An Effective Article 2 of the Uniform Commercial Code: Who is Responsible?

John E. Murray, Jr.[*]

The articles in this issue of the *Duquesne Business Law Journal* present a spectrum of views by distinguished scholars over the plight of the keystone of commercial law reflected in Article 2 of the Uniform Commercial Code ("U.C.C."). More than two decades ago, a decision was made to pursue a revision of the venerable Article 2 of the Uniform Commercial Code. Other Articles of the U.C.C. had been revised, some more than once. After its vetting by the New York Law Revision Commission inducing the 1958 "official text," however, the statutory language of Article 2 has remained fundamentally unchanged for a half century.

There has never been any doubt that the Uniform Commercial Code, especially Article 2, was not designed as a civil code. It was always seen as a common law code—a "semi-permanent" piece of legislation that would evolve as commercial practices evolved. Indeed, its chief architect even found an approach by statute to be dubious and awkward. Karl Llewellyn's Article 2, filled with Llewellynesque leeways, was his radically different contract law with its emphasis on "agreement." The apotheosis would be the "bargain-in-fact" of the parties. The statutory definition of "agreement" emphasized the indispensable inclusion of trade usage, course of dealing and course of performance when consistent with the parties' words that would never be excluded under the Article 2 version of the parol evidence rule. The then new parol evidence rule would preclude other consistent evidence of prior manifestations of agreement only if such agreements "would certainly" have been included in the writing. The consequent rejection of any "plain meaning" interpretation of the parties' words was one of many Article 2 thrusts to eschew "technical" rules of classical contract law that would interfere with the identification of the factual bargain.

Among other radical changes in classical contract law, the leading iconoclasts were the sections on unconscionability and a species of unconscionability addressing variant terms in pre-fabricated, unread and non-negotiable "boilerplate" standard forms dictated by a party with superior bargaining power. The unconscionability "principle" in § 2-302 was designed to avoid the use of "covert tools" and spawn candid precedent that would provide workable standards to assure enforcement of "decent" terms while ridding

* Chancellor and Professor of Law, Duquesne University School of Law.

contracts of "indecent" terms. More than six decades later, the pristine judicial analysis of the unconscionability principle has yet to appear.

The more specific new tool which I once called "incipient unconscionability" was designed to war against mechanical applications of the "matching acceptance" ("mirror image") rule of the common law that had previously resulted in unwitting inclusions of unbargained boilerplate terms solely because they appeared in the printed form of the party who fired the "last shot" in the battle of the forms. For more than fifty years, courts have criticized the statutory language of § 2-207, but judicial interpretations and constructions of that language meriting similar characterizations are rarely uttered. Decades of confusion have resulted in the current construction that allows a knowledgeable draftsman to create a buyer's purchase order that will "win" the battle of the forms every time—raising the immediate suspicion that there is something wrong with the current construction.

Disagreements over the necessary revision of various sections of Article 2 were almost non-existent in relation to § 2-207. The virtually unanimous view that it had to be revised, however, disintegrated with respect to how it should be revised. The amended (2003) version of § 2-207 would address a number of problematic issues that would improve it. The amended version's express refusal to address the current controversy over the scope of § 2-207, however, is quite disappointing as is its broader reliance on judicial elaborations which provide preciously little confidence that all will be well in light of a half century of confusion.

In 2009, some courts would hold that § 2-207 applies only if there are two forms with different non-dickered terms, thereby ignoring statutory language, comment language and considerable precedent. The fact that any court would view the popular title of § 2-207 as literally requiring a "battle of the forms" is incredible. Indeed, the primary evil to which the section was addressed was the sending of only one form containing terms that varied the terms of the parties' prior oral agreement.

The elimination of § 2-207 was just one of the obstacles to the recognition of the nefarious "rolling contract" theory. This theory was anything but a "quiet revolution." It was a swashbuckling invasion that not only severely limited § 2-207, but emasculated the offer and acceptance section[1] and the modification section,[2] while it added a new exception to the common law precept that silence does not constitute acceptance. In the process, it also performed a magical transformation of the offeror and offeree. The "theory" applies to "merchants and non-merchants alike." Consider how a practicing lawyer or a sitting judge should analyze the following simple illustration.

An authorized agent of the Ames Corporation telephones an order for equipment identified as an X-35 computerized sorting machine to the Barnes

1. U.C.C. § 2-206.
2. U.C.C. § 2-209(1).

Corporation at price of $50,000. The machine is shipped by Barnes and arrives in a carton containing a sheet of Barnes' standard terms and conditions (warranty disclaimers, arbitration clause, choice of law and choice of forum clauses, remedy exclusions that limit the buyer's remedy to return of the goods and repayment of the price for 90 days and a statement that the buyer accepts these terms by failing to object to them and return the goods within 30 days from delivery its refund). The invoice is paid, and 92 days later, the machine fails to operate and cannot be repaired. No objection to the terms inside the container was made during the first 30 days.

Under the "rolling contract" analysis, the seller's terms are enforceable. The theory supporting this analysis begins with the determination of which party was the offeror. When the buyer "ordered" the machine by telephone, it would appear that the buyer was the offeror, but the "rolling" analysis insists that the seller is the offeror. This is essential to the theory to ascertain that no contract will be formed until the goods and the terms inside the box are delivered and the buyer has an opportunity to review the terms and decide whether to "accept" them.

If the buyer is what it appears to be, the offeror, the seller's statement that the goods would be shipped would be an acceptance of the offer. At the very latest, the buyer's offer would be accepted upon the seller's shipment of the machine under § 2-206(1)(b) expressing the truism that "prompt shipment" constitutes acceptance. The "theory," however, cannot abide this analysis because a contract would have been formed without the seller's standard terms. Thus, § 2-206 is simply ignored. It is not mentioned. Another section not mentioned is § 2-209(1). If a contract had been formed at the latest upon shipment by the seller, the seller's later submission of terms would be relegated to an attempt at modification of the contract which would fail absent evidence of the buyer's agreement to such terms. Thus, § 2-209(1) is also ignored and circumvented. Since § 2-207 was expressly relegated to situations involving two conflicting forms, it has no application to this situation. So, transform the seller into the offeror, ignore § 2-206 and § 2-209 and their precedent, limit § 2-207 and ignore its language and precedent while creating a new exception for "silence" as acceptance and, *voila*, we have a major judicial revision of Article 2. Jurisdictions that do not accept these imaginative and revolutionary changes, however, will not find the seller's standard terms to be enforceable. Whatever happened to law settlement? The invasion of the "rolling contract" theory, alone, is more than sufficient reason for a revised Article 2.

The underlying purpose of the "rolling contract" theory was the obsessive desire to promote "efficiency." Moreover, the condescending tone of the rolling contract opinions suggests that everybody knows that a seller's standard terms are compelled by market forces to be fair and reasonable. Thus, it is unnecessary to read, understand or have any negotiating power at all with respect to such terms. Suddenly an old slogan comes to mind: "Trust but verify." There are too many illustrations of oppressive terms drafted by

sellers' lawyers who continue the practice Llewellyn cautioned against of "drafting to the edge of the possible." The "rolling contract" supporters' general response to those concerns is, "not to worry." On the off chance that there may be some deviation from fair and reasonable standard terms, courts will simply refuse to enforce any "unconscionable" term.

The unconscionability section, § 2-302 was Llewellyn's favorite section, but he found he could not draft a statute that adumbrated the details or mechanics of that section. His early efforts to do so produced a section of unacceptable length which continued to leave unresolved issues. The denouement was the section that can be translated as, "Unconscionability is bad; conscionability is good." Llewellyn expected courts to adumbrate the details of this equitable principle that he had reconstructed in statutory form to allow courts to "police" contracts—again, to remove "indecent" terms. His most candid "definition" recognized total dependency upon the judicial process: "When it gets too stiff to make sense, the court will kick it over."

Arthur Leff provided an early and devastating critique of the new unconscionability section as nothing more than "an emotionally satisfying incantation" proving that "it is easy to say nothing with words." Arthur, however, could not resist suggesting something to assist the analysis. He emphasized the distinction between "procedural" and "substantive" unconscionability. Since Llewellyn had died and left no manual on how to use the new tool, courts were eager to embrace any new analysis and the "procedural-substantive" dichotomy certainly sounded impressive.

Leff's cute aphorism of "bargain naughtiness" was not a sufficient description of the procedural variety for courts and commentators. It was necessary to plod through the ritual of determining just how "fine" or legible the printed clauses were. Was there anything conspicuous about them? Did they appear only on the reverse side? Was their terminology excessive technical, i.e., "substantively inconspicuous"? What was the educational and experiential background of the weaker party? Was there an opportunity to review the boilerplate?

"Procedural" unconscionability had a distinguished provenance. It reflected the view of the 1960's in classic cases such as the opinion by Judge Francis in *Henningsen v. Bloomfield Motors*,[3] or Judge Skelly's Wright's oft-quoted definition of unconscionability as involving "an absence of meaningful choice" in *Williams v. Walker-Thomas*.[4] By the time revisions or pervasive amendments to Article 2 were discussed, however, "procedural" unconscionability had been emasculated. Numerous cases suggested that the formerly evil "contract of adhesion" of the 1960's was no longer evil. The ultimate recognition of this view came from still another Seventh Circuit Court of Appeals opinion by the creator of the rolling contract theory, Judge

3. 161 A.2d 69 (NJ 1960).
4. 350 F.2d 445 (D.C. Cir. 1965).

Frank Easterbrook, who wondered, "What's wrong with a contract of adhesion, anyway?" It is not difficult to discover statements in the case law suggesting that any contract of adhesion is procedurally unconscionable, but that characterization will have no effect on the enforcement of procedurally unconscionable terms. The conventional wisdom is that substantive unconscionability is essential.

Skelly Wright defined "substantive unconscionability" as a term "unreasonably favorable to one of the parties." Other characterizations, however, suggest that the terms must be "bizarre" or, under the classic concept as used in equity, the kind of term that no sane person would abide. There was a time when a disclaimer of the implied warranty of merchantability would be viewed as substantively unconscionable. Currently, however, a contract with seller's boilerplate terms that does not disclaim that warranty or limit it to the shortest duration possible under a statute such as the Magnuson-Moss Act should be preserved for museum display.

Is it necessary to demonstrate both procedural and substantive unconscionability to preclude the enforcement of a contract or term? The case law answers vary. Some courts talk about a "sliding scale"—presumably, the more procedural, the less substantive is needed, and the reverse. There are several cases, however, holding that substantive unconscionability, alone, is sufficient. Is procedural unconscionability, alone, sufficient? Courts are particularly uncomfortable with that question and generally refuse to answer it. Their discomfort is understandable since the millions of contracts of adhesion formed every day manifest procedural unconscionability. If a contract of adhesion is *per se* procedurally unconscionable but there is nothing "wrong" with a contract of adhesion, procedural unconscionability, alone, is necessarily insufficient.

If we had the distinct advantage of Arthur Leff's scholarship in 2009, the experience of the last fifty years would almost certainly produce a new statement that the "procedural" and "substantive" unconscionability labels have proven to be nothing more that additional emotionally satisfying incantations proving it is easy to say nothing with words. Some courts admit that they cannot define "unconscionability." When courts are unsure of the meaning and application of a concept, they apply it sparingly, if at all. In the last few years, the unconscionability argument was recently revived in a series of cases concerning claims of unconscionable arbitration clauses where the mantra of procedural and substantive unconscionability is repeated ad nauseam but with no more precision or meaning than its restatement in earlier cases. The need for clarification and adumbration of the unconscionability concept, alone, is sufficient to induce a new effort to pursue a revised Article 2.

There are other needs required under a new Article 2, some of which have been addressed effectively by the amended version, but the needs and their expressions exceed the amended version which was understandably pusillanimous. Trying to resurrect some kind of meaningful version of Article 2

after a decade of failure that ended in a pathetic display of vested interests is an almost frightening task that was destined to fail. The current "law" under § 2-318 involving vertical and horizontal privity (or its partial or complete absence) is messy. It should be possible to arrive at a final version that will not require statutory alternatives. Allowing for treatment of a manufacturer's express warranty obligations to remote buyers should be possible without the confusion of amended § 2-313A and B. It is also really possible to create a meaningful and understandable § 2-313 test to replace "basis of the bargain." Rescuing §§ 2-209(2) through 2-209(5) from judicial constructions that expressly reflect "little analysis" and unwittingly repeal most of § 2-209(2) is not terribly difficult. It is even possible to find agreement and provide necessary certainty on the "baffling" issue of standardized terms. Other needs are simpler, and some have been effectively met in the amended version.

The "underlying purposes and policies" of the Uniform Commercial Code are unchanged under the revised Article 1 including the purpose and policy "to make uniform the law among the various jurisdictions."[5] On the assumption that values such as law settlement, certainty and finality continue to be preferred over *ad hoc* decision-making, it is reasonable to suggest that the enacted underlying purpose of the U.C.C. will not be fulfilled absent a sufficient measure of uniformity. If the current interpretations and constructions of Article 2 are sufficiently uniform, the need for an amended Article 2 is not pressing. It is my view that the current interpretations and constructions are not sufficiently uniform and there is a critical need for a new Article 2. The issues remain.

There is no easy solution to the issue of the enforceability of boilerplate terms to which there is no vestige of genuine assent, but the excuse of impossibility of performance will not lie. For people who spend their lives dealing with "material," "substantial" and "reasonable" normative standards, not to mention "good faith and fair dealing," developing a coherent analysis of unconscionability and variant terms in the acceptance of an offer should present nothing more than an interesting challenge. There is a need for sufficient uniformity that can only be addressed by insisting on a consensus of meaningful analyses concerning these and other unresolved issues.

Creating a new committee with a charge to pursue another ten years of wrangling over a new Article 2 will not succeed. The ALI/NCCUSL[6] experience provides clear and convincing evidence that any new committee of lawyers will ignore any scope limitations when provided with an opportunity to redo an entire Article of the U.C.C. It may be useful to allocate responsibility to pursue specific sections where the needs are greatest. The "uncons-

5. U.C.C. § 1-103(b).

6. The ALI refers to the American Law Institute. The NCCUSL refers to the National Conference of Commissioners on Uniform State Laws.

cionability" group would confine itself to that topic just as the § 2-318 group and the § 2-207 group would focus on their responsibilities along with other similarly limited efforts. The particular design of a revision process, however, is not the essential obstacle.

The genius of Llewellyn has provided a splendid ambience for the settlement of disputes under Article 2, which incidentally effected radical and necessary changes in classical contract law. That ambience is clearly eroding, however, and the current erosion augurs even more drastic erosion. The sorry experience of the nineties reveals an historic abdication of responsibility by the members of the academic and practicing bars who could have achieved consensus but failed, not always for virtuous reasons. Who is responsible for an effective Article 2? We are responsible. There is a collective responsibility to pursue this effort to a highly successful conclusion. It is time for ALI and NCCUSL to return to the noble purposes in their mission statements for the benefit of law and society to assure a sound and workable Article 2 for the 21st century.