A tech company contracted with a private university to sell and deliver to the university a mainframe computer using a new type of technology then under development but not perfected by the company, at a price substantially lower than that of a similar computer using current technology. After making the contract with the university, the tech company discovered that the new technology it intended to use was unreliable and that no computer manufacturer could yet build a reliable computer using that technology.

The tech company thereupon notified the university that it was impossible for the tech company or anyone else to build the contracted-for computer "in the present state of the art."

If the university sues the tech company for failure to perform its computer contract, which party will the court most likely find in favor of?

A. The tech company, because a contract to build a machine using technology under development imposes only a duty on the builder to use its best efforts to achieve the result contracted for.

B. The tech company, because its performance of the contract was objectively impossible.

C. The university, because the law of impossibility does not apply to merchants under the applicable law.

D. The university, because the tech company assumed the risk, in the given circumstances, that the projected new technology would not work reliably.

**Explanation:**

**Commercial impracticability**

(UCC § 2-615)

Seller's delay in delivery or nondelivery (in whole or in part) excused if:

unanticipated or extraordinary event made it impossible or commercially impracticable for seller to perform as agreed
nonoccurrence of event was basic assumption of contract
seller did not assume risk of event's occurrence (eg, by contractual language)
**UCC** = Uniform Commercial Code

Contracts for the **sale of goods** (eg, computers) are governed by Article 2 of the Uniform Commercial Code (**UCC**). Under the UCC, the doctrine of **impracticability** will **excuse** a **seller's* nonperformance** (eg, late or nondelivery of goods) if:

an unanticipated or extraordinary event made it impossible or commercially impracticable for the seller to perform as agreed **(Choice C)** *and*
the contract was formed under a basic assumption that the event would not occur.
But this doctrine does ***not* apply if** the **seller assumed the risk** of the event—eg, the circumstances indicate that the seller **foresaw the risk** yet **failed to make contractual provision** for it.

Here, after entering the contract with the university, the tech company learned that the new technology it intended to use was unreliable and that it was impossible to build the contracted-for computer. However, there is always a foreseeable risk that new technology will not work reliably. Since the tech company failed to make contractual provision for this risk, it assumed the risk that the new technology would fail. Therefore, the tech company's failure to perform will not be excused for impracticability, and the court will likely find for the university **(Choice B)**.

*Under the UCC, impracticability almost always affects the seller (not the buyer) because the buyer's only obligation is to pay for the goods.

**(Choice A)** There is no rule that a contract to build a machine using technology under development imposes only a duty on the builder to use its "best efforts" to achieve the contracted-for result.

**Educational objective:**

The UCC's doctrine of impracticability does not apply, and a party's performance will not be excused, if the party assumed the risk of the event giving rise to the impracticability.

**References**

U.C.C. § 2-615 (Am. Law Inst. & Unif. Law Comm'n 2020) (excuse by failure of presupposed conditions).