Consumer Biases and "Fairness" in Standard Form Adhesion Contracts

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ABSTRACT

Legal thinkers coined the term "adhesion contracts" to denote boilerplate contracts, prepared entirely by the party with preponderant bargaining power, and offered to the weaker party on a 'take it or leave it' basis. Such contracts depart, in many ways, from traditional Bragain Theory, since it limits greatly the ability of the weaker party to influence terms. In case of a dispute, courts will usualy scrutinize such contracts to ensure compliance is only required if terms are "fair". In other words, courts will frequently refuse to enforce terms which are considered to be "unfair".

Traditional economic analysis makes the case against such type of judgement. Information on parties' individual preferences is usually unavaiable to courts, and consistent external criteria for "fairness" are difficult to establish. In the case of consumer contracts, apparently "unfair" terms can be accepted willingly by consumers searching for a lower price, for example. Economists alert to the fact that similarly "unfair" clauses can be used by one party as a way of signaling relevant information to the other party.

According to traditional analysis optimal solution is likely to be achieved without intervention in competitive markets. Behavior Economics puts these results in question. In fact, the problem of economic irrationality points out to a specific role of regulation of adhesion contracts.

The purpose of this paper is to discuss the conflict between traditional economic analysis and behavioral economics in respect to contract interpretation. Our initial perception is that regulation is strictly concerned with information disclosure in most markets, a typical regulatory measure wich is not appropriate to deal with irrational behavior anomalies.

1. Introduction

Standard form contracts depart, in many ways, from the typical scenario prescribed by Bargain Theory. While Bargain Theory assumes voluntary acceptance[3] to all terms and clauses, standard form contracts are rarely read by consumers. In several cases, acess to full terms may be difficult or even impossible before purchase. In fact, even if consumers have access to full contract terms and decide to read them, they are unlikely to comprehend what they read, since unfamiliarity with legal vocabulary or case law will usually make contractual terms uncomprehensible to the average person.

These conditions made legal thinkers coin the term "adhesion contracts" to denote boilerplate contracts, prepared entirely by the party with preponderant bargaining power, and offered to the weaker party on a 'take it or leave it' basis. In case of a dispute, courts will usualy scrutinize such contracts to ensure compliance is only required if terms are "fair". In other words, courts will frequently refuse to enforce terms which are considered to be "unfair"[4].

Traditional economic analysis makes the case against such type of judgement. Economists alert to the fact that similarly "unfair" clauses can be used by one party as a way of signaling relevant information to the other party. For example, if a contractor wants to ensure his client that he can deliver on time, he may accept highly disadvantageous conditions for latency. He knows his client doesn't trust his ability to finish on time, and a binding commitment to such terms could be the cheapest way to convey reliability. However, if the terms are non-enforceable, the contractor's signal becames non-reliable, and in this case the client might decide not to contract. As a result of courts judgement, an eficient transaction won't occur.

Information on parties' individual preferences is usually unavaiable to courts, and consistent external criteria for "fairness" are difficult to establish. In the case of consumer contracts, apparently "unfair" terms can be accepted willingly by consumers searching for a lower price, for example.

[3] PEREIRA (2006), p. 482.
[4] MARQUES (2004), p. 56; NORONHA (1996), p. 92; e GALDINO (2001), p. 19-22.

Traditional analysis departs from the premisse that optimal solution is likely to be achieved without intervention in competitive markets. Behavior Economics puts these results in question. Behavioral economics makes the argument that even if consumers have access to full terms, decide to read them and understand what they read, their decisions may still lead to inneficient outcomes. Standard form contracts make it particularly easy for firms to exploit consumers known cognitive biases, such as: cognitive dissonance, confirmation bias, post-purchase rationalization, overoptimism, among others. Regulatory constraints may thus be desirable.

In fact, the problem of economic irrationality points out to a specific role of regulation of adhesion contracts. The purpose of this paper is to discuss the conflict between traditional economic analysis and behavioral economics in respect to contract interpretation. Our initial perception is that regulation is strictly concerned with information disclosure in most markets, a typical regulatory measure wich is not appropriate to deal with irrational behavioral anomalies.

2. Traditional Bargain Theory and Adhesion Contracts

Bargain Theory is mainly concerned with questions such as: "When does a promise becames enforceable?" or "Which kinds of promisses are enforceable by Law?". To answer these questions, Bargain Theory offers a model to understanding the process of contract formation.

Agreements made by contracting parties, which can be either express or implied, manifest themselves on one side by an offer and on the other by acceptance. Offer and acceptance are essential elements of contract formation. A valid contract depends on a valid offer, meaning an offer to perform a legal exchange of goods, services or rights. For a contract to take place also necessary that the second party volontarily accepts the offer. If an offer is made and freely accepted it forms a valid contract, as long as acceptance of contractual terms isn't flawed, and legal form is respected. The rationality of Contract Law departs from the premisse of volontary choice, by all parties, of contractual terms[5]. In this sense, freedom of choice is the most essential principle of contract law.

Despite the its seamingly simplicity, the meaning of freedom of choice can be difficult to stablish. As Wilson[6] puts it: "freedom of contract is perhaps one of the most cherished aspects of individual liberty and it is therefore unfortunate that ist ambivalent nature has resulted in its abuse".

A contract takes place when parties manifest their willingness to follow a body of rules freely chosen by themselves. The rule of a contract assures the commitment of parties to their previous promisses, and the enforceability of contractual terms is based on the idea that free acceptance of contractual terms binds parties to their previously stated intentions[7]. Acceptance is a manifestation of intention, expressed or implied, of the recipient of a proposal made on time, adhering to it in all its terms, making the final completed contract.

Acceptance can still be subject to scrutiny to assure that a contract is free of traditional formation issues. Formation defenses can prevent a contract from being enforceable when acceptance was not correctly manifested. One party can, for example, claim that a contract was signed under duress or coercion, that there was an essential misunderstanding on what the object of the contract was, or yet that acceptance was given under undue influence[8].

The meaning of acceptance can vary greatly beetween different legal cultures. American traditional contract doctrine, for example, emphasizes the importance of 'consideration'[9] for contract formation, while civil law cultures don't usually have an

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[5] ROUBIER (1963), p. 61: *"Ces situations représentent le développement maximum de l`autonomie de la volonté privée; non seulement un acte de volonté sera nécessaire pour leur création(...)".*

[6] WILSON (1965), p. 172.

[7] COMPARATO (1964), p. 2-4; MENDONÇA (1938), p. 107-111; PEREIRA (2006), p. 480-484.

[8] Traditional formation flaws generaly consist of: lack of capacity to contract, duress or coercion, *non est factum* flaws, undue influence, illusory promises, or non-compliance to a statute of frauds .Thus, only individuals that have legal capacity to assume obligations (a group that generally consists of capable adults) can sign an enforceable contract, for example. Contracts signed under threat, or signed by mistake, or also without basic knowledge of its purpose are not valid. It is not our purpose to discuss in depth the doctrine of each of the enumerated defenses against formation. Our purpose is only to point out that acceptance plays an essential role in Contract Law and Contract Theory. For deeper discussions on formation defenses see: PEREIRA (2006),

[9] Anglo-saxan bargain theory also estipulates the necessity of consideration to the formation of a valid contract, which consist on an simbolic act of exchange, usually of a small sum of money, in order to consolidate the contractual relation. Most civil law traditions dismiss the necessity of consideration to the formation of a valid contract.

analog provision. Despite such differences, it is possible to make the case for a similar movement of departure, across different legal cultures, from a more strict meaning of acceptance of terms to a "softer" version. In contemporary "mass markets", standardization plays an important and necessary role, as full negotiation of terms becames too costly[10].

The focus of classical bargain theory on acceptance has been challenged by the rise of standard form contracts in most developed economies. In contemporary markets, the great majority of contracts are standard form adhesion contracts. As Becher puts it:

> *"The most pervasive kind of contract is the consumer standard form contract. Consumer contracts account for the vast majority of everyday transactions between firms (as sellers) and consumers (as buyers). The ubiquity of consumer SFCs cannot be exaggerated. One enters an SFC by opening a bank account, purchasing software on the web, renting a safe deposit box in a bank, or engaging in countless other day-to-day activities[11]".*

And yet, despite their recent assurgence, these contracts depart, in many ways, from the typical scenario prescribed by Bargain Theory. Standard form contracts are rarely read, access to full terms can often be difficult or even impossible before the purchase, and they are offered in a "take it or leave bases" to a weaker party. Transaction costs of reading these terms is usually high, since they are often lengthy and written in complicated legal jargon. Expected gains from reading such contracts, on the other hand, are very low, since terms are non-negotiable, and a consumer is likely to find similar provisions on other companies' contracts. These conditions pose difficult questions to contemporary legal doctrine, which is still focused of volontary acceptance of terms as an important element of contract formation. Zhang[12] stresses this point:

> *"As a legal instrument prescribing consensual rights and obligationsof the parties, however, a contract is not a one-sided*

[10] MARQUES (2004), p. 56; NORONHA (1996), p. 92; e GALDINO (2001), p. 19-22.
[11] BECHER (2007), p. 118-119.
[12] ZHANG (2009), p. 125.

> *deal. A contract results from the bargain made on a free and voluntary basis between parties of equal footing. For that reason, the increasing use of contracts of adhesion has generated considerable debate on how contracts of adhesion should be dealt with and what rules for such contracts are needed. For example, when handling contracts of adhesion, courtshave a tendency to strike down the terms that are believed to be 'unconscionable'"*.

The legal concept of adhesion contracts tries to deal with the ambiguity of the meaning of acceptance in the case of standard form contracts. In the case of adhesion contracts, since full acceptance of contractual terms is hard to assume, courts will frequently put contractual clauses through scrutiny, and refuse to enforce "unfair" terms. In other words, terms which are considered too disandvantageous to the weaker party may not be enforced. The legal doctrine of adhesion contracts is meant to protect the consumer who signs a contract proposed on a 'take it or leave' basis. It is important to note that courts' scrutiny of terms is meant to explicitly protect the weaker party, which means the rules of interpretation become uneven beetween both parties (*interpretatio contra stipulatorem*).

The main flaw in this doctrine is the difficulty of stablishing objective external criteria for "fairness". Most approaches to the definition of fairness are nothing but "new editions" of known topics in contract law, such as duty to disclosure relevant information, or standard practices rules, such as imposition of good-faith and fair dealing, or the prohibition of contradictory practices (*venire contra factum proprium*). Specific consumer protection measures beyond that depend on the imposition of terms that may vary greatly depending on the type of contract, or specific market necessities. These measures, when existant, are a consequence of regulatory intervention on specific markets, or may be scaterred through specific legal precedents. Consistent studies of consumer choice are lacking to the refinement of legal solutions to the problem of acceptance in the case of standard form adhesion contratcs.

3. Cantract Law and State Intervention in Competitive Markets

3.1. Inefficiency of State Intervention

Economists see diversity and choices as something positive in terms of well-being. Faced with a wide range of options, one can choose the option which is closest to one's individual preferences. Through better choices, individuals are more satisfied, increasing their individual utility.

Competitive markets generally offer such choices when they are profitable for producers, and desired by consumers. In other words, if a sufficient number of people is willing to pay for the costs of producing a certain service or product, the market will take care of offering that service or product. Consumers are more satisfied because they will get what they want, produrcers are satisfied because they are miximizing their profit, and the end result is greater economic growth. The general welfare of the economy increases, and we say that the market allocates resources efficiently. Mainstream economic theory indicates that in a free market, the exchange ratios tend to be mutually beneficial to the parties when contracts are performed under complete information[13].

This line of thinking is a simplification of the basic discourse of the neoclassical school of economic thought. Neoclassical economists argue that, in competitive markets, exchange relations are economically efficient, and therefore, mechanisms of state intervention on private relations are justified only by the presence of market failures or imperfect competition.

Thus, under the traditional economic perspective, contracts, when free of formation flaws, are tools for efficient exchanges. The standardization of contractual relations is a mechanism for the reduction of transaction costs that enables the realization of a greater number of exchanges. Thus, adhesion contracts can generate positive effects

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[13] Agreed terms under complete information tend to be Pareto efficient. From a given initial inefficient allocation, it is easy to see that individuals have strong incentives to adopt mutually beneficial solutions as they exist in order to maximize their individual gains, to the point where neither party can increase its own welfare without affecting the interests of the other party. As neither party can compel the other party to adopt measures contrary to their interests, it is assumed that rational individuals, in a scenario, will achieve Pareto efficient outcomes. For a moral formal approach to this argument, see VARIAN (2003), p. 607-609, ULEN (2000), p. 205-212; POSNER (2003), ch. 4.

in terms of economic welfare, particularly in the so-called economies of scale, characterized by increasing returns rates at higher levels of production.

Direct government intervention on the parties' freedom to hire, assign prices, or determine levels of quality for products or services available on the market can generate inefficient economic distortions, since state agents performing the function of central planning do not have, as a rule, full information about consumers preferences, or about producers' cost structures.

Stiglitz[14] sums up the neoclassical position by presenting 4 reasons why state intervention in competitive markets is likely to cause economic distortions. First of all, as already mentioned, governments have limited information about the markets they seek to regulate. They also have limited control over market responses to regulation, since enforcement of regulations can be costly, difficult to implement, and generally creates dead weight. to the economy. Governments also have limited control over their own bureaucracy, and a common obstacle to the efficacy of public policies derives from the fact that policy design and policy implimentation rarely go together. Finally, government decisions are the result of a political process that may not focus on economic efficiency.

3.2. The efficiency of "unfair" clauses

3.2.1. Signaling Commitment and Information Disclosure

Consider the following example. A contracts a contruction company B to reform his kitchen. To achieve the feat, A will commit to pay a price to B, and B in turn is responsible for the entire execution of the work, promising delivery of the final product in six weeks. When analyzing the project, one of B's employees suggests some modifications that would make for a better final result at low cost. It happens that A intends to hold an event which he considers extremely important in their new home just three days after the deadline for delivering the construction. Despite finding that the modifications suggested by the employee would bring many benefits at a low price, A fears that the end of the construction may go beyond the contractual period.

[14] STIGLITZ (2000), p. 9.

A doesn't have good information about the technical capacity of B's company. B's team, in turn, is sure to be able to finish the work on time, as they have already conducted several similar projects. B also wants the changes to be made to the project, since it would increase B's profit.

A simple way of resolving this impasse would be for B to propose an extremely high contractual penalty if the work is not delivered on time. In this case, A would be sure of B's commitment to delivery, and even in case of delay, would have an appropriate reward for the inconvenience suffered. However, if the clause could be considered 'unfair' because of the disproportion of the amount stipulated for the fine, A would no longer be sure about the changes, knowing that B could foresee the future invalidation of contractual terms.

This example seeks to illustrate how seemingly unfair contractual clauses can be used as a mechanism for disclosure of relevant information, or signal of commitment to the contract. In some cases parties may not have alternative mechanisms to ensure security at the same costs. In this example we assume that the project would be carried out in a less efficient manner, for both parties, that is, leaving aside the suggested changes to the work by B, if the parties could not take advantage of this type of mechanism. A, suspicious of the information provided by B, would rather prevent the worse outcome, and would ensure on-time delivery. B, even though being able to deliver a top quality product, would have no means to guarantee the result to his client.

3.2.2. Price and quality sensibility

Consider now another example. C intends to travel to work and, therefore, needs to buy a laptop. C hates this type of device, and is satisfied with the desktop computer he now has in his home, so much in fact that he has no prospect of use for the portable device beyond this particular trip. Everything C demands is a computer capable of performing basic functions during the five days he will be traveling, and he seeks the lowest possible price, and nothing more.

This is an example of a consumer extremely price sensitive and quality insensitive. C may prefer to purchase a low quality product, and does not care whether or not it has collateral, provided the price is minimized. C would be pleased to acquire, for example, a extremely cheap computer from company X, even if offered a contract stipulating the renunciation of the right to claim for product defects seen after 10 days of purchase. This agreement, however, would probably be subject to subsequent invalidation in court. Company X, foreseeing this outcome, decides to offer greater security to their consumers, and thus, their product ends up being more expensive.

The "unfair" terms doctrine would, in this case, by giving the consumer a number of inalienable rights, prevent an economic relationship in which the waiver is desired by both parties. C desires to waive such rights because he know that there are costs associated with legal safeguards, and would prefer a reduction in the price offered. Company X, in turn, wants to offer a product model that meets thw demand of consumers like C, who prefer a computer that has poor quality, no warranty, but has great price value. The maintenance of legal safeguards in this case can mean the impracticability of pricing so dramatically low as desired by these types of consumers.

The most important function of contracts is the allocation of obligations between parties, which, in economic terms, means cost allocation. As already stated, in a competitive market, this allocation is done more efficiently when the parties themselves negotiate freely, since a central planner does not have complete information about the preferences of economic agents. The example illustrates how limitations freedom of contract may, in some cases, stifle the alternatives available to parties, and prevent effective relationships from happening.

3.2.3. Moral hazard and adverse selection on the demand side

Now to our last example. C, seeking to ensure that the operation of his desktop computer does not depend on the expenditure of his own time, hires D, which offers technical assistance and maintenance of personal computers. Since C has recurring problems with his computers, he decides to hire as follows: for a fixed amount paid monthly, D will always be available within one business day to provide assistance by phone, and eventually analyze and solve personally any technical problem that C may have with his computer.

D find the proposal advantageous, because it guarantees a fixed monthly income, but he notes that, at the amount stipulated by C, the contractual terms would only be profitable if C is effectively accountable for taking certain precautions when using the machine, thus reducing considerably the likelihood of a problem. It unfortunatelly happens that D cannot monitor the use of the machine by C, and so cannot guarantee that it meets the standards of appropriate use.

Economic theory calls this type of problem "moral hazard", a term that refers to situations in which the conduct of one of the agents involved in an economic exchange cannot be verified by the other party, and is critical to ensure efficient business. If the behavior of one participant, who we will call the agent, is relevant (meaning his conduct can potentially generate costs for the other part, called the principal, and offset gains for himself), there will be incentives for the agent to break contractual terms of conduct.

Now let us consider the D's situation. Suppose he wants to offer only this type of service to the market. One way to balance the differences between "good" and "bad" customers, dealing with the difference between the more cautious and the less careful, would be to set a price based on an average consumer. Unfortunatelly, the average price would be especially advantageous for the "bad" consumers who would use his services much more often, and less interesting for the "good" consumers, who would not need much care. D would end up selecting a greater number of "bad" consumers, and being forced to practice higher price. However, each time the price increases, D provides stronger incentives so that only "bad" consumers remain, and so on. At the end of the process, D is left with only the worst and most difficult clients at the highest price.

Economic theory calls this kind of problem "adverse selection", a term that describes the situation in which variations in quality that have direct impact on the price set can easily be verified by one side of the market, but cannot be verified by the other side. In our case, the incentives given to participants lead to adverse selection of goods of inferior quality, despite the existence of potentially effective intermediate solutions.

The problems of adverse selection and moral hazard arise from asymmetric distribution of information between the parties: one party has information relevant to the contract that the other party is not able to get. Such problems are commonly offered as reasons for the implementation of regulations aimed at protecting the interests of consumers. This is the case of regulations aimed at ensuring minimum quality standards for certain products, establish minimum standards for warranty, or criteria for civil liability of professionals like lawyers or doctors.

The same problems can, however, occur on the demand side. This is the case of insurance contracts, or guarantees, for example. In these cases, the behavior of consumers, who cannot be verified by the supplier or service provider, is particularly relevant to the achievement of an efficient outcome. Consumer bahavior may lead to savings for consumers and costs to suppliers. In typical cases, regulation itself already seeks possible solutions for known market failures. In other cases, however, such problems must be addressed jointly by the parties to find contractual solutions different contractual design.

Contractual arrangements meant mitigate the problem, such as clauses that establish hypotheses of repudiating the contract, or mechanisms for removal of the liability of suppliers, will not be viable if terms can later be invalidated in court. In fact, in most cases, the very lack of criteria for definition of "fairness" can greatly limit parties tendency towards inovative contractual design.

4. Consumer Biases and Standard Form Contracts

4.1. Economic Irrationality

As we have seen, part of the traditional economic theory opposes the contemporary legal trends that go towards the protection of the consumers against any "unfair" terms. Economists believe that in competitive markets, contracts tend to be efficient, meaning they tend to reflect economic options of the parties who should be enforced to ensure market efficiency. We also described three cases in wich apparently "unfair" clauses can be efficient.

However, the assumption of efficiency of competitive markets, as stipulated by the so-called 'fundamental theorems of welfare economics', has been challenged by behavioral economics in an interesting way. As we stressed earlier, the biggest problem with central economic planning derives from lack of information. Aside from structural beaurocratic issues, regulation agencies cannot see consumers preferences or producers cost structures.

Critics of public regulation underline the fact that free market agents "know best what they want", and that the government shoudn't make choices for them. But is that true? Do consumers "know best what they want"? Behavioral economics suggests that, in some cases, they may not know, or simply not make the best choices. The image of a self-dependent rational consumer, who strives at finding utility-maximizing solutions to his problems, as portrayed by traditional economic thought, may not be true.

Economic theory departs from a rigid assumption about the rationality of economic agents in order to describe the behavior of consumers in a given market. Microeconomics defines rational behavior as the maximization of a utility function, defined over a set of well-established preferences of an individual comparing all different outcomes. In the case of consumer choice, preferences of a consumer are defined over different baskets of goods, indicating the options for a given consumer on quantities purchased of certain goods or services. So that a consumer's preferences are well defined and have internal consistency, firstly, choice consistency must hold over time, since most economic thoery operate under the pressumption of stable preferences. Furthermore, preferences relations must satisfy the three following logical conditions:

- (1) completeness: the consumer should be able to compare any two consumption baskets and choose consistently between them;
- (2) reflexivity: any basket should always be considered by consumers at least as good as itself, and

- (3) transitivity: consumer preferences must be ordered and follow hierarchy, meaning that if basket A is preferred to B, and B is preferred to C, it must follow that basket C is preferred A, for any three given baskets.

Behavioral Economics shows that, in many cases these conditions are not met by actual human beings making decisions. In fact, human irrationality can be predictable, since it follows certain recurring patterns, which behavioral researchers seek to classify. These patterns of irrationality, described as tendencies toward specific decision 'mistakes' are called biases.

Behavioral law and economics, does not necessarily opose traditional economic though in general, but rather tries to complement the narrow definitions of human behavior postulated by traditional economic models with examples of consistent departures from these models found in reality by psychologists. Psychologists who seek a more comprehensive description of human behavior can provide a fuitfull contribution to the economic description of individual choices, specially when such departures are consistently identified as specific tendencies. As Camerer and Loewenstein[15] point out:

> *"At the core of behavioral economics is the conviction that increasing the realism of the psychological underpinnings of economic analysis will improve the field of economics on its own terms—generating theoretical insights, making better predictions of field phenomena, and suggesting better policy. This conviction does not imply a wholesale rejection of the neoclassical approach to economics based on utility maximization, equilibrium, and efficiency. The neoclassical approach is useful because it provides economists with a theoretical framework that can be applied to almost any form of economic (and even noneconomic) behavior, and it makes refutable predictions. Many of these predictions are tested in*

[15] CAMERER & LOEWENSTEIN (2003), p. 3.

the chapters of this book, and rejections of those predictions suggest new theories."

Let us now see how some of the behavioral biases described by the theory may be applied to the case of standard form contracts, and the light it may shine on specific regulatory roles.

4.2. Consumer Biases in Standard Form Contracts

4.2.1. Cognitive Dissonance

Cognitive dissonance is a term from social psychology, which refers to a conflict between two ideas, beliefs or incompatible opinions[16]. Since this conflict is often uncomfortable individuals try adding "elements of line", a change of beliefs, or both, to make them more compatible. In the case of standard form contracts, the theory would sugest that a disparity between the consumer's initial perception of the product's desirability and undesirable contract clauses would be acomodated by consumers. Becher[17] argues for a streight relation beetween research findings and the case of standard form contracts:

> *"As noted, in many (if not most) instances consumers decide, consciously or not, to enter a transaction before being confronted with an SFC. If an SFC is introduced when the purchaser has already decided to enter a transaction, cognitive dissonance may prevent him from rationally evaluating the contract terms he finds in the pre-drafted form. Where the contract terms he encounters undermine the utility he hopes to derive from the transaction at issue, cognitive dissonance may preclude efficient evaluation. Moreover, the natural human*

[16] See ARONSON, (1969), who definies cognitive dissonance as “a state of tension that occurs whenever an individual simultaneously holds two cognitions (ideas, attitudes, beliefs, opinions) that are psychologically inconsistent,” where the tension can be reduced “by changing one or both cognitions in such a way as to render them more compatible (more consonant) with each other”.

[17] BECHER (2007), p. 131-132.

desire to avoid cognitive dissonance might imply that consumers are likely to prefer, consciously or not, not to read the form contract and realize that they may be about to enter into a poor contract, knowing that they are probably going ahead with the transaction anyway. As before, the option of not realizing the terms of the contract one enters is quite exceptional (though not exclusive) to the context of SFCs. In most other contracts both contracting parties take an active role in the contract's formation."

Since consumers are likely to 'acomodate' contractual disadvantages, and try to soften abusive clauses in order to allow compatibility beetween the previously desirable product and the disadvantageous clauses, firms are likely to make highly abusive contracts, which will strictly protect their own interests.

4.2.2. Overoptimism

Overoptimism generaly refer to the behavioral tendency of ignoring low probabilities of negative outcomes[18]. Standard form contracts tend to be highly salient. While the most important terms to consumers of a good are price and quality, more specific terms relating to events which have very small probabilities of occurring oftem wont be considered relevant by the consumer[19]. Such terms are frequently ignored, or not even read by consumers.

"(...) consumers might opt to devalue risks integrated in SFC terms since in many casual and daily transactions the probabilities that those terms address, and their potential outcomes, might not meet a certain threshold. Moreover, many everyday SFC transactions include goods and services which are neither expensive nor dangerous. This implies that the relevant worst case scenario will probably not involve a

[18] KAHNEMAN & (1984), KAHNEMAN, KNETSCH & THALER (1986), CAMERER (2003), CAMERER (2005), BECHER (2007).
[19] CAMERER (2003), CAMERER (2005), BECHER (2007).

personal injury and will usually not meet the necessary threshold to induce alertness and precaution taking". [20]

Numerous empirical studies show that individuals tend to believe that good things happen to them are more likely than the average, while bad things happen to one less likely than the average[21]. Illustrating this bias, Neil D. Weinstein[22] found that individuals tend to believe that they are more likely than average when it comes to experience positive future events, as they tend to believe they are less likely to experience negative future events (meaning that people may underestimate the volatility of random events). For example, individuals responding to one study[23], although correctly informed that about 50% of couples in the United States end up getting a divorce, estimated their chances of divorce in zero. Similarly, university students are six times more likely to think they will have a greater satisfaction with their jobs than the average person.

Overoptimism generates an opportunity for firms to exploit consumers lack of carefull consideration of low-probability risks. Again, more often then not consumers will fail to take these clauses into carefull consideration, wich would lead to hilghly disadvantageous terms.

4.2.3. Confirmation Bias

Related to the difficulty of correctly interpreting information inconsistent with our initial hypotheses, several experiments have demonstrated the existence of confirmatory bias (confirmatory bias or self-serving bias), which refers to the tendency of individuals to interpret information received in order to conform with their preconceptions[24]. For example, researchers[25] found that by providing factual

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20 BECHER (2007), p. 143.

21 ANDERSON, Craig A. et al., "Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information", J. Personality & Soc. Psychol, vol. 39, 1980, pp. 1037, 1039-40.

22 WEINSTEIN, Neil D., "Unrealistic Optimism About Future Life Events", Journal of Personality and Social Psychology, vol. 39, 1980, pp. 806-820.

23 BAKER, Lynn A. e Robert E. Emery, "When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage", Law & Hum. Behav., vol 17, 1993, p. 439

24 See: LORD, Charles G. et al., "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence", J. Personality & Soc. Psychol., vol 37, 1979, pp.

evidence about aspects of the death penalty, individuals who previously identified themselves as being favorable to the death penalty say the evidence presented confirmed their ideas, while individuals opposed to the death penalty stated that the same pieces of evidence also confirmed their oposite opinion. In this study, scientists realized that this phenomenon was so powerful confirmation that both groups have become polarized in extreme confidence levels. That is, advocates of the death penalty became more in favor of it, while opponents have become even more contrary.

This type of experiment demonstrates something even more interesting. Our difficulty to correctly interpret information and evidence after having taken a position is not a persistent phenomenon, but, on the contrary, this difficulty may depend in part on the type of evidence presented. The more complex and ambiguous and the evidence, more evidence like this seems to be susceptible to this bias[26]. As the framers understood the experiment described above, individuals sometimes interpret ambiguities or inconsistencies in the evidence which contradicts their positions as evidence in favor of them. The phenomenon of confirmatory bias also appears to influence people's memory, since studies show that people tend to forget not only facts that were inconsistent with their theories, but also "remember" the facts were not presented in evidence to them. Thus, this bias further reinforcing the explanations and the initial positions of individuals in a circular manner.

Evidently, this effect further facilitates the imposition of unreasonable clauses by firms. Not only are consumers likely to "acomodate" their evaluation of contractual clauses to avoid dissonance, ignore relevant low-probability cases, but also, as research sugests, consumers will actively seek to confirm their initial perception of the desirability of the goods they purchase. This means consumers will, more often then not, seek to interpret any evidence the derive from the contract in a manner wich

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2098, 2099-2100; DARLEY, John M. e Paget H. Gross, "A Hypothesis-Confirming Bias in Labeling Effects", J. Personality & Social Psychol, vol 44, 1983, pp. 20, 22-25; BABCOCK, Linda e George Loewenstein, "Explaining Bargaining Impasse: The Role of Self-Serving Biases", Journal of Economic Perspectives, vol. 11, 1997, p. 109.

[25] LORD, Charles G. *et al, Ob. cit.,* pp. 2101-02.

[26] GRIFFIN, Dale e Amos Tversky, "The Weighing of Evidence and the Determinants of Confidence", Cognitive Psychol., vol 24, 1992, p. 411; KEREN, Gideon, "Facing Uncertainty in the Game of Bridge: A Calibration Study", Organizational Behav. & Hum. Decision Processes, vol. 39, 1987, p. 113.

confirm their previous liking of the product. Since consumers will usually choose before actually reading the contract, this interpretation wont provide basis for comparison across firms, as a rule.

5. Conclusion

In this article we presented, in short, the incompatibility of traditional Bargain Theory and the reality of standard form consumer contracts. We argued that, since these types of contracts are rarely read by consumers, the classic characterization of acceptance to contractual terms acquires a "softer" meaning, while the doctrine of adhesion contracts advocates for courts scrutiny of clauses to determine wether terms are considered "fair". We pointed out the shortcomings of this doctrine, which leaves much to case-specific interpretation.

In section 3 we presented traditional economic analysis of contracts, and its advocacy for lack of intervention in competitive markets. As pointed out, direct government intervention on the parties' freedom to hire, assign prices, or determine levels of quality for products or services available on the market can generate inefficient economic distortions, since state agents performing the function of central planning do not have, as a rule, full information about consumers preferences, or about producers' cost structures. We analysed three specific cases in which seamingly "unfair" terms could have specific economic goals, and ensure efficiency.

Finally, in section 4 we presented an alternative justification to state intervention on such types of contracts, based on consistent consumer biases that are likely to arise in standard form adhesion contracts. These biases provide a wide oportunity for firm exploitation of consumers tendencies.

Regulation of consumer contracts, despite its prevalence in contemporary 'mass production' society, still poses great doubts to legal thinkers. Perhaps an alternative role for contract law is still needed. While adhesion contract theory seeks to take general inconsistencies into account, there is still a lack of comprehension of how these types of choices are made by consumers, and which legal measures can provide necessary protections without excessively limiting parties freedom to contract.

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