THE STANDARD FORM CONTRACTS LAW: RE-REVIEW FOLLOWING AMENDMENTS

SHMUEL BECHER & MOSHE GELBARD

The advantages of using standard form contracts are considerable, both for suppliers and customers. However, consumer contracts are different than other contracts. They are formed between parties of unequal power and are offered on a "take it or leave it" basis. The typical consumer does not read the contract, is unable to properly understand its content and does not attribute to it much importance. However, the supplier has an economic incentive to formulate the contract in an unfair and inefficient manner.

In order to reduce the problematic nature of standard form consumer contracts, the State of Israel enacted the Standard Form Contracts Law. Two substantial amendments to this law were enacted over the years. This article examines these two amendments from the standpoint of the accepted consumer protection rationales found in the literature.

The first amendment, Amendment number 1, addressed section 4(9) of the law, the choice of place of jurisdiction. The amendment stemmed from the Knesset's dissatisfaction with the way in which the Supreme Court interpreted the law. Analysis of existing rulings indicates that the courts frequently ignored the consumers' interests and rationales that should be at the heart of consumer contract law. We shall note the markedly conflicting trends seen in the court rulings and suggest an outline for future interpetation of the law.

The second substantial amendment, Amendment number 3, was implemented pursuant to 30 years of consumer legislation. Review of this period indicates that the law, especially concerning the procedures for approving standard form contracts, has not fulfilled its objective. Thus, the law was amended in June 2010. The amendment authorized the Minister of Justice and the Minister of Industry, Trade and Labor to set extreme obligations, which greatly erode the freedom of

contracts in its classic sense. However, when one examines the amendment in light of the rationales of consumer law, it seems that the amendment has the potential for true change. We examine this potential and propose milestones for the implementation of the law through regulations that are supposed to be enacted by the two Ministers.

II

REACHING THE WATER TROUGH AND NOT DRINKING: FAILURES OF THE ISRAELI STANDARD FORM CONTRACT LAW AND CHANGING PROPOSALS

MICHAEL LIRAN

For many years Scholars have thought that Standard Form Contracts (SFCs) constitute 99% of contracts in the market. It seems as if the number of pages forming those contracts is equal to the number of pages scholars have written in dealing with this unique discipline.

Many problems arise from the unilateral conduct of SFCs. Sellers, On the one hand, draft the contract; dictate the terms of the contract to their own interests and benefits, and don't allow consumers to negotiate them. Consumers, on the other hand, do not read those contracts and cannot make an educated decision because of asymmetric information, unequal bargaining power and cognitive biases.

The Israeli legislator was a pioneer in the area of Standard Form Contracts. Standard Form Contract Law was the first law in this field, sought to deal with challenges and problems arises from SFCs contracts.

Nowadays, after 28 years, it appears that the legislator fail in achieving its goal. The aim of this article is to summarize the failures of Standard Form Contract Law and to suggest changes, which will protect consumers signing SFCs.

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THE STANDARD CONTRACTS LAW (AMENDMENT NO. 4): A CRITICAL COMMENTARY

MOSHE GELBARD & YEHUDA ADAR

In June 2012, the Knesset passed, in the first reading, a comprehensive proposal to reform the Standard Contracts Law (1982). The article outlines, and critically examines the main changes and innovations included in this important proposal. The article is divided into seven parts. The second part provides a thorough examination of the proposed amendments to article 4 of the statute, which includes a list of contract terms presumed to be unfair, unless proven otherwise. Amendments were proposed with respect to terms transferring the burden of proof, contractual restrictions on access to justice, as well as seemingly unfair arbitration clauses. A new presumption relating to declarations made by the consumer is also examined. Finally, the authors support the inclusion of two further 'unfairness presumptions': First, a presumption regarding stipulations extending the supplier's remedial rights and second, a presumption applying to clauses formulated in incomprehensible or complex language.

Part three discusses a major amendment, namely, the proposal to abolish the procedure allowing suppliers to seek a pre-ruling before the Standard Contracts Tribunal (hereinafter SCT) on the validity of the terms included in their contracts. Under present law, suppliers are entitled as of right to such an inspection and, if they are successful in convincing the SCT that the contract includes no unfair terms, are also entitled to a five year immunity against any judicial intervention based on unfairness or unreasonableness. The current proposal aims at significantly reducing suppliers' incentives to resort to such a pre-ruling. This is done mainly by authorizing the SCT to deny such requests and by substituting a more fragile procedural protection for the substantive and absolute five year immunity. This reform is outlined and criticizes it for being inconsistent and hesitant.

Part four examines an important amendment concerning the applicability of the SCT's rulings. Under the current regime, a ruling changing or invalidating a certain contract term applies only prospectively, unless otherwise indicated in the judgment. The proposal alters this regime, turning the exception into a general rule, so that decisions are always prospective and retrospective, unless otherwise indicated by the SCT. The article discusses the justifications for this proposal and outlines the pertinent considerations relevant to the exercise of the Tribunal's discretion.

Part five deals with two amendments concerning restrictions on the scope of application of the Standard Contracts Law. These restrictions exclude from the reach of the law terms defining the monetary consideration to be paid to the supplier as well as terms the substance of which conforms to conditions laid down by statute. The authors discuss the rationales of these two traditional restrictions and consider whether the proposed amendments are desirable.

Part six examines a number of additional amendments, most importantly, those concerning the proper functioning of the STC. The bill proposes certain amendments regarding the publication of the Tribunal's decisions and their enforcement. The authors assess these proposals and suggest further ways to promote the efficacy of this judicial institution. Part seven concludes.

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BANKING (SERVICE TO CUSTOMER) LAW, 5741-1981: REFLECTIONS AT A 30TH ANNIVERSARY

RUTH PLATO-SHINAR

Banking (Service to Customer) Law, 5741-1981 is one of the key laws regulating the relationship between bank and customer. The Law was enacted in order to solve the problem of disparity of power between the parties and to ensure proper conduct on the part of banks. The law contains numerous safeguards for the customer and imposes duties and limitations on the banks. However, it does not include a fiduciary duty. Nor does it refer to the central prohibition that derives from fiduciary duty - that of conflicts of interest. The missing statutory provisions have seemingly been completed by the courts, which have imposed a sweeping fiduciary duty on the banks. However, these rulings have created a number of problems.

The author suggests inserting a section into the Banking (Service to Customer) Law which would impose a fiduciary duty on the banks, including an explicit reference to the issue of conflicts of interest. This section should be formulated in such a way that will provide a proper response to the problems created by the case law. The autor would also suggest amending and expanding the remedies section of the Law.

FASHION VICTIMS

CHEN ZILBERMAN

Israel is the first country in the world to regulate the fashion industry in order to prevent it from encouraging eating disorders. The Weight-Restrictions in the Fashion Industry Act of 2012 forbids hiring models that are classified as being underweight, and requires a written discloser on digitally altered advertisements.
This article examines the justifications for such regulation from a consumer standpoint, placing it alongside issues such as tobacco and alcohol advertising. I shall assert that the ideal of extreme thinness is marketed by fashion manufacturers, who take advantage of market failures that are inherent to the advertising industry. Thus, the economic-consumer viewpoint has the potential to help reduce eating disorder tendencies amongst young women. This viewpoint demonstrates that legislation in this realm is warranted, despite the risks stemming there from.
Next, the article examines a number of options for regulative intervention, the objective of which is to minimize the damage caused by fashion manufacturers and advertisers through their portrayal of the ideal of extreme thinness. These options include the existing law, as well as other alternatives such as the filing of civil suits against advertisers. The article concludes that the existing law has a potential to strengthen consumers in face of commercial entities, and suggests several changes that may improve its impact.