When an amendment, which would otherwise be valid under the statute, is blocked by a minority acting under a special charter provision limiting the amending power, equity should grant relief if the majority can prove mala fides on the part of the dissenters. This test would be difficult to meet, but, since its burden would fall on the litigant having superior resources and strategic position, it should prove more workable than the often clumsy attempts to control unlimited majority powers.

POLICING CONTRACTS UNDER THE PROPOSED COMMERCIAL CODE

If the court finds the contract or any clause of the contract to be unconscionable it may refuse to enforce the contract or strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed.²

This provision is presently being considered for inclusion in the new Uniform Commercial Code by the Commissioners on Uniform State Laws. The provision and the commissioners' comments on it invite analysis of the possible effects of interfering with contractual obligations because they are "unconscionable." The latest comment indicates one area in which increased judicial control may be expected. Prior comments and the language of the provision provide incentive for further speculation.

At present the commissioners appear primarily concerned with the difficulties resulting from an application of existing rules of assent to form contracts. The law generally insists that acceptance of a document, particularly when signed, indicates agreement to all its terms.² However, the average individual becoming a party to a form contract actually agrees to a type of transaction in which only such matters as price, quantity, and quality are of interest.³ The ratable benefit of all the shareholders as their interest appears." The Modern Corporation and Private Property 248 (1932). This principle should apply to any power given a minority or special class to block a given action.

² Uniform Commercial Code § 2-302 (tent. draft, May, 1950). The draft considered by the commissioners before the latest revision in May read, "If the court finds the contract or any clause of the contract to be unconscionable it may refuse to enforce the contract or strike any unconscionable clause and enforce the rest of the contract or substitute for the stricken clause such provision as would be implied under this article if the stricken clauses had never existed" (tent. draft, Spring, 1950) (emphasis added). Professor Grant Gilmore, Yale University, informed the writer of the latest revision which was unpublishable at the time this article went to press. The commissioners' comment on the provision is to be rewritten to reflect the deletion in the latest revision. Actually the section omitted appears superfluous to the meaning of the clause. For example, should a clause concerning place of delivery be stricken as unconscionable, the law will still imply, without this provision, that delivery is to be at the seller's place of business. Uniform Commercial Code § 2-308 (tent. draft, Spring, 1950).

² 1 Williston, Contracts § 90A (1936); Rest., Contracts § 70 (1932).

³ Llewellyn, Review of Prausnitz, The Standardization of Commercial Contracts in English and Continental Law, 52 Harv. L. Rev. 700 (1939). There are a number of excellent discussions concerning form contracts. For an analysis of their treatment by the courts consult
whole set of collateral form provisions used to limit risks and promote certainty are seldom given attention. It is through these terms that an unfair advantage may be taken. Typical examples of "unfair" clauses in sales contracts are those limiting the buyer's remedies against the seller shipping defective merchandise.\(^4\)

The courts have displayed various attitudes in controlling the effect of "unfair" form terms. Some have rendered such clauses innocuous by manipulating canons of construction and legal doctrine.\(^5\) Others appear to apply a subjective test of assent to prevent enforcement.\(^6\) Still another approach is to determine whether a reasonable man would understand a writing to contain terms of a special contract which he must read at his peril and regard as part of the agreement.\(^7\) None have admittedly denied enforcement on the ground that the terms were unfair.

The unconscionability provision proposed by the commissioners disregards the assent approach. Rather, it appears to require a generalized background of rights and duties which will be fair to both parties. In this respect the code approach appears realistic since parties to form contracts seldom assure themselves a fair agreement by bargaining term by term.

If such a standard is to be adopted, some method should be provided for ascertaining "fair" risk allocations as a basis for judging particular clauses. While the commissioners state that the provision will not disturb such allocations, the practice of striking unfair clauses will necessarily have that result.\(^8\)

Perhaps an attempt could be made to study various types of day-to-day transactions involving form contracts in order to determine typical risk distributions.

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\(^4\) Kansas City Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P. 2d 1272 (1937) (unduly limiting time for complaint); Austin Co. v. Tillman Co., 104 Ore. 541, 209 Pac. 121 (1922) (limiting buyer's remedy to return); Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927) (clause negating all seller's warranties).

\(^5\) Cases cited in Uniform Commercial Code § 2-302, Comment (tent. draft, Spring, 1950).

While such practices may be effective, they result in a series of embarrassing precedents when the court is seriously attempting to apply rules of construction and legal doctrine. Llewellyn, Review of Prausnitz, The Standardization of Commercial Contracts in English and Continental Law, 52 Harv. L. Rev. 700 (1939).

\(^6\) Jones v. Great Northern Ry., 68 Mont. 231, 217 Pac. 673 (1923); see Wholey Boiler Works v. Lewis, 45 R.I. 441, 123 Atl. 595 (1924); Contract Clauses in Fine Print, 63 Harv. L. Rev. 494, 495 (1950).

\(^7\) Boston Lumber Co. v. Pendleton Bros., Inc., 102 Conn. 626, 129 Atl. 782 (1923); Secoulsky v. Oceanic Steam Nav. Co., 223 Mass. 465, 112 N.E. 151 (1916); Williston, Contracts § 90B (1936); Contract Clauses in Fine Print, 63 Harv. L. Rev. 494, 496 (1950).

\(^8\) If the court should strike a clause disclaiming all warranties of fitness, the "risk" of defects in the product would shift from the buyer back to the seller.
Such research would necessarily extend beyond the courtroom and might be an appropriate function for either private or governmental agencies.9

If the commissioners were interested only in the "prevention of unfair surprises" caused by certain types of form clauses, the provision could have been specifically directed to this problem. A general application of judicial notions of fairness to sales contracts is in no way precluded by the statutory language, and the ease with which such an application could be effected is illustrated by the variety of purposes the draftsmen have already found in the provision. While the present comment directs attention to form contracts, a prior draft stated that the clause would apply "to the field of sales the equity court's ancient policy of policing contracts for unconscionability...."11 Formerly, the commissioners believed the provision extended to contracts "deliberately entered into ... with full knowledge" and required "certain incidents despite any agreement to the contrary."12 Today, they insist that the same clause will not disturb "allocation of risks" resulting from "superior bargaining power."13

Regardless of these changes, the present comment makes no attempt to limit the application of the clause to form contracts. Whether courts accept this invitation to interfere with private agreements is a matter of speculation. A clause phrased in terms of unconscionability certainly provides an incentive to interpret sales contracts in the light of "equity's ancient policy." That policy represents existing judicial notions for policing unfair contracts, and its application was anticipated by an earlier comment on the provision.14 The best indication of the consequences of such a practice can be seen by comparing equitable and legal doctrine.

Specific performance cases provided the medium for development of a doctrine which transcended traditional concepts of fairness. The latter, applied by both law and equity courts, treated a gross inadequacy of consideration as evidence of fraud.15 The equity doctrine has further required an indefinable fair-

9 Sharp, Pacta Sunt Servanda, 41 Col. L. Rev. 783, 797 (1941).
11 Uniform Commercial Code § 2-392, Comment (tent. draft, Spring, 1949).
12 Ibid.
13 Uniform Commercial Code § 2-302, Comment (tent. draft, Spring, 1950).
14 Uniform Commercial Code § 2-302, Comment (tent. draft, Spring, 1949).
15 Lord Hardwicke appears to have offered the first definition in Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 155 (1729), when enumerating the various forms of fraud recognized in equity. He defines an unconscionable bargain to be one which "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...." A number of other equally elusive definitions can be found in 1 Page, Contracts § 641 (1920). A review of many of the unconscionability cases at law can be found in United States v. Hume, 132 U.S. 406 (1889). See Scott v. United States, 12 Wall. (U.S.) 443 (1870); Streifer v. McCullough, 97 Ind. App. 123, 174 N.E. 823 (1931); Kelley & McHale v. Caplic, 23 Kan. 474, 33 Am. Rep. 179 (1880).
ness in the negotiations preliminary to the contract and in the circumstances at the time of enforcement.

Fairness of negotiations has been judged on the basis of the parties’ conduct and the resulting contract. Sharp practices and misunderstandings insufficient to avoid a contract at law on grounds of fraud, duress, or mistake have prevented specific performance.\(^6\) When the agreement has been the only evidence of unequal bargaining, courts of law and equity have both generally allowed relief only when inadequacy of consideration amounted to evidence of fraud.\(^17\) However, application of fraud doctrines has differed materially in the two courts. A mere handful of damage actions at law grant relief;\(^9\) similar cases in equity denying specific performance are numerous.\(^8\) This disproportionate quantity may indicate that equity has been more interested in the exchange than in fairness of negotiations. Interest in exchange equivalence has led a minority of jurisdictions to abandon the fraud test as a gauge for relief; mere inadequacy of consideration may be grounds for denying specific performance.\(^20\) The more exacting standard of fairness applied in these states has produced considerable litigation.\(^22\)

It is generally agreed that determinations of fairness refer to the time of agreement.\(^23\) However, the view that specific performance should not work a

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\(^8\) Cases cited note 15 supra.

\(^9\) Cases collected in Specific Performance as a Matter of Right, 65 A.L.R. 7, 86 (1930).


\(^12\) Simmerman v. Fort Hartford Coal Co., 310 Ky. 572, 221 S.W. 2d 442 (1949); Smith v. Farmer’s State Bank of Alto Pass, 390 Ill. 374, 61 N.E. 2d 557 (1945); Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 23 S.E. 2d 372 (1943); Pomeroy op. cit. supra note 16, at § 178.
hardship has afforded the courts considerable latitude in determining the effect of events subsequent to the contract. Hardship has not invalidated contracts which were intended to run indefinitely or which were designed to settle uncertainties, but subsequent events may introduce an element of inequality that will prevent specific performance in other types of agreements. The test applied seems to depend upon whether changed conditions have been beyond the scope of reasonable expectation. The decision in Willard v. Tayloe reflects this approach. Prior to the Civil War the parties concluded a ten-year lease which contained an end-of-term option to purchase. The great rise in land values and the general currency inflation resulting from war conditions caused the lessor to refuse to convey the property. The Supreme Court viewed the inflation as rendering the agreement inequitable and refused specific performance to the lessee.

If such a contract had been considered in a court of law, tests of impossibility and frustration of purpose probably would not have prevented the awarding of damages. However, should the code provision be developed according to equity notions of fairness, courts may deny all recovery.

While the application of these doctrines in actions at law would seem a remote danger if it were not for the new code provision, there are indications that similar developments have already begun. Cases involving requirement contracts indicate that risks assumed by one party can meet with judicial disapproval. Schlegel Manufacturing Co. v. Cooper’s Glue Factory illustrates this result. The defendant agreed to supply the plaintiff-jobber with his requirements of “Special BB” glue for one year. Because of war conditions the price of the product rose greatly, and the plaintiff placed large orders. The defendant refused delivery. The Court of Appeals of New York denied damages on the ground that the contract lacked mutuality. Despite the court’s view, the promise to purchase requirements implied an obligation not to purchase elsewhere, which could have been damaging if prices had fallen. This certainly would appear to be a legal detriment sufficient to support a contract under orthodox views.

It requires little imagination to see that the New York court was doing just what had been done in Willard v. Tayloe through requirements of fairness. Such an approach, given support by the new code provision, may cause notions of a fair exchange to replace ideals of freedom of contract.

The continental law has had long and considerable experience with such at-
tempts to insure a fair exchange. The rule of *laesio enormis*, which attempted to determine matters of fairness by a mathematical standard, has been seriously reduced in scope in all continental jurisdictions and actually abandoned in modern German law. The reasons for limiting the doctrine are always the same. In principle it is incompatible with the ideal of a modern competitive economy, and in practice it is condemned for leading to artificiality, confusion, and litigation.

Despite these criticisms, fair exchange concepts have not been eliminated. In Germany, for example, fair price ideals cropped up again in the code provision concerning usury under which any exchange of values is theoretically subject to scrutiny provided the transaction gives rise to a suspicion of overreaching. Like previous systems of judicial price control, problems of valuation were again of central importance. The ostensible mathematical certainty characterizing doctrines of *laesio* was abandoned for a provision similar to that in the new commercial code—evidence of a "strikingly disproportionate" exchange. Decisions under that section offer little illumination as to methods of valuation employed, though market price does seem to be one index of value.

While such an index is the only realistic standard available, it is often hard to ascertain with any accuracy. Furthermore, the test has offered little insight into the problems of risk and other elements of value incapable of measurement.

Even if American and European experience indicated that the judicial process were capable of handling difficulties inherent in policing contracts, such control would not be desirable. The code provision does not prevent courts from...

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30 The evolution of continental methods of insuring a fair exchange is discussed in Dawson, Economic Duress and the Fair Exchange in French and German Law, 11 Tulane L. Rev. 345 (1937), 12 Tulane L. Rev. 42 (1937). On efforts to determine and enforce a "just price," consult also the article under that title by Salin, 8 Enc. Soc. Sci. 504 (1932).

31 The doctrine of *laesio enormis* originated in Roman law and provided that in sales, originally perhaps only in sales of land, the seller could demand rescission if the price received was less than one-half the value of the land sold. During the middle ages the scope of *laesio* was extended to include contracts of exchange, partnership, lease, and even compromise agreements and gifts. Since the sixteenth century it began to lose force and was finally wiped out in German law during the codification of 1896. Dawson, op. cit. supra note 30, at 12 Tulane L. Rev. 42, 49.

32 Ib. at 376.

33 Dawson, op. cit. supra note 30, at 12 Tulane L. Rev. 42, 48-52. Usury laws represent one sphere in which legislatures have shown no hesitancy in attempting to promote fair price ideals. The classical rebuttal of the wisdom of such laws was written by Bentham, A Defence of Usury (1818).

34 Article 138 of the German Civil Code provides: "(1) A transaction that is *contra bona mores* is void. (2) In particular, a transaction is void, whereby a person through exploitation of the necessity, thoughtlessness, or inexperience of another, causes economic advantages to be given or promised to himself or to a third party, which economic advantages exceed the value of the counterperformance to such an extent as to be, under the circumstances, strikingly disproportionate." Dawson, op. cit. supra note 30, at 12 Tulane L. Rev. 42, 49.

35 Compare ibid., at 56-62.
regulating bargains "deliberately entered into ... with full knowledge." Promissory liability, however, ideally has been considered based on the mutual free consent of individuals rather than on secular, religious, or judicial notions of fair price.

Some possible consequences of the code provision can be foreseen if it is allowed to develop in a manner similar to present equity practices. Experience indicates that inquiries into the adequacy of consideration breed litigation. Trial court judges will be required to reach conclusions demanding an intimate knowledge of economics and requiring arbitrary value judgments. It is doubtful whether any basis of predictability can be expected from such treatment; parties with particularly appealing arguments may be helped in forcing settlements because of the increased uncertainty of a court decision.

If the country is plagued by a large number of unhealthy bargains requiring particular attention, the commissioners might well adopt provisions designed to deal directly with the problem. The "hard" bargain has normally appeared in particular types of transactions or has resulted from factors preventing the proper type of preliminary negotiation.

Statutes could be drafted to solve problems of fairness presented by particular types of transactions. A comparison of the "firm offer" provisions of New York38 and of the Uniform Commercial Code39 illustrates such treatment. Both provide that offers stated to be irrevocable need no consideration to be given effect. However, the Commercial Code provision limits the duration of such offers to prevent hardships which may arise through changing conditions. The code also anticipates the difficulties which may result through the use of form clauses. When form clauses preventing revocation are prepared by the offeree, they must be separately assented to by the offeror to become binding. The problems of the Schlegel40 case, the form clause, and other common transactions raising questions of fairness might well be controlled in this manner rather than through the unconscionability provision proposed by the commissioners.

Concepts of fraud, mistake, and duress are designed to combat lop-sided bargains which result from improper preliminary negotiations. These concepts have developed slowly; however, they offer opportunity for worthwhile expansion. For example, relief for unilateral mistake has been severely limited because of a supposed threat to "objective" theory. Nevertheless, relief for unilateral mistake would appear as sensible as relief for mutual mistake if similarly ana-

36 Uniform Commercial Code § 2-302, Comment (tent. draft, Spring, 1949).
37 Cases cited note 21 supra; Dawson, op. cit. supra note 30, at 11 Tulane L. Rev. 345, 376.
39 Uniform Commercial Code § 2-205 (tent. draft, Spring, 1950).
41 § Williston, Contracts § 1579 (1936).
lyzed under either traditional or realistic views of assent. The doctrine of business compulsion, the most modern extension of duress, depends upon proof of very serious pressure, illegal under independent circumstances. However, the use of legal pressures to obtain undeserved benefits may be just as reprehensible. The expenses and delay of litigation, for example, make the threat of suit a formidable weapon.

If legislative and judicial controls were directed at affording parties a fair opportunity of gauging their own bargain, it is doubtful whether widespread policing for unconscionability would be necessary. The parties, rather than the courts, are still considered to be the best judges of their bargain, and their promises, freely given, should continue to be enforced.

However, the language of the code provision would make extensive judicial policing of contracts possible. Early comments indicated that such surveillance was intended; the present draft fails to preclude observance of such a purpose in judicial interpretation. Perhaps the omission of mention of general judicial control in the present comment indicates that the commissioners have experienced a change of heart, but that comment cannot be expected to control development of the provision. If the draftsmen do not wish to enact something similar to "equity's ancient policy" as part of sales law, the statute must be rewritten. It can no longer be couched in broad terms of unconscionability. It must concentrate on particular problems toward whose solution it is directed.

LOSS SPLITTING IN CONTRACT LITIGATION

With rare exception Anglo-American legal tradition has regarded financial and economic losses as burdens to be borne completely by either one individual or another. The major task of the courts has been that of shifting the burden from the party suffering the loss to the party "causing" it. In cases where this could not be accomplished, the loss was then said to "lie where it falls."

The application of this primitive notion to the more complex legal relations of present-day life often leads to unjust results. In some situations efforts to remedy these inequities have been made. Thus, when a loss has been suffered because of the fault of more than one individual, damages may be apportioned among the wrongdoers. Losses resulting from the negligence of both the in-