referred to as "hell-or-high-water" clauses because of their unconditional promise to pay. See *infra* notes 5-6 and accompanying text.

conscionability exists is whether one party failed to disclose facts not reasonably available to the other party, and whether that failure prevented the other party from properly assessing the risks involved. This is true with both public policy and private contract concerns. If WPPSS failed to disclose the risk of noncompletion to the utilities, and if the hell-or-high-water clause is found to place virtually all risk on the utilities, then the clause should be found unconscionable.

I. THE PARTICIPANTS' AGREEMENT

The Participants' Agreement between numerous utilities³ and WPPSS provides that the utilities will make certain payments in return for which WPPSS will finance and construct two nuclear plants and will provide the utilities with electricity from those plants.⁴ An important provision of the contract provides in pertinent part that the utilities "shall make the payments to be made to [WPPSS] under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part."⁵ This hell-or-high-water⁶ clause is important because construction of the plants in question has in fact been terminated before completion; thus the utilities, and ultimately their consumers, may pay considerable sums of money for no electricity whatsoever.⁷

Before considering whether a clause of this type might be found unconscionable, one must interpret the obligations imposed. Here the clause in question may not, in fact, obligate the utilities to pay for the terminated plants. For example, the clause might be interpreted not to apply if the plants were terminated because of willful or negligent action by WPPSS. In an analogous area of contract law involving engineers' and architects' certificates, this sort of reading is common. When parties to a construction contract agree that payments will be made upon certification by a

3. See *supra* note 1. All of the 88 participants are public utilities, but represent various organizational structures such as public utility districts, municipalities, electrical cooperatives, and irrigation districts. The participants are located in six different states: Washington, Oregon, Idaho, Montana, Nevada, and Wyoming.

4. Participants' Agreement, *supra* note 1, §§ 3-6.

5. *Id.* § 6(d). This clause continues:

Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by [WPPSS] or any other Participant or entity under this or any other agreement or instrument, the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy.

6. See Ramsey, *What Happens If WPPSS Takes a Tumble*, Seattle Post-Intelligencer, Mar. 28, 1982, at D5, col. 1.

7. *Id.*

named engineer or architect the contract often appears absolute on its face. It may, for example, give an engineer “final, binding, and conclusive” authority to decide “any and all questions” that arise.⁸ Nonetheless, courts usually find that the parties did not intend such a clause to govern in cases where the engineer is guilty of fraud or gross mistake.⁹ A similar inquiry into the parties’ intent would be necessary to determine whether those signing the Participants’ Agreement intended the disputed clause to apply regardless of how WPPSS behaved. Clauses apparently as rigid as the hell-or-high-water clause have been liberalized through contract interpretation of this type. For example, in a contract for the sale of oil, the court found implicit exceptions in a clause that purported to excuse the buyer from receiving deliveries for “any . . . cause whatsoever beyond the control of such party, whether similar or dissimilar to the causes herein enumerated.”¹⁰

Indeed, thorough interpretation will require a court to examine the hell-or-high-water clause carefully in the context of the entire contract. The clause does not, for example, speak of “termination” of the projects even though that term is used elsewhere in the agreement.¹¹ Indeed, the clause, rather than speaking of “termination” or “cancellation,” speaks only of “reduction or curtailment . . . in whole or in part.”¹² These words might cover the ending of the projects, but it is worth noting that as basic a source as *Black’s Law Dictionary* defines curtail as “to shorten, abridge, diminish, lessen, or reduce; and . . . has no such meaning as abolish.”¹³

In any event, the unconscionability argument itself bears on judicial interpretation of the hell-or-high-water clause. Courts often avoid reading clauses in ways that render them unconscionable by interpreting the clauses so as to avoid harsh results.¹⁴ If the hell-or-high-water clause is

8. *State Highway Comm’n v. R.A. Heintz Constr. Co.*, 245 Or. 530, 423 P.2d 175, 180 (1967) (en banc).

9. *Id.* See also *Lincoln Constr., Inc. v. Thomas J. Parker & Assocs.*, 43 Or. App. 207, 602 P.2d 676, 678 (1976) (en banc); RESTATEMENT (SECOND) OF CONTRACTS § 227 comment c, illustrations 5–8 (1979).

10. *Monolith Portland Cement Co. v. Douglas Oil Co.*, 303 F.2d 176, 180 (9th Cir. 1962).

11. See, e.g., *Participants’ Agreement*, *supra* note 1, §§ 3, 13.

12. *Id.* § 6(d).

13. BLACK’S LAW DICTIONARY 346 (rev. 5th ed. 1979).

14. See, e.g., *Einhorn v. Ceran Corp.*, 177 N.J. Super. 442, 426 A.2d 1076, 1080 (1980); *Spahn v. Pierce County Medical Bureau, Inc.*, 7 Wn. App. 718, 502 P.2d 1029, 1033 (1972); *Dickson v. United States Fidelity & Guaranty Co.*, 77 Wn. 2d 785, 466 P.2d 515 (1970) (en banc). The first official comment to U.C.C. § 2-302, the Code’s unconscionability section, provides that “[t]his section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language” U.C.C. § 2-302 comment 1 (1978). Nonetheless, the judicial tendency displayed in the cases above persists. As a recent text comments, “[c]ourts have often used interpretation or construction to avoid giving effect to an inherently unfair provision of an agree-

not interpreted to avoid the harsh result of requiring utilities to pay under any circumstances whatsoever, that raises the probability that the clause is unconscionable. Conversely, if the clause is read to allow the utilities to stop making payments under some circumstances, that reduces the likelihood that the clause is unconscionable.

This analysis does not, of course, indicate the proper judicial interpretation of the hell-or-high-water clause.¹⁵ The point is simply that an unconscionability analysis is likely to have an important bearing on judicial interpretation of that clause and vice versa.

II. UNCONSCIONABILITY IN A COMMERCIAL SETTING

Determinations of unconscionability focus today on section 2-302 of the Uniform Commercial Code.¹⁶ Although article 2 of the Code applies as a formal matter only to sales of goods,¹⁷ section 2-302 has often been applied by analogy throughout contract law¹⁸ and is now embodied in the Second Restatement of Contracts.¹⁹ Thus whether or not the Participants' Agreement is technically a sale of goods—and there is precedent for so treating a sale of electricity²⁰—section 2-302 will be the focus of attention in any unconscionability analysis.

A more difficult question than whether section 2-302 applies to the sale of electricity is whether it applies in a commercial setting. Standard con-

ment when a decision based on unconscionability would have been more candid." E. FARNSWORTH, *CONTRACTS* 498-99 (1982).

15. For example, a court might find that the clause was not intended to cover all eventualities, but that it was intended to cover what happened with the power plants in question. Moreover, a court might find that the clause did shift the risk to the utilities, but that the utilities are nonetheless bound by the clause because they had a reasonable opportunity to assess and assume that risk. *See infra* text accompanying notes 64-75.

16. U.C.C. § 2-302 (1978), provides:

(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 the determination.

The UCC is codified in Washington at WASH REV CODE tit. 62A (1981).

17. Article 2 is titled "Sales" and numerous sections refer to "buyers" and "sellers." *See, e.g.*, U.C.C. §§ 2-703, 2-711 (1978). A somewhat broader scope is suggested by § 2-102 which provides that "this Article applies to transactions in goods."

18. J. CALAMARI & J. PERILLO, *CONTRACTS* 322-23 (2d ed. 1977).

19. *RESTATEMENT (SECOND) OF CONTRACTS* § 208 (1979).

20. *Helvey v. Wabash County REMC*, 151 Ind. App. 176, 278 N.E.2d 608 (1972). The supplying of electric power by a public utility was found to be a sales-service hybrid transaction subject to UCC warranty protection in *Wivagg v. Duquesne Light Co.*, 20 UCC Rep. Serv. (Callaghan) 597 (Pa. Ct. of C.P. 1975).

tracts texts and articles stress that successful unconscionability claims are primarily limited to consumers.²¹ Three of the most recent sources tell us, for example, that merchants have been “largely unsuccessful”²² in arguing unconscionability, that their victories have been limited to “rare cases,”²³ and that courts “have generally been chary”²⁴ about using unconscionability on their behalf. However, these generalizations do not represent an immutable rule. First, the standard texts themselves list a variety of cases in which businesspeople have successfully argued unconscionability.²⁵ These cases, and other similar ones not generally listed in the texts, involve more than “small unknowledgeable shopkeepers.”²⁶ Unconscionability has been successfully argued by insurance agents,²⁷ trucking companies,²⁸ restaurant²⁹ and apartment³⁰ owners, and others.³¹

Second, the standard summaries about unconscionability in a commercial setting overlook large areas of the law in which such claims are often successful. Specialization in academic life is such that a book on contracts usually treats government procurement contracts the way it treats torts—as a distant, somewhat odd cousin. Yet the fact remains that businesses often successfully invoke section 2-302 when disputes arise over government procurement contracts.³² Successful arguments of this type have been made by such parties as Spasors Electronics Corporation,³³ the

21. Kornhauser, for example, writes of the “almost exclusive application of the unconscionability doctrine to consumer transactions.” Kornhauser, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1161 (1976).

22. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 43 (1981).

23. Jordan, *Unconscionability at the Gas Station*, 62 MINN. L. REV. 813, 816 (1978).

24. E. FARNSWORTH, *supra* note 14, at 313. See also J. CALAMARI & J. PERILLO, *supra* note 18, at 323; J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 149, 170 (2d ed. 1980).

25. See, e.g., E. FARNSWORTH, *supra* note 14, at 313 nn.36–37; J. CALAMARI & J. PERILLO, *supra* note 18, at 323 n.30. A line of commercial unconscionability cases involving gas station operators is analyzed in Jordan, *supra* note 23.

26. E. FARNSWORTH, *supra* note 14, at 314 (quoting *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572, 579 (D.D.C. 1974), *rev'd mem.*, 527 F.2d 853 (1975)).

27. *Allen v. Michigan Bell Tel. Co.*, 18 Mich. App. 632, 171 N.W.2d 689 (1969). Although *Allen* has been criticized, it has not been overruled. See Hillman, *supra* note 22, at 8 n.38.

28. *Fairfield Lease Corp. v. Umberto*, 7 U.C.C. Rep. Serv. (Callaghan) 1181 (N.Y. Civ. Ct. 1970).

29. *Jutta's Inc. v. Fireco Equip. Co.*, 150 N.J. Super. 301, 375 A.2d 687 (1977).

30. *United States Leasing Corp. v. Franklin Plaza Apts.*, 65 Misc. 2d 1082, 319 N.Y.S.2d 531 (N.Y. Civ. Ct. 1971).

31. See, e.g., *C & J Fertilizer, Inc. v. Allied Mutual Ins. Co.*, 227 N.W.2d 169 (Iowa 1975); *Electronics Corp. of Am. v. Lear Jet Corp.*, 55 Misc. 2d 1066, 286 N.Y.S.2d 711 (Sup. Ct. 1967).

32. See I R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW 160–62 (3d ed. 1977); Arnava, *Unconscionability Under UCC § 2-302: How It Applies to Commercial and Government Contracts*, 12 U.C.C. L.J. 48 (1979).

33. *Spasors Elec. Corp.*, 70-1 B.C.A. (CCH) ¶ 8119, at 37,725–26 (1970) (modified delivery date unreasonably harsh to the contractor is unconscionable).

Stevens Institute of Technology,³⁴ and ITT³⁵—not exactly “small shopkeepers.”³⁶ Indeed, once one begins looking at contracts that fall outside the types discussed in standard contracts texts, one sees merchants successfully arguing unconscionability with surprising frequency. Arbitration journals discuss cases in which businesspeople successfully argue unconscionability when they sign contracts containing unfair arbitration provisions.³⁷ Referees in bankruptcy find certain security agreements involving a company’s assignment of its accounts receivable to be unconscionable.³⁸ Instances of shipowners being freed from harsh bargains crop up in admiralty law.³⁹

This use of unconscionability by merchants is not surprising in light of the history and language of section 2-302 itself.⁴⁰ While an early draft of section 2-302 distinguished between merchants and non-merchants, the final draft does not.⁴¹ Moreover, of the ten illustrative cases cited in the official comment to section 2-302, a majority involve merchant-merchant transactions.⁴² Finally, other sections of article 2 clearly anticipate the

34. *Stevens Inst. of Technology v. United States*, 396 F. Supp. 986 (S.D.N.Y. 1975). Although the court in this case does not refer explicitly to § 2-302, its decision rendering void a clause under which the government attempted to exculpate itself from its own negligence during delivery of a vessel is based on the same factors used in unconscionability cases. The court noted, for example, that “the government’s bargaining clout dictated the inclusion of the exculpatory clauses in the sales agreement. . . . Such a contract cannot be enforced as a matter of public policy.” *Id.* at 990–91. This case is analyzed as an unconscionability case in Arnavas, *supra* note 32, at 60.

35. *ITT Defense Communications Div.*, 70-2 B.C.A. (CCH), ¶ 8415, at 39,163 (1970) (unconscionable to hold contractor to no-cost termination settlement after large preparatory costs had been incurred).

36. *See supra* note 26 and accompanying text.

37. *Wright, Arbitration Clauses in Adhesion Contracts*, 33 *ARB. J.*, June 1978, at 41, 43–44. *See also* *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981) (en banc).

38. *In Re Dorset Steel Equip. Co.*, 2 U.C.C. Rep. Serv. (Callaghan) 1016 (E.D. Pa 1965); *In Re Elkins-Dell Mfg. Co.*, 2 U.C.C. Rep. Serv. 1021 (E.D. Pa. 1965).

39. In a line of cases beginning with *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), the courts have struck down clauses in which a tugboat owner, in his contract with the owner of the vessel to be towed, attempts to exculpate himself from liability arising from his own negligence. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 516–20 (2d ed. 1975). Although these cases do not always explicitly refer to unconscionability, similar concerns are involved. Thus the Court in *Bisso* emphasized the need “to protect those in need of goods or services from being overreached by others who have power to drive hard bargains.” 349 U.S. at 91. Moreover, some of the cases do refer explicitly to unconscionability analysis. *See, e.g., Caribe Tugboat Corp. v. J.D. Barter Constr. Co.*, 509 F. Supp. 312, 322 (M.D. Fla. 1981).

Some lower courts extended *Bisso* to other admiralty contracts involving efforts by a party to exculpate himself from his own negligence. *See Zock, Charter Parties in Relation to Cargo*, 45 *TUL. L. REV.* 733, 741–42 (1971); *see also supra* note 34.

40. The leading analysis of the section’s history is Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 *U. PA. L. REV.* 485 (1967).

41. *Id.* at 507 n.78.

42. U.C.C. § 2-302 comment 1 (1978); Leff, *supra* note 40, at 502–03.

use of unconscionability by merchants, and the case law demonstrates that those sections have in fact been used in that fashion.⁴³

The point of these observations is not to outline when a merchant ought to be able to argue unconscionability successfully, but simply to show that the usual notion that such arguments are rare is misleading. There is ample precedent for the successful assertion of unconscionability in a non-consumer setting.

III. UNCONSCIONABILITY AND THE ASSESSMENT OF RISK

Although the UCC nowhere defines unconscionability⁴⁴ and although commentators have criticized the vague contours and uncertain goals of the concept,⁴⁵ there is rather broad agreement on what a court will consider in determining unconscionability. Courts generally will not void a clause unless they find both substantive unconscionability—a bargain that appears dramatically uneven—and procedural unconscionability—a defect in how a bargain is reached.⁴⁶

A. *The Substantive and Procedural Components of Unconscionability*

Substantive unconscionability in the case of the Participants' Agreement will turn on how that agreement is construed. If, for example, the hell-or-high-water clause is read to apply even if WPPSS fails to build the plants because of its own negligent management practices, there is a reasonable chance substantive unconscionability will be found. Clauses that

43. U.C.C. § 2-309(3) provides that an agreement dispensing with notification of termination of a contract is "invalid if its operation would be unconscionable." Such clauses are most likely to arise in contracts involving merchants. *See, e.g., Flavorland Indus., Inc. v. Schnoll Packing Corp.*, 167 N.J. Super. 376, 400 A.2d 883, 885-86 (1979).

U.C.C. § 2-719(3) provides that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." Pursuant to this section, the courts have allowed merchants to attempt to show that remedy limitations are unconscionable. *See, e.g., Luick v. Graybar Elec. Co.*, 473 F.2d 1360, 1363 (8th Cir. 1973).

44. E. FARNSWORTH, *supra* note 14, at 310.

45. *See, e.g., Leff, supra* note 40; C. FRIED, *CONTRACT AS PROMISE* 92-93 (1981).

46. The distinction is credited to Leff. *See Leff, supra* note 40, at 487. Courts usually require that both substantive and procedural unconscionability be present before striking down a clause. *See, e.g., J. WHITE & R. SUMMERS, supra* note 24, at 163-65. The utility of Leff's substantive-procedural framework is questioned in Hillman, *supra* note 22, and in Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 752-53, 800 (1982).

shield a party from its own negligence have long been disfavored⁴⁷ and have at times been found unconscionable.⁴⁸

Even if the hell-or-high-water clause does not extend to cases of WPPSS's negligence, it may still be substantively unconscionable. Applying the clause to the case of total termination of the plants has the effect of placing virtually all of the risk in the Participants' Agreement on the utilities. The result is similar to the situation in which a party excludes all warranties, a frequent source of substantive unconscionability holdings.⁴⁹ For example, in a commercial case involving a lease of equipment with a disclaimer of warranties the court found that "the equipment did not work at all, that it achieved none of the purposes of the parties. This is a result so 'one-sided', in the words of the authors of the official comment to [section 2-302], that the disclaimer in good conscience should not be enforced."⁵⁰ Similarly, a court could strike down an agreement that allowed WPPSS to provide uncompleted nuclear plants which served none of the purposes of the parties while simultaneously providing that the utilities bore all of the risk of such an unfortunate result.

Procedural unconscionability is the bigger hurdle. This branch of the doctrine represents a catchall for a variety of defects in the contract formation process—defects closely related to and often indistinguishable from such traditional defenses as fraud and duress.⁵¹ A court analyzing the contract formation process in the instant case will ask if utility managers should have understood the implications of the hell-or-high-water clause when they signed the Participants' Agreement and, if so, why they should be relieved from that clause now. Procedural unconscionability, even in a commercial setting, reaches cases of small print and confusing terminology,⁵² but those arguments do not appear available with the hell-or-high-water clause. Procedural unconscionability also reaches cases in which, because of grossly disproportionate bargaining power, a party is forced to accept particular contractual language⁵³—an issue that would depend on the evidence that the utilities could present.⁵⁴ It seems most

47. See, e.g., *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 90-91 (1955).

48. See *supra* notes 34 & 39; see also *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971).

49. See, e.g., J. WHITE & R. SUMMERS, *supra* note 24, at 161-63.

50. *Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc.*, 58 A.D.2d 482, 396 N.Y.S.2d 427, 432 (1977).

51. See, e.g., Hillman, *supra* note 22, at 7-9.

52. See, e.g., *C & J Fertilizer, Inc. v. Allied Mutual Ins. Co.*, *supra* note 31, at 179-81.

53. See, e.g., E. FARNSWORTH, *supra* note 14, at 315.

54. The whole area of procedural unconscionability will require the courts to examine closely, among other things, the bargaining that led to the Participants' Agreement, the relationship between WPPSS and the utilities (some of which are owners of WPPSS), see *infra* note 79, and the utilities' understanding of the bond sales used to finance the plants.

likely, however, that if there was a defect in the contract formation process here it stemmed from an imbalance of information: WPPSS may have had much more knowledge of the risks involved in the Participants' Agreement and yet WPPSS may have disclosed little of this knowledge to the utilities.

B. Procedural Unconscionability as a Failure to Disclose Information

Applying this duty-to-disclose aspect of procedural unconscionability involves a difficult inquiry.⁵⁵ There is no general requirement that a party to a contract tell everything he or she knows to the other party.⁵⁶ Information may be expensive and often it is sensible to preserve incentives for the acquisition of information by allowing for its exclusive retention.⁵⁷ But there are also instances where failing to disclose information is widely regarded as improper.⁵⁸ How one characterizes those instances depends ultimately on one's theory of contractual liability. Thus Fried, a will theorist, would ask whether the better-informed party is "conventionally entitled to count" on his or her superior information;⁵⁹ Posner, stressing the efficiency criterion, would impose liability according to "who can obtain the relevant information at lower cost";⁶⁰ Kronman, who favors a Rawls-inspired distributional approach, would allow taking advantage of superior information only if this makes "the disadvantaged themselves better off in the long run."⁶¹ The Second Restatement of Contracts appears to weave together many of these concerns when it condemns nondisclosure of a fact in cases in which disclosure "would correct a mistake of the other party as to a basic assumption . . . and . . . nondisclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing."⁶² In its section on unconscionability, the Second Restatement speaks more generally of cases in which the stronger party knows "that the weaker party is unable reasonably to protect his interests by reason of . . . ignorance."⁶³

55. Unconscionability cases in which the procedural element turns on the duty to disclose are ably discussed in Hillman, *supra* note 22, at 10-15.

56. RESTATEMENT (SECOND) OF CONTRACTS, § 161 (1979).

57. See generally Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978).

58. See *supra* note 55.

59. C. FRIED, *supra* note 45, at 83.

60. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 50-51 (1972).

61. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 491 (1980); see also C. FRIED, *supra* note 45, at 83.

62. RESTATEMENT (SECOND) OF CONTRACTS § 161(b) (1979).

63. RESTATEMENT (SECOND) OF CONTRACTS § 208 comment d (1979).

These differing formulations do not mean that the authorities in question would reach different results in most cases. On the contrary, Fried, Posner, Kronman, and the Restatement often assert that their approaches are consistent with results in various cases.⁶⁴ In the case of the Participants' Agreement, these varying formulations all point to a similar line of inquiry. Did WPPSS fail to disclose material information to the utilities at the time the agreement was signed? If so, could the utilities reasonably have been expected to obtain that information on their own before signing? Was any imbalance of expertise so great and so difficult for the utilities to rectify that nondisclosure by WPPSS amounted to bad-faith dealing?

C. Failure to Disclose Technical Information vs. Failure to Disclose Risk

Judicial analysis of these questions will require a determination of precisely what information WPPSS had at the time the Participants' Agreement was signed. Here there is a great danger that the courts will go astray. Because this case involves nuclear reactors, there is a strong temptation to focus on technical information. Did WPPSS know more about reactor design than the utilities? Were the utilities ever given an adequate explanation of nuclear reactor construction and operation? But these questions, if they are relevant at all, are not central.

One must carefully separate the technical from the policy considerations in deciding whether to buy a reactor. The more relevant inquiry is whether the utilities understood the magnitude of the risk they were assuming under the hell-or-high-water clause. Did WPPSS know more than the utilities about regulatory requirements and uncertainties, about WPPSS's experience in projects of this type, about the odds of delay in construction? If WPPSS had this type of information and failed to disclose it, could the utilities on their own reasonably have obtained enough information to make a rational judgment on whether to assume the risk embodied in the hell-or-high-water clause? These are the central questions. The technical aspects of nuclear energy are relevant only insofar as they bear on the utilities' ability to understand the risk they were assuming.

Perhaps the distinction can best be brought home with a hypothetical

64. Thus Fried discusses the different theories under which he and Kronman at times reached the same result. C. FRIED, *supra* note 45, at 83. Posner asserts that his approach explains the expanding judicial recognition of a duty to disclose. R. POSNER, *supra* note 60, at 51. The reporter's note to the Restatement provision provides numerous cases consistent with the Restatement's formulation. RESTATEMENT (SECOND) OF CONTRACTS, § 161 reporter's note (1979).

example. Suppose you are considering buying a computer that is being sold without warranties, and the seller has, in her office, a desk with two drawers. In one drawer is a detailed description of the computer's design. In the other drawer is a report of how often computers of this type have broken down in the past. Which drawer would you rather look in? The seller's willingness to show you the computer's design may be quite unimportant. But if the seller alone has access to the frequency-of-repair information and she conceals it from you, procedural unconscionability may be present.

The distinction in contract formation between understanding purely technical matters and assessing risk is simply another instance of the importance of that distinction in science policy generally. When a legislature is considering whether to allow nuclear weapons testing, it will hear from various technical experts on the likely nature of radiation exposure to the population and on the possible link between such exposure and various diseases. But the legislature still needs to know the level of uncertainty in the experts' estimates. What are the odds that the testing will have more or less impact on public health than the experts predict? Only with those odds in mind can the legislators make the ultimate, nontechnical decision: do the risks justify the benefits of the testing?⁶⁵

Of course, understanding the odds that certain health effects will arise may involve understanding technical information on the possible links between radiation and disease. But it involves as well understanding the limits of that information. Legislatures, just like private parties entering into technically complex agreements, often hear much more about technical details than about uncertainties. Indeed, if the history of science policy is any guide, it may well be that the utilities were perfectly free to look at an overwhelming display of technical manuals on nuclear reactor construction had they so desired. The more difficult task is to separate the purely technical information from the less-certain risk assessments vital to making a science policy decision, whether that decision is, at the public level, a question of weapons testing, or, at the private level, a question of whether to enter into a contract for the construction of a nuclear plant. A central focus of science policy at the public level since World War II has been on separating the policy from the technical questions. The evo-

65. A classic statement of the limited importance of purely technical information in ultimate policy decisions may be found in D. PRICE, *GOVERNMENT AND SCIENCE* 164–67 (1962). See also Goldberg, *Controlling Basic Science: The Case of Nuclear Fusion*, 68 *GEO. L.J.* 683, 693–94 (1980).

The formulation in this article's text—do the risks justify the benefits of the testing—should not be taken to imply that all relevant factors in a science policy decision can be reduced to conventional cost-benefit terms. Indeed, to the extent that unquantifiable values are at stake, purely technical information may be of even more limited relevance.

lution of Congress' Office of Technology Assessment,⁶⁶ of the President's Office of Science and Technology Policy⁶⁷ and of the federal courts' "hard look" doctrine⁶⁸ has not been a desire merely for more technical data, but rather a desire for an enhanced ability to analyze the contentions of the science establishment so that policy judgments can be made properly.⁶⁹

When courts have discussed procedural unconscionability in the context of commercial leases of complex equipment, they have often mixed together, somewhat imprecisely, the technical information and risk-assessment issues. In finding unconscionability in the lease of an incinerator without warranties to the owners of a picnic grove, the court noted the fact that the lessor of the equipment informed the lessees that the equipment would be suitable, but the equipment turned out not to work at all.⁷⁰ The court also noted that the picnic grove owners "did not profess to understand the size and mechanism of the equipment which would satisfy their needs."⁷¹ But the court failed to inquire into whether the lessor had

66. The origins and workings of the Office of Technology Assessment are described in Note, *Congress and the Office of Technology Assessment*, 45 GEO. WASH. L. REV. 1123 (1977). Congress was concerned in part about technological information from the executive branch being slanted for political reasons. *Id.* at 1126-28. In addition, far from being short of technical data, Congress was swamped with an "infinite amount of information supplied by constituents, lobbyists, the mass media, professional staff, party leadership, the President, and governmental agencies." *Id.* at 1125. The Office of Technology Assessment was created in large part "to assist Congress in asking the 'right questions' about technological issues" and to "systematically sort relevant data and fill information gaps, making possible more adequate congressional appraisal of scientific and technical issues." *Id.* at 1131.

67. The Office of Science and Technology Policy was created by the National Science and Technology Policy, Organization, and Priorities Act of 1976, Pub. L. No. 94-282, 90 Stat. 459 (codified at 42 U.S.C. §§ 6601-71(1976)). The science advisory apparatus that preceded the Office of Science and Technology Policy is described in E. BURGER, JR., *SCIENCE AT THE WHITE HOUSE* 6-11 (1980). From at least 1962 on, the President's science advisor has served to coordinate federal science activities and to attempt to develop a national science policy. *Id.* at 8-11. Some of the President's science advisors' most influential activities have involved providing the President with a view different from that presented by federal agencies and private scientists. For an example involving the dangers of pesticides, see J. PRIMACK & F. VON HIPPLE, *ADVICE AND DISSENT* 41-47 (1974).

68. The origin and scope of the "hard look" doctrine is described in Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 704-08 (1979). The doctrine is designed to help courts gain "systematic control" of the decisions of government agencies. *Id.* at 704. As Rodgers explains,

[c]ourts taking a hard look must become sufficiently acquainted with technical matters in the record to understand why the agency did what it did. The administrator through the record must be in a position to explain to the court "the reasons why he chose to follow one course rather than another."

Id. at 705-06.

69. See *supra* notes 66-68.

70. *Industrialease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc.*, 58 A.D.2d 482, 396 N.Y.S.2d 427, 428 (1977).

71. 396 N.Y.S.2d at 432. In addition, the court implied that the lessees might not have realized that warranties were eliminated when they signed a new version of the contract. *Id.*

any reason to doubt that the equipment would work and if so, whether it concealed that information from the lessees. The lessees' lack of knowledge of the equipment's mechanism is less important than whether they were prevented from accurately assessing the odds that the equipment would work. It may well be that failure of the equipment was a very small possibility, that everyone knew it, and that the risk of that possibility was reasonably assumed by the lessees.

Similarly, when a court found no unconscionability in the lease of a computer it overlooked an important line of inquiry.⁷² Although the computer system suffered numerous breakdowns, the court upheld a disclaimer of warranties, noting that "[a]lthough the plaintiff was less knowledgeable concerning computers than the defendant, as a business man he must be deemed to possess some . . . familiarity with disclaimers."⁷³ That is accurate as far as it goes. But did the lessor of the computer conceal from the plaintiff what it knew about the chances that the computer would break down if used in the way plaintiff planned? If so, was it possible for the plaintiff to get this information on his own? Without answers to these kinds of questions it is difficult to know whether there was in fact a procedural defect in the bargain.

The best judicial analysis of procedural defects relating to risk assessment comes, oddly enough, not in cases involving complex equipment, but rather in the traditional area of farmers buying seeds with latent defects. In a modern example of this line of cases, a farmer purchased a soybean inoculant that did not work.⁷⁴ Although the contract limited liability to the return of the purchase price, the court found that limitation unconscionable and allowed an action for consequential damages.⁷⁵

The product, Triple Noctin, was based on a new freeze-drying process.⁷⁶ The court did not worry about whether the farmer knew how this process worked. Rather the court stressed that the seller had conducted tests revealing "grave doubt" that the process would work, yet the test results were not told to the farmer.⁷⁷ Moreover, the court emphasized that there was no way "by which a farmer, with the naked eye and without the assistance of scientific examination not ordinarily available," could decide whether the process was useful until it was too late, that is, until the crop had developed and consequential damages had been suffered.⁷⁸

72. *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919 (E.D. Wisc. 1977), *aff'd mem.*, 588 F.2d 838 (7th Cir. 1978).

73. 444 F. Supp. at 923.

74. *Majors v. Kalo Laboratories, Inc.*, 407 F. Supp. 20 (M.D. Ala. 1975).

75. *Id.* at 25.

76. *Id.* at 22.

77. *Id.*

78. *Id.*

Under the circumstances, the court's finding of procedural unconscionability was well supported. Nondisclosure of facts not reasonably available to the other party can justify a finding of procedural unconscionability when the nondisclosure prevents that party from adequately assessing the risks involved in the contract.⁷⁹ This ultimately should be the inquiry not only for latent defects that ruin a farmer's crop but for a contract like the Participants' Agreement as well.

IV. CONCLUSION

Unconscionability in a commercial setting has been established more often than is generally realized. Whether it can be established in the case of the Participants' Agreement should depend in large part on whether there was nondisclosure of relevant information concerning the risk of noncompletion. If such nondisclosure poisoned the bargaining process and if the hell-or-high-water clause is interpreted as placing virtually all of the risk on the utilities, a finding of unconscionability should result.

79. The duty to disclose is particularly strong when parties are in a fiduciary relationship. RESTATEMENT (SECOND) OF CONTRACTS, § 161 comment f (1979). Whether any such relationship exists between the parties to the Participants' Agreement is a factual issue. *See supra* note 54. There is some overlap between the duty to disclose and Eisenberg's notion of transactional incapacity. *See Eisenberg, supra* note 46, at 763-73.