

M E M O R A N D U M

TO: TOBY VIGOD

FROM: Virginia Adamson

DATE: 24 September 1981

RE: Hyde Park - Unconscionable Contracts

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Toby, attached is the article "Unconscionability under UCC Section 2-302: How it Applies to Commercial and Government Contracts" referred to me by Reuben Hasson at OHLS. I don't think it will be very helpful to you but you may want to read it over. Below is a brief outline of the article;

Section 2-302 of the UCC is intended to allow the Court to pass directly on the unconscionability of a contract or on a particular clause of the contract. That section also makes 3 remedies available to a court if it finds a contract unconscionable. The Court:

- (i) may refuse to enforce the contract as a whole;
- (ii) may refuse to enforce the unconscionable portion; and
- (iii) may modify the unconscionable portion to avoid unconscionable results.

The application of the unconscionability section is to be considered in light of the "circumstances existing at the time of the making of the contract." If later circumstances arise rendering a contract unconscionable, relief is not to be granted.

Earlier cases where contracts made with the government have been held unconscionable concerned bidding and proposal mistakes. As an example, in one case involving a supply contract, the GAO (General Accounting Office) recommended that the contract be cancelled as being unconscionable on the basis that the bidder's mistake was so great that the "Government was obviously getting something for nothing."

The courts and Boards have not followed any consistent pattern in deciding the few cases where the question of unconscionability is raised. Cases have been categorized as concerning either procedural or substantive unconscionability.

In a case where a contractor abandoned performance of a fixed-price well-digging contract when he could not obtain water of the quality guaranteed, and the government refused to make any further payments, the decision-making body did not find the guarantee provisions procedurally unconscionable because of the disparity in the parties' bargaining power. There have been other cases, concerning "substantive unconscionability" when the unequal bargaining power between the government and other contracting party has been considered, however.

Examples of cases where "substantive unconscionability" is raised are also given. In one case the Board held that the government threatened to terminate a contract for default when sending a new schedule, where a contractor had experienced schedule difficulties, was unconscionable.

There were no cases that dealt with a fact situation similar to Hyde Park. The article is useful in showing that unconscionability continues to be a growing source of relief to contracting parties in the governmental area. An argument might be made that there is the possibility of unconscionability being alleged by Hooker because of:

- unequal bargaining power;
- the period of time during which the contract is to be enforced being extended indefinitely,

and on that basis the contract being unenforceable. Reuben Hasson at OHLS also pointed to the fact that the government did not consult with the public before entering into this agreement, which arguably is a minimum obligation; and acted arbitrarily on deciding on this settlement. These may be grounds for an intervenor to allege unconscionability. Whether someone who is not a party to a contract, but who has an interest in a contract, can allege unconscionability, needs to be looked into.