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A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law

Shmuel I Becher

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[*] Assistant Professor, The College of Management Academic Studies–School of Law. LL.B., Tel Aviv University (2001); LL.M (2003), J.S.D. (2005), Yale Law School. Many thanks to Benjamin Alarie, Ian Ayres, Yaron Back, Amichai Cohen, Kevin Davis, Mary Davis, Yaniv Friedman, Henry Hansmann, Jeffery Rachlinski, Alan Schwartz and the participants of the Yale Law School Graduate Seminar, for comments and illuminating discussions on earlier versions. I also acknowledge the generous financial support of Yale Law School, the Fulbright Program, and the Research Foundation of The College of Management Academic Studies–School of Law.

ABSTRACT

Consumer contracts diverge from the traditional paradigm of contract law in various conspicuous ways. They are pre-drafted by one party; they cannot be altered or negotiated; they are executed between unfamiliar contracting parties unequal in their market power and sophistication; they are offered frequently by agents who act on behalf of the seller; and promisees (i.e., consumers) do not read or understand them. Consumer contracts are thus useful in modern markets of mass production, but they cast doubt on some fundamental notions of contract law.

To reframe the long-lasting debate over consumer contracts this Article develops a superior legal regime whereby sellers can obtain certification of a form contract by an independent third-party. Such approval may be viewed as a quality certification, akin to a "Good Housekeeping Seal of Approval," for standard form contracts.

The many impediments to the design of such a project notwithstanding, its overall advantages are promising. The tension between the duty to read contracts and the common practice of signing consumer contracts without reading will be better reconciled. The adverse consequences of asymmetric information possessed by typical sellers and consumers will be obviated. This regime will also minimize sellers' ability to manipulate consumers' bounded rationality; increase social welfare by reducing transaction costs; diminish socially undesirable litigation over standardized contracts; make a notable step towards minimizing the alleged anomaly that punitive damage awards create in consumer contract cases; and promote market participants' autonomy by advancing trust between the contracting parties.

INTRODUCTION

Standard Form Contracts (SFCs) and the traditional paradigm of contract law seem to have nothing in common. Unlike the conventional contract envisioned by the classic contract law paradigm, SFCs are pre-drafted by one party; they cannot be altered or negotiated; they are executed between unfamiliar contracting parties that substantially differ in their market power and sophistication; they are offered frequently by agents who act on behalf of

the seller; and they are not read or understood by promisees (i.e., consumers). While these particular characteristics make SFCs apt for usage in modern consumer markets of mass production, they also call some fundamental notions of contract law into question.[1]

One of the most fundamental assumptions that accompany modern theory of contract law assumes that by entering a contract, parties advance their own interest. However, for a contract to maximize the utility of the contracting parties, no substantial informational gaps should exist.[2] Unfortunately, this is not likely to be realized in the case of SFCs, where consumers do not read SFCs prior to accepting them, thereby creating an acute market failure known as asymmetric (or imperfect) information.[3]

Moreover, consumers' cognitive biases may negatively influence the efficiency of consumer SFCs as well, making it even harder to achieve efficient equilibrium. Inevitably, consumers lose their ability to maximize utility via open market transactions, while social welfare is not optimally maximized. Accordingly, some kind of intervention aimed at protecting consumers and minimizing their exposure to cognitive biases is generally assumed necessary.[4]

Commentators, courts, society and legislatures acknowledge the problems that SFCs pose, and attempt to address them by designing a variety of legal rules, tools, principles and doctrines.[5] Generally, such proposals and

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[1] Two of the early seminal articles that address this issue are Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contracts,* 43 COLUM. L. REV. 629 (1943) and W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

[2] *See, e.g.,* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Market,* 104 MICH. L. REV. 827, 827 (2006) (stating, merely as a starting point, that "[t]he usual assumption in economic analysis of law is that in a competitive market without informational asymmetries, the terms of contracts between sellers and buyers will be optimal-this is, that any deviation from these terms would impose expected costs on one party that exceed benefits to the other"); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World,* GA. L. REV. 583, 585 (1990) ("Imperfect consumer information causes a tendency toward inefficiency in…consumer form contracts").

[3] This potential danger has been discussed and debated at length. *See, e.g.,* Alan Schwartz, *Unconscionability and Imperfect Information: A Research Agenda,* 19 CAN. BUS. L. JOUR. 437 (1991); Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information*, 127 U. PA. L. REV. 630 (1979); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interest*, 69 VA. L. REV. 1387 (1983); Shmuel I. Becher, *Asymmetric Information in the Market for Contract Terms: The Challenge That Is Yet to Be Met,* 45 AM. BUS. L. J. (forthcoming 2008).

[4] *See, e.g.,* Russel Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability,* 70 U. CHI. L. REV. 1203, 1203 (2003); Robert A. Hillman & Jeffery J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U.L. REV. 429, 435 (2002); Melvin A. Eisenberg, Comment: *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986); Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117 (2007); Oren Bar-Gill, *Seduction by Plastic,* 98 NW. U. L. REV. 1373 (2004).

[5] For a brief history of the legal approach to SFCs see Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers,* 104 MICH. L. REV. 857, 860-64 (2006).

policy recommendations can be categorized into three groups: *ex post* intervention by courts, *ex ante* regulation by legislatures and competition enhancement. Still, those predominant approaches are unsatisfactory as they do not overcome asymmetric information and consumers' behavioral biases, thus impeding overall market efficiency.[6] This general failure leads to an inherent tension between the classical paradigm of contract law on one side and consumer contracts on the other.[7]

Noting the inadequacy of current approaches to SFCs takes us only half-way. It is one thing to note that current approaches are flawed or that a new model is needed, but quite another to suggest how an alternative model should work.[8] Since "the boilerplate puzzle has lasted entirely too long",[9] the goal of this Article is to reframe the debate over SFCs and develop a superior legal treatment of such contracts.

The approach developed in this Article is based on the idea of allowing an independent third-party to review and approve SFCs. This proposed mechanism of prior approval aims at ensuring that consumer contracts are fairly and efficiently drafted. Accordingly, an approval should be viewed as a quality certification, not unlike a "Good Housekeeping Seal of Approval", for SFCs. Certification of an SFC by an independent third-party–dubbed here "The Good Housekeeping Law Institute"–would indicate that a seller offers a contract that meets both substantive (fairness, efficiency, cognitive biases) and procedural (font, language, color, etc.) standards as set out by the

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[6] The literature critical of current approaches to SFCs is ample. For a few examples *see* Robert A. Hillman, *Would Mandatory Website Disclosure Backfire?*, 104 MICH. L. REV. 837, 839 (2006) (referring to the market-based approach and noting that "market pressure may be insufficient to deter some businesses from overreaching"); Bar-Gill, *supra* note 4 (opining that competitive market forces cannot cure consumers' underestimation of future borrowing); R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information,* 47 HASTINGS L. J. 635 (1996) (arguing that relying on a group of informed consumers to correct the market for contract terms is misguided due to economic pitfalls); Peter V. Letsou, *The Political Economy of Consumer Credit Regulation,* 44 EMORY L.J. 589 (1995) (questioning legislatures' ability to solve efficiently consumer market imperfections); Robert A. Hillman, *Debunking Some Myths about Unconscionability: A New Framework for U.C.C. Section 2-302,* 67 CORNELL L. REV. 1 (1981) (criticizing courts' competence to apply abstract contract law concepts such as the unconscionability doctrine); Hillman & Rachlinski, *supra* note 4, at 441 (noting the problems courts experience when confronting fairness issues in consumer contracts); Becher, *supra* note 4 (detailing the shortcomings of market forces, legislatures and courts).

[7] For a recent interesting statement that questions the fundamental assumption that SFCs are indeed contracts *see* Omri Ben-Shahar, *Forward,* in Symposium on *Boilerplate: Foundation of Market Contracts*, 104 MICH. L. REV. 821, 826 (2006) ("On a theoretical level, boilerplate is shown to be a legal phenomenon different from contracts. Is it a statute? Is it property? Is it a product?").

[8] For a succinct list of recent proposals that go beyond the traditional methods of legislative and judicial control over SFCs *see* Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1243 (2006) ("In addition to the obvious possibilities of legislation and judicial decision, the authors [of this symposium on boilerplate] suggest in one setting or another turning matters over to expert administrative agencies, nonprofit trade associations, law firms that are leaders in a field, and even (although somewhat uncertainly) publicity-minded watchdog groups"; footnotes omitted).

[9] Douglas F. Baird, *The Boilerplate Puzzle,* 104 MICH. L. REV. 933, 950 (2006).

approving agency. It is also proposed that the approving institute will have the authority to approve any given contract as a whole, or just certain parts of it, with some contractual clauses left unapproved ("partial approval"). Although partial approval is largely legitimate, creative devices should be utilized to encourage sellers to approve SFCs as a whole.

Approval granted to a contract will be indicated on its face by a suitable mark. Consumers will then be able to rely on the approval, which will be interpreted as a quality signal, when shopping for products and services. This suggested reform will relieve consumers of the theoretical duty to read the fine print frequently found in SFCs.[10] Thus, it will economize on consumers' time and direct their attention to crucial or problematic contracts (or terms).

To make the system attractive for market participants, sellers must be provided with ample incentives to use it. Accordingly, approved contracts would be immune (at least to some degree) from certain types of legal claims and remedies. Sellers who have their contracts approved will also enhance their reputation and market power, while reducing transaction costs and legal expenses.[11] Where relying on incentives is not likely to yield the anticipated results, specific fields of commerce or contracts are proposed where approval will be made mandatory by law and imposed on sellers.[12]

Before proceeding, a clarification is in order. The idea of contract approval has not received wide scholarly attention in the US as an overall approach to consumer SFCs,[13] but it has been exercised in a limited manner in some contexts.[14] Moreover, such an approach has been experienced, albeit with limited success, in Israel.[15] Accordingly, the Israeli path will be used to encourage critical evaluation of the various design issues that the

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[10] On the relation between the Good Housekeeping Law idea and the traditional common law duty to read *see infra* Part III.

[11] *See infra* Part IV (detailing possible incentives to use the mechanism).

[12] *See infra* Part IV.D.

[13] This is not to say that such a possibility has been wholly overlooked; *see* LOUIS KAPLOV AND STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 217 & n. 146 (2002) (mentioning the possibility of administrative control over SFCs). Yet the only previous paper I know of that explored in detail the idea of adopting a pre-approval mechanism of SFCs in the USA is Clayton P. Gillette, *Pre-approved Contracts for Internet Commerce,* 42 HOUS. L. REV. 975 (2005). The approach offered here differs significantly from Gillette's in many ways, and two conspicuous ones are the following. First, Gillette focuses his analysis on e-commerce SFCs, whereas this paper addresses both online and offline contracts. Second, Gillette concludes his Essay by stating that "[t]he relevant, and I fear *still unanswered, question* is whether a pre-approval process will improve the desired match between contract terms found in the marketplace and those preferred by informed buyers": *id.* at 1013 (emphasis added). This Article attempts to employ additional perspectives to those discussed by Gillette, thus leaving no doubt regarding this "still unanswered question".

[14] Some state laws allow sellers to submit their SFCs to the state's attorney general for review of some contractual aspects: *see, e.g.,* Plain Language Contract Act, Minn. Sta. Ann. 325G.29- .36. In another context, the Insurance Services Office drafts and sells standard policy forms, as well as submits proposed wording to state insurance commissioners for approval.

[15] To the best of my knowledge, the Israeli pre-ruling approach is unique, and has not yet been exercised by other countries. For a discussion of the Israeli experience and the possible causes of its failure *see* Shmuel I. Becher, A Fresh Approach to the Long-lasting Puzzle of Consumer Contracts (unpublished JSD thesis, 2005), pp. 160-63, 249-56.

establishment of the Good Housekeeping Law (GHL) mechanism engenders. A discussion of the Israeli experience appears below.[16]

I now seek to flesh out the idea of creating a GHL for approving SFCs. Part I explores currently used mechanisms for *a priori* approval as applied in some consumer markets and merchandises. Parts II and III explain how the approval process, in the context of SFCs, should work and be interpreted by consumers. Part IV describes potential incentives that can encourage sellers and consumers to use this system, while Part V examines the consequences of mistaken decisions made by the GHL Institute. Part VI points to some of the future challenges that ought to be considered after the establishment of this Institute. Part VII, which in a way summarizes some of the main arguments articulated in this Article, addresses several general objections to the novel approach proposed here.

I. EXISTING MECHANISMS OF PRIOR APPROVAL & QUALITY WARRANTIES

The idea of a third-party that operates as a mechanism to ensure quality of products or services has been exercised in some contexts and fields. Studying how these systems work in other contexts can provide relevant insights applicable to the solution that this Article seeks to develop.[17] This Part illustrates how some such systems work and what motivates their operation.

Seven mechanisms are discussed. The first is the Good Housekeeping Institute, which in a sense inspired the idea presented here. Second and third are food certification programs: the American Heart Association, and the USDA Organic Seal. Fourth and fifth are TRUST-e and BBBOnLine, which operate in cyberspace as mechanisms to ensure web sites' standards of quality. Last is a description of two legal mechanisms of *a priori* approval: the United States Securities and Exchange Commission (SEC) and, most importantly, the Israeli Standard Contract Tribunal.

A. The Good Housekeeping Institute

The *Good Housekeeping Institute* ("the Institute") declares that its main purpose is to improve "the lives of consumers and their families through education and product evaluation."[18] The Institute functions as the consumers' evaluation laboratory of the *Good Housekeeping Magazine* ("the Magazine"). In this capacity, the Institute reviews advertisements that are submitted to the Magazine. Advertisements found acceptable by the Institute are published in the Magazine. Most importantly for the purposes of this Article, the approved products become eligible to earn the *Good Housekeeping Seal* ("the Seal").

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[16] *See infra* Part I.D, discussing the Israeli experience. I use some insights drawn from this experience as a starting point, while attempting to correct the mistakes that led to its failure and in their light provide a superior mechanism that is apt for adoption in the US.

[17] However, it should be clear that this Part does not provide an inclusive review of current approval mechanisms. I focus on some important ones that provide valuable insights into the way the present proposal should be designed.

[18] *See* http://www.goodhousekeeping.com/

Advertisers whose products are found acceptable for advertisement in the Magazine may opt to use the Seal on their advertising and packaging, without additional charge. Although the Seal is commonly viewed as a quality signal or certification,[19] the Good Housekeeping Consumers' Policy states that it functions more as an extended third-party warranty.[20] This illustrates that the Good Housekeeping mechanism is more of a contractual term than a third-party certification program. According to the Good Housekeeping policy, if a product bearing the Seal proves defective within two years of purchase, the Institute will replace the product or refund the purchase price.[21] According to the Institute's policy, information regarding the products that are denied approval is considered proprietary and remains confidential between the applying manufacturer and the Institute.[22] As a result, consumers cannot know which products or manufacturers were found inappropriate for approval.

Surprisingly, a random examination I conducted shows that many manufacturers opt not to present the certification on their approved products.[23] A few possible reasons explain such behavior. First are commercial considerations (*i.e.*, the marginal costs of adding the seal to its products' packages or advertisements will not be offset by the increase in sales). Second are technical problems (*e.g.*, size limits that prevent the manufacturer from presenting the Seal so as to allow consumers to read what is written within the approval, as required by the Good Housekeeping Institute). I will return to this point later on.

B. Food Certification Programs

The first food certification program addressed here is the American Heart Association. This is a national voluntary health agency, aimed at reducing "disability and death from cardiovascular diseases and stroke."[24] In 1995 the American Heart Association established its Food Certification Program, which seeks to provide consumers with "a quick, easy way to identify heart-healthy foods."[25] This identification signal is supposed to be particularly valuable since most consumers need to be assisted with food

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[19] A research study conducted by the Institute suggests that when consumers are confronted with several brands of the same product, they will select the one that bears the Seal (*see* www.ghmediakit.com. The Institute claims that "[a]ccording to research, 94% of consumers respect the Good Housekeeping Seal, 92% feel it is trustworthy, and 90% believe a product worthy of having the Seal is valuable").

[20] Susanne Williams, director of Customer and Reader Services, explained that the Good Housekeeping Institute bears the financial responsibility to replace a faulty product or refund the consumer for it unless the advertiser requests otherwise. (e-mail dated October 6, 2004).

[21] Exceptions to this general rule include automobiles, prescription drugs, and the like.

[22] Approximately 15% of the products submitted to the institute's review and certification are denied approval (Susanne Williams, Consumer & Reader Services, Good Housekeeping, e-mail dated February 19, 2004).

[23] The *Good Housekeeping Seal* can be applied to almost all kinds of consumer merchandise, including, for instance, appliances, beauty and personal care, childcare & toys; food & beverages, electronics, photography and technology.

[24] *See* http://www.americanheart.org/presenter.

[25] *Id.*

selection.[26] Food products displaying the American Heart Association Seal (known also as the heart-check mark) are evaluated in order to ensure that they meet the requirements set by the American Heart Association Food Certification Program.[27]

Another food certification program was initiated by the United States Department of Agriculture (USDA). In October 2002, the USDA announced its decision to issue a national seal and to apply national standards to all organic food produced in the United States.[28] The USDA Seal is aimed at guaranteeing consumers that food items labeled "organic" are indeed organic. As of October 2002 the USDA has had in place a set of standards that most food labeled "organic" must meet.[29] These standards apply whether the product is grown in the United States or imported from other countries.

C. Web Certification Programs

One web certification programs is offered by TRUSTe, which is "an independent non-profit privacy initiative dedicated to building users' trust and confidence on the Internet and accelerating growth of the Internet industry."[30] TRUSTe mainly addresses privacy concerns. The ultimate purpose of this initiative is to make the e-commerce environment more comfortable, allowing consumers to be confident with online purchases. TRUSTe further claims to educate and protect Internet consumers.[31]

The TRUSTe online seal–the "trustmark"–is awarded to web sites that comply with TRUSTe consumer resolution process and adhere to its privacy principles.[32] A displayed trustmark indicates to online users that the certified site openly reveals, as a minimum, "what personal information is being gathered, how it will be used, with whom it will be shared, and whether the user has an option to control its dissemination."[33] This information is presumed to help Internet users make informed decisions about whether or not to release their personal information on the web.

Another relevant mechanism is BBBOnLine, which is an arm of the Council of Better Business Bureaus.[34] Similar to TRUSTe, BBBOnLine declares that its mission is to promote trust and confidence on the Internet.

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[26] *Id.* ("Consumers face an almost overwhelming selection of products in American grocery stores. Every year hundreds of new food products appear. Despite standardized nutrition labeling, the nutritional content of food products still confuses many consumers").

[27] These standards include criteria for heart-healthy levels of fat, saturated fat and cholesterol.

[28] *See* http://www.ams.usda.gov/nop/Consumers/brochure.html.

[29] Farms and handling operations that sell less than $5,000 per year in organic agricultural products are exempted from this program.

[30] *See* www.truste.com

[31] However, TRUSTe also states that it is not purely consumer oriented, and that its privacy program–which is based on an online seal–is intended to bridge the gap between "users' concerns over privacy and Web sites' desire for self-regulated information disclosure standards."

[32] TRUSTe also offers some more tailored and specific certification programs, apart from the general web site Privacy Seal Program, which will not detailed here.

[33] *Supra* note 30.

[34] The information below is drawn from www.bbbonline.com.

To attain this goal, BBBOnLine offers its Reliability Seal Program ("reliability program")[35] as well as its Privacy Seal Program ("privacy program").[36] BBBOnLine allows web sites to display its Seal of Approval once the site has been evaluated and confirmed to meet its requirements.[37]

D. Legal Certification Mechanisms

One legal certification program is provided by The Securities and Exchange Commission (SEC), which declares that its primary mission is "to protect investors and maintain the integrity of the securities markets."[38] Broadly speaking, the SEC seeks to promote disclosure of important information, enforce securities laws, and protect investors. As part of its enforcement powers, the SEC launches hundreds of civil enforcement actions annually. The SEC consists of five appointed commissioners and four divisions, and it has approximately 3,100 staff employees. One of the four divisions is Corporation Finance, which "oversees corporate disclosure of important information to the investing public."[39] This division reviews and pre-approves registration documents for newly offered securities.

Another legal certification program is part of the Israeli treatment of SFCs.[40] The Israeli law allows pre-approval of consumer contracts by a special tribunal. Since this system bears some resemblances to the idea developed in this Article, some space should be filled detailing its characteristics.

Acknowledging the "unequal bargaining power" between typical sellers and buyers who contract via SFCs,[41] the main purpose of the statute is to protect consumers from "unduly disadvantageous" contract terms.[42] To achieve this goal, the statute created a mechanism that allows traders to get their SFCs pre-approved. The statute establishes a "Standard Contract Tribunal" ("Tribunal" or "special tribunal") for this purpose. Pre-approval of

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[35] The reliability program confirms that (i) a company is a member of its local Better Business Bureau; (ii) it has been examined for its adherence to advertisement guidelines; and (iii) it implements what are conceived to be "good" customer service practices.

[36] The privacy program confirms that a company stands behind its online privacy policy and has met the program requirements with regard to the handling of personal information released by individual users on the web.

[37] Some authors have articulated skeptical views with regards to such privacy seal programs. *See, e.g.*, Major R. Kenn Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware*," 47 A.F. L. REV. 125, 160 (1999) (stating that "consumers should not let down their guard just because there is some sort of seal of approval... Consumers need to know about the benefits and the limits of seal programs and how easy it is to be misled about the scope and type of protection offered by the site with a privacy seal").

[38] *See* the SEC's website http://www.sec.gov/about/whatwedo.shtml. The description relies on this site.

[39] *Id.*

[40] Standard Contract Law, 5743-1982 ("the statute"). This statute replaced the previous Israeli Standard Contract Law of 1964.

[41] The statute is broad in its scope since it defines "customer" as "a person to whom a supplier proposes that an engagement between them shall be in accordance with a standard contract, irrespective of whether he is the giver or the recipient of anything" (*Id.* § 2). For clarity, I retain the term "consumer" when referring to the Israeli approach.

[42] *Id.* § 1 (entitled "Object of the Law").

an SFC can be given only by this special tribunal.[43] Such an approval means certification that the reviewed contract does not contain any unduly disadvantageous terms.[44] Basically, every trader can have his SFC approved by submitting it to the Tribunal's review.[45] After the approval is given, the trader is free to indicate the fact of approval on the face of his contracts.[46]

As enacted, the mechanism of prior approval tries to anticipate and avoid some potential problems. First, to simplify procedures and to allow the Tribunal to function efficiently, the statute exempts the special tribunal from most of the rules of evidence.[47] Second, to encourage traders to use this mechanism[48] the statute creates what seems to be a powerful incentive: an SFC that has been approved is basically immune from annulments by the tribunal and the "regular" civil courts for a period of five years.[49] However, a party who considers himself aggrieved by the Tribunal's decision can appeal to the Israeli Supreme Court.[50] Although the system is by and large voluntary, traders might be required to have their contracts approved mandatorily under certain circumstances.[51]

The success of the Israeli Tribunal is highly disputed. The activity of the special Tribunal is considerably limited, and its creation did not engender the expected effect.[52] Since it is difficult to learn how to succeed only by studying other legal systems, especially where they seem not to thrive, some clear thinking about the GHL mechanism design is required. However, essential factors and aspects of the Israeli experience occasionally will serve as an important starting point in the discussion that follows.

In sum, the idea of an independent third-party that examines products' characteristics and assures the general pool of consumers that a product meets specific standards of quality is applied in some fields of commerce. The first three sections surveyed a few mechanisms of prior approval, mainly

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[43] *Id.* § 12.

[44] In addition, the Tribunal has the power to annul unduly disadvantageous terms. The statute allows the Attorney-General, the Commissioner of Consumer Protection and other consumers' organizations to apply to the Tribunal for annulment. *Id,* § 16. Where a legal dispute that involves an unfair contract term arises, consumers (as individuals) can bring their cases before the (regular) civil courts.

[45] *Id.* § 12. According to this section, sellers can even have contracts approved that are already in use in commerce.

[46] The previous law from 1964 *required* sellers to do so. This requirement was thought to be unnecessary and accordingly is not in the current statute. Surprisingly, most sellers who opted to have their contracts approved did not include the fact of its approval on its face.

[47] *Id.* § 9.

[48] *Supra* note 40, § 14.

[49] The special Tribunal has the authority to annul a term of an approved contract only "if it finds that special reasons justify the annulment." *Id.* § 14(C).

[50] Thus, the Attorney-General, as well as consumer organizations, can appeal to the Supreme Court against the Tribunal's decision to grant an approval. *Id.* § 10.

[51] For a further discussion *see* VARDA LUSTHAUS & TANA SPANIC, STANDARD CONTRACTS (1994) (in Hebrew), §§ 160-161. On the option of imposing mandatory approval *see infra* Section IV.D.

[52] *See, e.g.,* Galia Masika, *The Standard Contracts Tribunal in Reality - Much Ado about Nothing*, 32 MISHPATIM 95 (2002) (in Hebrew). Masika provides numerical data that support this argument: *id.* at Appendix A.

in the context of food and cyberspace. It is not a coincidence that one can find such mechanisms in these two fields, for there consumers are extremely hard pressed to test products' quality. Most consumers do not have the information, knowledge, time or expertise required to check if a food product is organic or how good it is for their health. Similarly, most Internet surfers cannot distinguish between safe and unsafe web sites, even after a long period of usage. Basically, the same is true in the case of SFCs, where consumers as a class suffer from asymmetric information.

II. MAKING THE SYSTEM WORK: ADDRESSING PRACTICAL ASPECTS

The GHL idea assumes that an independent body will be authorized to grant approval to SFCs. Sellers who seek such approval will have to adhere to relatively clear criteria and unambiguous standards formulated by the GHL. An approval of an SFC should thus be viewed by consumers as a "best practice" certification. Accordingly, three substantial issues are discussed in this part. The first, discussed in Section A, explains why traders should be allowed to gain partial approval of their contracts and not be required to approve contracts in their entirety. The second substantial inquiry, advanced in Section B, focuses on the relation between the GHL mechanism and the idea of pre-approved default terms. The third issue, detailed in Section C, explains why approval should be based on a binary system, rather than grading on a scale (that is, where contracts are graded based upon the *degree* of their fairness).

A. Allowing Partial Approval

A simple and practical way that will allow sellers to gain partial approval is to put all terms which are not approved by the GHL and are not considered as "best practices" in a special "frame" or "box". At the same time, all the other provisions, which are approved as "best practices," will be put outside of this frame. Visual measures should be tailored to minimize consumers' difficulties in distinguishing between the different parts (i.e., the approved part, on one hand, and the unapproved, on the other) of the contract. This might be done, for example, by locating non-approved terms at the front of the contract, using noticeable visual characteristics (such as color[53] and size of font for both the frame and the terms themselves). At the same time, approved provisions can be appended to the unapproved ones.[54] Consumers would thus be advised to focus their attention on the non-approved contractual terms that are included in this frame or box.[55]

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[53] Thus, for instance, we might use red color to print non-approved parts, knowing that the color red tracks peoples' attention and enhances excitement and alertness.

[54] This regime, where sellers are not obliged to approve their contracts as a whole, will be titled here "a partial approval regime." It is important to note, however, that the approving body will be required to review the contract in its entirety even when granting merely partial approval; thus moderating the problem of institutional mistakes. For an analysis of mistaken approvals *see infra* Part V.

[55] This would be natural as people tend "to think inside the box". See also the Truth in Lending Act, which requires credit card issuers to use the "Schumer box" to reveal information.

Allowing partial approval has a few noticeable advantages. First, it is only reasonable to predict that in some instances the approving body will not be able to reach (let alone in a cost-effective way) an *ex ante* decision regarding some of the terms being reviewed for approval. In these cases, the approving institution might prefer approving only the parts that are not deemed problematic.[56] Moreover, consumers are heterogeneous, and what might seem to be efficient and fair for some types of consumers might not be so for others. Thus, different consumers might have different preferences as to the scope of insurance or warranty they wish to purchase. Additionally, different terms entail different risks which might be balanced by other contractual terms. For example, think of a regular computer purchase. A one year warranty and a three year warranty (for the same computer) are both plausible, thus making it impossible to point out a "best practice" term.[57] Thus, it might be a very challenging task to decide what exact coverage should an "efficient" or "fair" warranty term offer.[58] This inherent limit is a crucial one, and it should be seriously taken into consideration.[59]

From sellers' standpoint, the significance of providing sellers with strong incentives to use the proposed GHL mechanism cannot be overemphasized. If sellers will not use the mechanism in light of its strictness, which can be, in part, a result of the "all-or-nothing" regime, the enterprise is much less probable to succeed. The flexible framework–where sellers can apply for partial approval–is much more likely to be accepted by sellers. Such a regime will make it easier for sellers to receive an approval while allowing more drafting options.

However, things are different once we consider consumers' perspective. For consumers, approving contracts on an "all-or-nothing" basis would certainly simplify the system. Under this alternative regime, since the contract would be examined as a whole, consumers will not have to survey contracts and read non-approved parts. Strong opponents of the common law duty to read contracts;[60] those who believe that cognitive biases prevent consumers from reading and fully understanding standardized terms; and

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[56] A common example of a contractual term which is hard (or impossible) to approve *ex ante* is price, which vary over time and turn on cost fluctuations.

[57] This is so, since where sellers offer an extended warranty they are also likely to demand an additional price premium.

[58] Proponents of the "all-or-nothing" regime can somehow mitigate the problem of institutional inability by allowing denied sellers to indicate on their contracts that the contract was not approved because of the approving body's own inability or capacity limits. This will allow sellers to maintain, at least in part, the ability to assure consumers that the contract was denied approval for reasons other than problematic drafting methods.

[59] Leaving the non-approved terms to be considered by consumers, however, is not a simple solution either. It is true that at times consumers are better situated to evaluate a contract term in light of their specific interests. Yet, in many other instances it is plausible to presume that if specific contract terms are found hard to evaluate by the approving body, consumers will also encounter hurdles in doing so.

[60] For further discussion *see infra* Part III.

scholars who doubt whether consumers have the sufficient incentive to read SFCs, are likely to be more supportive of the "all-or-nothing" alternative.[61]

However, consumers might nonetheless prefer a partial regime since it will provide them with a wider variety of contracts to choose among. Under the "all-or-nothing" regime, this argument contends, sellers will end up using the same set of terms which will be regarded as the minimum that satisfies the standards set out by the GHL. Moreover, sellers who do not approve their contracts might end up with another incentive to engage in a race-to-the-bottom, knowing that relatively "balanced" terms are less likely than before to be appreciated by consumers (as long as such terms are not approved). I will return to this issue below.[62]

Sellers' ability to manipulate the system is another issue that is important to mention. The "all-or-nothing" approach will encourage sellers not to try and camouflage or add non-approved contractual terms that would undermine the pre-approved ones. One dominant problem with partial approval, for example, is the substitution of remedy: Crafty sellers might try to use the mechanism in order to approve most of the contract's provisions, but not a provision that substitutes the remedy to which consumers are entitled.[63]

The same sort of problem can be a result of a contractual term which assures unrestricted unilateral discretion in changing the contract's substance. One case that illustrates this problem is Rossman v. Fleet Bank (R.I) National Association.[64] In this case, Fleet issued a credit card with "no annual fee". About six months later, Fleet invoked a contractual provision which provided it with unilateral power to change the contract in order to impose on Rossman a $35 annual fee.[65] The Third Circuit ruled that Fleet must not change any annual fee for a period of one year. I believe that substitution of remedy and unilateral discretion to change an SFC are two examples of contractual terms that can turn the fairness of the contract on its head.

Moreover, the GHL Seal of Approval is a way of signaling contracts' quality to consumers. A partial regime will allow (nearly) all interested sellers, including those that use mostly unfair terms in their forms, to have the GHL Seal of Approval on their contracts. This is so, since even in the harshest contracts one can insert a fair provision. Hence, much of the Seal's attractiveness and meaning is diminished once sellers can present an approval which will be granted only to minor or unimportant parts of their contracts. As a consequence, consumers will be bothered again with the duty to read SFCs. Alternatively, consumers might end up ignoring the approval– which under the partial regime will have little force as a signal– thus undermining its purpose and strength.

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[61] For those who believe that consumers are capable of reading SFCs, there still remains the inquiry of balancing between the advantages of a flexible regime and the main disadvantage of inducing many consumers to spend time reading standardized provisions.

[62] *Infra* VII.C.

[63] For instance, "[a] great warranty enforceable only after arbitration in Nepal is not worth much"; Baird, *supra* note 9, at 950.

[64] 280 F.3d 384 (3d Cir. 2002).

[65] For explaining the relation between terms that guarantee unilateral change and behavioral patterns that allow sellers to manipulate consumers see Becher, *supra* note 4, Part II.E.2.

However, this is not a serious challenge. First and foremost, it is important to recall that the approving body is required to review the contract as a whole even when granting merely a partial approval.[66] By doing so, we can ensure that the GHL will refrain from granting partial approval when the non-approved part can undermine the contract's fairness. In other words, this suggestion entails categorization of reviewed contractual terms into three main groups. The first group of terms includes those that are approved as "best practices". The second constitutes those provisions that are not approved but have no relation to the approved parts and are thus left for consumers' evaluation. The last group includes those harsh and exceptional terms that not only are not "best practices," but may furthermore undermine the fairness of the contract as a whole. Once the approving body has found a term that belongs to this last group, it will refrain from giving any kind of contractual approval.

Yet another way to mitigate this concern is devising two kinds of approval seals. One kind will be given to partial approval; whereas another, distinct in its physical characteristics and appearance, will be designed for contracts that are approved as a whole. Despite making the system somewhat more complicated, if this idea will be implemented wisely it can ensure that buyers will not be misled by partial approval or end up reading unnecessary contracts (or terms). Moreover, the approving agency can establish some minimum standards for approval, thus excluding approval of merely marginal or unimportant terms.

Last, the disadvantages associated with a partial regime can be further alleviated by differentiating between partial approval and full approval in other ways. One option concerns the approval fee traders have to pay when submitting their contracts for review.[67] Assuming that approving a contract will require some kind of a fee, charging a lower premium for "full approval" may encourage sellers to seek approval for the entire contract.[68]

B. Validation of Approved Clauses and Incorporation of Default Terms

One can think of a whole range of measures aimed at protecting consumers from fine print and unfair SFCs. For example, sellers might be required to ask consumers to rewrite a contractual term in order to validate it or to sign their names or initials beside specific contract terms. It is assumed that by rewriting terms or signing next to particular provisions there is a higher likelihood that the adhering party will become acquainted with their content. The GHL might condition an approval by requiring that buyers will sign their initials next to some provisions (or even re-write them) in order to promise validation of some specific contractual terms.

Yet, such options are prone to be inefficient. They substantially increase transaction costs and force people to waste time on provisions they frequently cannot understand or fully appreciate. Nevertheless, using these two options (of copying terms or signing next to them) in a much restricted manner might

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[66] *See supra* note 54.

[67] For a more detailed treatment of the issue of approval fee *see infra* Part VI.C.

[68] An additional possible method would be to adopt a partial regime where approved terms should meet substantive standards, whereas the non-approved terms will have to meet some procedural requirements (such as font, color, size, etc.).

be acceptable as a supplemental tool which the GHL can advance to assure consumers' consent to some types of provisions.[69] Thus, these methods can be used to validate approval of a contract or specific terms.[70]

Another interesting issue is incorporation of default terms. Contracts cannot specify all future contingences. Contracting parties cannot anticipate, much less negotiate for, all theoretical future states of the world. The term "incompleteness contracting" refers to contracts in which the obligations of the contracting parties are not fully detailed.[71] Default rules respond to this incompleteness by proposing a way to fill these gaps.[72] Such rules govern the incomplete contract unless the parties contract around them.

Accordingly, there might be some fields of commerce, relatively homogenous, where the GHL will be able to draft and propose a complete SFC. In such a case, it might result in turning the process of standard form contracting on its head, where consumers will be the ones that offer sellers an SFC (the one drafted by the GHL).[73] Alternatively, and where drafting a whole contract is not feasible or efficient, the GHL will propose specific contract clauses, such as those that deal with arbitration, warranty, remedies, forum selection, liability, and the like.[74] Thus, we can think of a regime where a general provision will incorporate, by reference, pre-approved "best practices" terms to all approved contracts in a given field of commerce or type of transaction. By restricting the application of such rules to approved contracts we provide a stronger inventive for consumers to prefer them.[75]

There are other immediate consequences of such incorporation. First, it will provide sellers with an incentive to clearly specify departures from the pre-approved "best practice" default terms. Arguably, this will result in disclosure of important information to the non-drafting party. Secondly, as the conventional analysis of default rules suggest, it will make it more expensive for sellers to deviate from desired rules. Thirdly, these default rules might further project normative desired practices. Moreover, behavioral law and economics analysis suggests that people tend to maintain

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[69] For explaining that legal rules that force people out of their routine might be justified as a cautionary function *see, e.g.,* Baird, *supra* note 9, at 944.

[70] Recall for a moment the discussion above with respect to the possibility that different warranty terms might be efficient, depending on one's preferences. The GHL can condition approval of the relevant contract or such terms. Re-writing or signing next to a term may alert consumers and thus encourage careful consideration prior to acceptance.

[71] In contrast, a contract will be considered as obligatory complete if the parties' obligations are fully specified for all future states; s*ee* Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules,* 101 YALE L. J. 729, 730 (1992).

[72] *See, e.g.,* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

[73] For asserting that consumers might be able to propose sellers pre-drafted contracts which were prepared by legislative bodies *see* Clayton P. Gillett, *Rolling Contracts as an Agency Problem,* 2004 WIS. L. REV. 679, 721.

[74] For arguing that the credit card industry requires the adoption of mandatory pre-approved set of contract terms *see* Ronald J. Mann, *"Contracting for Credit",* 104 MICH. L. REV. 899 (2006).

[75] For a detailed discussion regarding consumers' incentives to shop for approved contracts see *infra* IV.C.

what they conceive to be the status quo; thus, that default rules tend to be "sticky."[76] In accordance, incorporation of default terms prepared by the GHL will furthermore promote the chances that the normatively desired rule will be chosen. Additionally, an automatic adoption of default rules will contribute to the efforts to shorten SFCs.[77]

To summarize, there is a variety of ways to set the requirements for validation of contractual approval. On one polarity, approval can be conditioned on active actions such as re-writing contract terms or signing aside specific terms. On the other polarity, approved default terms set by the GHL can be incorporated by reference, without detailing the terms themselves as part of the contract. In between these two polarities, the GHL can allow, or at times even require, that approved terms appear in the contract's four corners.

C. Advancing Binary Approval

The next thorny issue to examine is how SFCs should be approved. One possibility is to approve contracts while using a binary system, where contracts are either approved or not. A second possibility is to approve contracts on a "scale" basis. This can be done, for example, by "grading" contracts using a numerical range (from 1 to 5, for instance).

Let's assume Y is an average consumer interested in purchasing a TV for her house. Y, not unlike most consumers, can easily distinguish between a 21' TV and a 29' one. She can also quite easily distinguish between different TV brands (Sony, Toshiba, etc.). Similarly, Y is familiar with the different payment arrangements proposed by the retail stores (at least in general terms), and she is likely, in most cases, to be able to categorize roughly the TV she is examining as "expensive," "average," or "cheap." If contracts become salient for consumers, why shouldn't Y be able to include the quality of the contract offered by the seller as a prominent merchandise feature? Under this scenario, Y is likely to get back home and tell her spouse: "I found a great 29' flat screen Sony TV *contract grade 4* for just $150 to be paid in 5 installments with no interest. What a bargain!"

A close examination reveals some merit to this scenario. The phrase "contract grade 4" represents contractual aspects of the transaction at stake, including those that the average consumer lacks the ability, time or willingness to evaluate properly. Thus, the grading system will release consumers from evaluating complicated contractual aspects while giving

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[76] *See* Russell B. Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

[77] Another interesting possible way to shorten SFCs is to allow (or require) that terms which comply with substantive reasonableness standards will not be included in the contract's four corners. These pre-approved default terms would be available for consumers' review via other informational sources, such as a website or a free brochure. This, in turn, will simplify SFCs and economize on consumers' time while drawing their attention to the more problematic contractual parts (or contracts). At the same time, by adopting default rules and excluding other approved terms from print, sellers will be able to minimize drafting efforts and expenses. The costs that can be reduced this way include print and paper costs, negotiation and interaction between sellers and buyers over SFCs provisions, legal drafting expenses, salesmen training, and the like.

them a good (though rough) sense as to the contract's quality. Moreover, grading SFCs also seems to fit neatly within the American culture, which invents–and increasingly employs–ranking and grading systems in numerous contexts.[78]

The key question, aside from making SFCs a salient feature for consumers, is whether we can reach a consistent way to evaluate and grade such contracts.[79] Grading contracts is a challenging task for a few good reasons. First, different fields of commerce require different "best practices." What might be considered as "good practice" in one field, may not be regarded so in another. For example, a provision that forbids the buyer from returning an item after opening its wrapping or container might be a reasonable one when dealing with a cereal box; whereas, the same provision strikes us as unfair in the industry of "rolling contracts" where buyers do not have the opportunity to examine the product prior to purchase. Additionally, as already noted, contractual clauses may be good for some kinds of consumers but not for others. For instance, some consumers prefer wide-scope warranties, while others legitimately prefer a narrow coverage.

Another demanding mission is to attribute weight to the different provisions that are included in a contract and to come up with a total evaluation that takes into account the different weights and grades given to the different terms. Because the approved part is to be graded as a whole, and since it is likely that different provisions will represent different level of fairness, determining the formula to be used seems perplexing. Since we deal with a question of degree–rather than a binary evaluation–the process of numerically grading becomes a very complicated one.

At least one more factor should be taken into consideration in this respect. A scale-basis evaluation can arguably be done by consumer agencies and consumer reports, rather than expecting the approving body to undertake this assignment. This is to argue, in other words, that the GHL Institute should merely provide consumers with a basic and simple signal of quality. The *degree* of this quality, according to this argument, can be determined by consumer-oriented organizations or watch dogs groups.[80]

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[78] *Cf.* Russell Korobkin, *Ranking Journals: Some Thought on Theory and Methodology,* 26 FL. ST. U. L. REV. 851, 851 (1999) ("Americans love ranking–of practically everything"). For a very few examples see http://www.usnews.com/sections/rankings (ranking, among others, colleges, graduate schools, hospitals, health plans, cars and trucks); http://lawlib.wlu.edu/LJ/index.aspx (ranking law journals); http://www.zagat.com/ (grading restaurants, hotels, nightclubs, etc.); http://www.boxofficemojo.com/siteinfo/?id=1368&p=.htm (best ranking movies); http://www.adherents.com/people/100_lists.html (books and lists ranking people in various categories); http://www.ssrn.com/ (ranking academic authors, papers and institutions); http://www.forbes.com/lists/ (ranking powerful and best-paid movie stars, musicians and athletes; best brokerage analysts in Wall-Street; big and small companies and much more).

[79] Another key question–though much more preliminary–is how important it is to grade contracts on a scale, and whether the benefit that can be gained by this regime outweighs the costs associated with it. For the purposes of the analysis presented here, I assume that it is important enough to consider whether it can be undertaken efficiently.

[80] It is yet unclear whether consumer-oriented organizations are willing and competent to undertake this mission. Moreover, it seems that the institution granted the authority to approve contracts can more successfully and efficiently grade them. If two distinct

I believe that in order to afford a smooth beginning the GHL Institute should be vested with the authority to approve contracts on a binary basis, while refraining from grading contracts on a scale. Hopefully, this will simplify the mechanism and make its usage easier. Nevertheless, this conclusion should be held tentatively, and policy makers should revisit it once the mechanism has been established and experience has been gained.

III. APPROVAL AND THE COMMON LAW "DUTY TO READ" CONTRACTS

Traditionally, the contractual relationship between consumers and sellers is not disturbed by third parties. Rather, it is mainly formed by the parties' behavior, agreements, and actions. The proposed mechanism of prior approval departs from this basic understanding and brings into the drama a new third-party actor. This third force will inevitably change the set of legal entitlements and duties that contracting parties face. One of the most crucial issues in this respect is how contractual approval will alter the application of the common law duty to read contracts.[81]

The GHL Approval can be viewed as a signal for consumers *not* to read approved contracts. Accordingly, the duty to read will not be applied to consumers who enter approved contracts. The theoretical explanation behind this idea is that according to this view there is a third-party–the approving institution–that reads the approved contract on behalf of consumers. In fact, consumers can be viewed as delegating their duty to read to the approving institution.

This approach has a few strong advantages. First, it allows consumers to focus on the parts of the contract (or contracts) that are not approved. This alternative becomes even more appealing once we consider the problems associated with the phenomenon of information overload and human limited capacity and scarce resources.[82] Consumers are more likely to be influenced by sellers' advertisements, oral representations, and reputation while being less able to read and understand SFCs.[83] Since approval indicates no duty to

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institutions conduct a thorough investigation with respect to the same contract (i.e., once for approval purposes and the other for grading purposes) the process will become costlier and thus less efficient. What's more, if we perceive the approving institution to be a central player in the consumer protection arena, giving it the discretion and responsibility to grade contracts will upgrade its function and the protection offered to consumers.

[81] For a further discussion of the common law duty to read and its relation and impact on the law of SFCs *see, e.g.,* John C. Calamari, *Duty to Read – A Changing Concept,* 43 FORDHAM L. REV. 341 (1974); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263 (1993).

[82] For discussing the problems that information overload generates in the context of consumer SFCs *see, e.g*., Jeffery Davis, *Protecting consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplifications of Consumer Credit Contracts*, 63 VA. L. REV. 841 (1977); Eisenberg, *supra* note 4; Korobkin, *supra* note 4. For arguing that information overload is not a serious threat for consumers *see* David M. Grether, Alan Schwartz & Louis Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure,* 59 S. CAL. L. REV. 277 (1986).

[83] Boardman has recently argued that a consumer "could have no fair duty to understand, and so has no duty to read". Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate,* 104 MICH. L. REV. 1105, 1105 (2006). The author opines that

read, consumers will not be required to engage in evaluating SFCs, a task they are not competent to perform. This, in turn, will encourage consumers to shop for approved contracts.[84] Moreover, this alternative tracks the common usage of other Seals of Approval. As noted above,[85] current existing certification programs are aimed at providing buyers with a good proxy as to the product's quality; thus exempting or minimizing the need to conduct further investigations. Allowing consumers to rely on the Seal as a signal of quality follows this established and intuitive tendency. This, in turn, can help implementing the GHL solution in a smooth way.

Another aspect that can shed more light on this issue is the way one regards the law (or more specifically – contract law) in a broader sense: whether it should follow life or rather modify it.[86] Whereas there is little doubt that law is one of the social forces that can and indeed does influence peoples' conception and behavior, the power, effectiveness, and value of this function are strongly disputed.[87] If one accepts the assertion that law should be humble with respect to changing customary human habits, then one might follow recognized practices (such as consumers' tendency not to read SFCs) unless some compelling justifications have been established.

In essence, a workable and effective regime would be to view the GHL as a promise of contractual content quality, thus exempting consumers from reading approved contracts. Viewing approval as an exemption from reading better matches the rationale behind the usage of other seals of approval; it goes with, rather than against, consumers' well established tendency not to read SFCs; and it does not attribute too much of rationality to consumers as a class. It further provides a response to people's need to minimize transaction

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drafters of insurance SFCs may employ ambiguous contractual terms even after they have been interpreted against the draftsmen since those terms have a fix meaning and thus are valued for their clarity.

[84] *See infra* Section IV.C (discussing consumers' incentives to use the GHL mechanism).

[85] *Supra* Part I.

[86] This idea is related to the much more general question of the potential and ability of the law to reform people's behavior and influence "real world" practices and attitudes. The common example frequently used as a starting point for many discussions is racial inequality. *See, e.g.,* Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intraracial Conflict,* 151 U. PA. L. REV. 1913 (2003). It should be emphasized, however, that our context is much narrower and less ambitious, since the behavior which is sought to be influenced in our case is more commercial and less public in nature. Nevertheless, I believe that the argument of the derivative nature and secondary influence of the law is valid here as well as in the much broader contexts.

[87] C.L.S., for example, is understood to be one of the streams in legal scholarship that strongly doubts social change through law. *See, e.g.,* Jason E. Whitehead, *From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Reexamination of Frankfurt School Critical Theory,* 26 FLA. U. L. REV. 701, 718 (1999) (associating C.L.S. with "a radical skepticism toward all theories that attempt to understand and change society through law"); Brain Z. Tamanaha, *Book Review: Law and Development* (Vol. 2, Legal Cultures), 89 A. J. I. L. 470, 485 (1995) (suggesting that the center of gravity in each society rests not in its law and that the law is not likely to generate from within itself a solution to social problems); Jane E. Larson, *Symposium Introduction: Third Wave – Can Feminists Use the Law to Effect Social Change in the 1990s?* 87 NW. U. L. REV. 1252, 1253 (1993) ("In the hostile political climate of the past decade, visionary efforts to transform society through law began to appear increasingly - and perhaps foolishly - naïve").

costs; it does not confront consumers with cognitive tasks they are not apt to carry out efficiently; and it creates a stronger incentive for consumers to shop for and prefer approved contracts.[88]

IV. INCENTIVES FOR USING THE SYSTEM

Since the proposed GHL system operates on a voluntary basis, it will not succeed unless the market's actors–both sellers and consumers–have sufficient incentives to use it. Economists refer to these incentives as participation constraints. If the incentives offered by the GHL are not strong enough, sellers and consumers will not use it. This Part deals with potential incentives and the way policy makers can make this mechanism more attractive.

A. Sellers' Perspective

A voluntarily system relies on sellers' willingness to use it. If sellers are able to enlarge their share of contractual benefits at the expense of consumers through the use of self-serving terms, then we should expect socially inefficient terms to be employed. In other words, if the social loss generated by unfair and inefficient contract terms is not realized by sellers, sellers have an incentive to offer biased self-serving terms in their contracts rather than to have them approved. Furthermore, even where the pre-drafted terms are fair and efficient, sellers might nevertheless prefer to refrain from using this system due to the costs associated with the necessary interaction with the proposed institution. These "interaction costs" can include, for example, legal assistance, time investment, approval fee (if and where applicable),[89] print costs and the like.

Hence, sellers might refrain from approving their contracts due to two main reasons. First, they might prefer to obtain the ability to draft one-sided terms. Second, they might draft fair and efficient contract terms but be reluctant to approve them because of incurred costs that approval entails. Can the proposed system overcome these participation constraints?

Assume a contractual term, X, is being used by a firm.[90] Further assume that the firm rationally evaluates the expected utility of this term, and that it considers gaining approval for it. One of the underlying ideas of the GHL is that by approving SFCs sellers can ensure that their contracts are immune, at least to some degree, against legal claims.[91] Thus, approval should be viewed

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[88] However, the system should be flexible enough to allow the GHL to deviate from this general rule when needed by employing some measures to assure consumers' attention to more sensitive terms. Some of the measures to promote this idea have been discussed *supra* II.B., and they include, *inter alia*, re-writing provisions, signing initials, and using conspicuous print and font.

[89] *See infra* Section VI.C.

[90] For simplifying purposes the example here involves an approval of a specific term; nonetheless, the analysis will be much the same for approving a whole contract.

[91] For listing some of these potential claims and discussing the rationale of immunizing approved contracts from such claims *see infra* IV.B.2.

as another precaution that sellers can take for assuring validation and adherence to contractual terms.[92]

The assertion that by gaining an approval a seller will minimize his liability towards aggrieved consumers should be examined carefully. First, if term X is inefficient and unfair, it cannot be approved. This observation makes it clear that term X will have to be changed (or to be an efficient term from the very beginning) in order to be approved. By the same token, once a term has been changed to a "best practice" term (or was a "best practice" beforehand), one might ask why a seller should seek approval for such a term. Seemingly, sellers would not face any liability upon aggrieved consumers when using "best practice" terms, even if those terms are not approved by the GHL Institute. In short, sellers who wish to use unjust terms cannot approve them; whereas, sellers who wish to use "best practice" provisions do not need to have them approved in order to diminish their liability. Contract immunization, according to this logic, is an invalid justification for contract approval.

Though interesting, this argument is misleading. First, sellers might wish to gain approval for fair and efficient terms in order to refrain from incurring expenses responding to frivolous suits. Second, by approving their contracts, sellers can minimize the prospects of suffering losses which are due to mistaken judicial decisions.[93] Third, the assumption that sellers have all relevant information regarding term X, including, *inter alia*, whether the term is to be considered as "best practice" or not, is far from being trivial. Hence, if full information and clear categorization of term X as a "best practice" term is not at hand, sellers might use the certification mechanism as a method to eliminate such an *ex ante* uncertainty.

Besides serving as a valuable precaution that sellers can take, sellers can also gain reputation by contractual approval.[94] Put simply, approved contracts will be viewed by consumers as a positive quality signal. This will increase the seller's reputation and, as a result, enhance his market power. More generally, therefore, sellers are likely to respond to the GHL regime in two typical ways. Swindling sellers will oppose this mechanism since it undermines their ability to exploit consumers. By the same token, legitimate

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[92] Whereas individuals are assumed to be risk averse, firms are assumed to be risk neutral. *See, e.g.,* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law,* 113 YALE L. J. 541 (2003) 547, 550, n. 16 (explaining the two facts that support this proposition).

[93] One might argue that since a term's approval can be reviewed by courts (*see infra* V.C.), sellers would actually not be able to immunize their contracts against judicial mistakes. In other words, adjudication errors would still be possible when courts review the approval made by the GHL Institute. Nevertheless, the incidence of such mistakes can be expected to decrease dramatically once a contract has been approved. First, the GHL Institute will enjoy some degree of discretion that courts should respect. Second, fewer cases will be brought before the court in the first place, since litigants (and their lawyers) would be aware of the deference to approval decisions.

[94] The relation and correlation between fine print and sellers' reputation is an exiting topic to explore from various perspectives. For a few recent examples *see* Baird, *supra* note 9, at 938; Bebchuk & Posner, *supra* note 2; Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2008).

sellers will benefit since it provides them with another vital tool to distinguish themselves from scrupulous ones.[95] Both consequences, of course, are normatively desired.

Using contractual approval as a mean to enhance reputation has an additional potential advantage: It might advance the challenging task of making SFCs terms a salient attribute from consumers' perspective. By using the GHL mechanism as a quality signal of "fairness" or "best practice," sellers might be more likely to engage in a "race-to-the-top," mainly by pointing out a contract's approval to potential consumers. The GHL system, in other words, can encourage sellers to bring the fact of approval to consumers' attention by making the evaluation of contracts simple and available.

The possibility of gaining reputation through contractual approval is also related to sellers' ability to reduce transaction costs once they approve their contracts. Sellers who opt for approval can reduce transaction costs since less time is likely to be spent on answering consumers' questions with regards to contractual aspects and addressing concerns that might arise from SFCs. In addition, this weaker need to assure consumers they are entering a good contract might also reduce the necessary of training salesmen to address contractual and legal aspects. Similarly, it has the potential to minimize the chances that salesmen's oral representations will cause misunderstandings.

Closely related, where sellers use pre-approved SFCs they might also minimize drafting expenses. Sellers who wish to approve their contracts may choose from among those default terms that are pre-approved as best-practice terms by the GHL Institute. As noted,[96] sellers could rely on pre-approved default terms, incorporate them into their contracts using a general reference, or use them as a starting point in their drafting process. By adopting pre-approved default rules and simplifying SFCs, sellers can substantially reduce legal fees and print expenses.

B. Providing Stronger Incentives for Sellers: Influencing the Main Factors

The previous discussion made explicit the different considerations sellers might have regarding contractual approval. Having this background in mind, it should be simple to understand how we can influence some of the factors that dominate sellers' decision. I now address these factors.

1. Self-serving Terms & Enforcement Probability

The fewer consumers who sue sellers in light of self-serving terms, the less incentive sellers have to abandon the use of such terms; and accordingly, the less beneficial it is for sellers to use the GHL system. Under-enforcement is under-deterrence, and various factors may lead to consumers' tendency not

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[95] That contract law should form legal rules that allow honest and reliable sellers to distinguish themselves from unscrupulous competitors is a well recognized idea that assisted courts at least as early as the 19th century. *See* Carlill v. Carbolic Smoke Call Co (1893) 1 Q.B. 256 (U.K.) (holding a seller liable to his pre-contractual presentation while noting that not doing so will undercut honest sellers' ability to distinguish themselves). *See also* Baird, *supra* note 9, at 847-48.

[96] *Supra* III.B.

to sue sellers. Some of these factors can be considerably modified or even eliminated.

One prominent case where consumers do not sue sellers with regard to everyday transactions is where small amounts of money are involved. This is a common scenario, relevant to many consumer goods.[97] From an efficiency perspective, in many ordinary cases an individual consumer is not likely to bring her case before a court since her claim is dwarfed by the costs she will have to acquire should she initiate litigation.[98] Likewise, and even when dealing with relatively large amounts of money, litigants typically do not recover reasonable trial expenses and attorneys' fees.[99] By systematically under-compensating plaintiffs for legal and trial expenses, we make it less valuable for consumers to sue and thus less attractive for sellers to avoid breaching a contract; refrain drafting unfair SFCs; or evade behaving in a strategic manner. On the other hand, allowing compensation of non-pecuniary expenses aside with real legal expenses and attorney' fees in consumer cases will result in increasing consumers' tendency to sue. Inevitably, it will also increase the potential loss (per case and in total) that sellers face, a factor that will foster using the proposed system of approval.[100]

While the previous explanations for under-deterrence are based on "pure" economical or efficient reasons (i.e., under-compensation), there are other reasons that prevent consumers from launching litigation. Since most individuals tend to be risk averse,[101] the uncertainly which is an inherent part of a legal litigation might prevent them from advancing their rights and allegations in court.[102] Furthermore, from an emotional perspective, a trial is an experience that most people find unpleasant.[103] Evidently, it is more

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[97] Hence, the Washington court invalidated a standardized forum selection term employed by America Online which read that all litigation should take place in Virginia. In its decision, the court noted, *inter alia*, that damages suffered by individual consumers are not likely to exceed $250, thus imposing unreasonable expenses on Washington residents who seek to launch litigation. Diz v. ICT Group, 106 P.3d. 841, 844-45 (Wash Ct. App. 2005).

[98] *See, e.g.* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. OF CHI. L. REV. 652, 671-672 (1983) (arguing that in the context of antitrust "consumer enforcement may lead to too few cases being brought and hence to underdeterrence of antitrust violations").

[99] For discussing the problem of trial expenses in modern trials and commenting on its impact in a more general sense s*ee, e.g.,* Edward L. Rubin, *Trial by Battle. Trial by Argument.* 56 ARK. L. REV. 261, 288 (2003) ("The converse problem with relying upon trial by argument is that many social policies are under-enforced… Litigation ranges from being rather expensive, to extremely expensive, to ferociously expensive, to make-your-hair-stand-up-on-and-knock-your-teeth-out-one-by-one expensive…Common law was remarkably blind to this difficulty. It devoted enormous attention to the measurement of damages, but ignored trial expenses…").

[100] The suggestion here to compensate for non-pecuniary components and allow real trial and legal expenses is a general suggestion, which might be applicable to both approved and non-approved contracts. The next Section will suggest some more specific and tailored grounds to distinguish between approved and non-approved contracts in ways that will increase sellers' motivation to seek approval for their contracts.

[101] *See supra* note 92.

[102] *See supra* note 99, at 288-89.

[103] *See id.* at 287-88 (concluding that "[a]ll these features lead to dread, to elaborate efforts at avoidance that foreclose actions that would otherwise be taken…").

unpleasant for individuals than for sophisticated or repeat-players litigants (such as firms, organizations and institutions).[104] This provides an additional explanation as to why consumers tend not to sue sellers with respect to everyday transactions.

Moreover, under-enforcement is likely to occur where consumers are not fully informed with respect to their rights.[105] It seems that this should be especially troubling when dealing with the less-educated and the more vulnerable groups of consumers. Also playing an important role are public legal assistance and consumer organizations. The less available public legal assistance is, the fewer the interests that will be represented, and the fewer the number of cases brought by consumers (and consumer organizations) before the courts. By the same token, the more active consumer organizations are, and the more leverage they possess, the more likely it is that enforcement percentage will rise, sellers will not draft inefficient terms, and as a result, their propensity to approve their contracts will increase.[106]

To summarize this point, sellers will tend not to use the approval mechanism due to under-enforcement. To minimize this problem, we can (i) consider allowing wider compensation for legal and trial expenses in consumer cases; (ii) better educate consumers as to their legal rights; and (iii) allow and encourage consumer organizations to have an active role in the enforcement of consumer rights. This will not only fight the social harm of under-enforcement, but also create strong incentives for sellers to use fair SFCs and approve them.

2. Contract Immunization: Sellers' Probability of Losing Legal Disputes

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[104] For discussing the inherent inferiority of ordinary consumers (as "one-shot players") when litigating against firms (as "repeat players") and its implications to the substance of consumer SFCs *see* Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contracts,* 47 STAN. L. REV. 211, 243 (1995) ("For the form taker, any given form contract is normally a one-shot transaction... For the form giver, however, a form contract is a high-volume, repeat transaction… These asymmetrical incentives almost always work to heavily slant form contracts in favor of form givers"; footnotes omitted).

[105] *See, e.g.,* Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 395 (1990) ("Promisees sometimes do not sue because they are uninformed about their rights"). For acknowledging consumers' awareness as one of the factors that influence the volume of cases brought to courts in the context of medical malpractice *see, e.g.,* Betsy A. Rosen, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive Reform*, 52 BROOKLYN L. REV. 135, 138 (1986) ("In addition, increased awareness of consumers' rights has led to a rise in the number of suits brought by dissatisfied patients").

[106] The importance and achievements of consumer organizations and public legal aid cannot be over-emphasized. For arguing that consumer organizations have an important role in mitigating the one-shot/repeat-player problem in the context of consumer-firms relationship *see, e.g*., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call For Reform*, 38 HOUS. L. REV. 1237, 1254-55 (2001) ("In fact, there are many ways consumers have been able to avoid, or substantially mitigate, the benefits of the repeat-player… Specialized legal organizations… follow litigation on a national front, offer their expertise and resources to individual players, and help determine which claims should be appealed to establish the best precedent.")

The more sensitive courts are to the fact that a contract has been approved and the more importance they attribute to it, the more likely it is that sellers will use this prior approval as an insurance against future claims. If we want to create incentives for sellers to use the approving mechanism, we can influence this factor in any number of ways.

(a) Unconscionability. First, we might employ higher standards of unconscionability when dealing with approved SFCs.[107] Assuming that sellers who gain approval use contractual terms that are substantially and procedurally fair, it might then follow that approved provisions should enjoy a higher level of anti-unconscionability guarantee. At the same time, sellers who opt not to approve their contracts may have made this conscious choice since their contracts are more likely to include unfair (or at least problematic) terms.[108] Requiring a higher burden for unconscionability claims against approved terms will increase sellers' probability of losing a case where non-approved contracts are involved. Hence, courts can, on a case-by-case basis, regard sellers' decisions concerning whether or not to approve their contracts as an important factor in examining an unconscionability claim.

(b) The Duty to Read. A different application of the common law "duty to read" contracts to approved and non-approved SFCs can promote contractual approval as well. If consumers have only a relaxed duty to read non-approved contracts, non-approved terms will be harder to enforce. Imposing extra hardship on sellers who wish to enforce non-approved terms (in comparison to approved ones) will provide sellers with another incentive to approve their SFCs.[109]

(c) SFC Interpretation. One supplementary tool that can be used as a measure of encouraging sellers to submit their contracts for approval is the judicial interpretation of SFCs. If the approving seal is viewed as a signal of "best practice," then it might be plausible to differentiate between contracts with approval and those without in this respect as well. This can be done, for instance, when considering whether to allow extrinsic evidence to be introduced as part of the judicial process of contract interpretation. I will expand a bit on this idea in the paragraphs that follow.

In general, current law holds that courts enjoy a high degree of discretion in the process of contract interpretation. Section 2-202 of the Uniform Commercial Code ("UCC"), for example, provides that extrinsic evidence can "explain or supplement" the contract writing, though not "contradict" it. *The Restatement (Second) of Contracts* ("*Restatement*")–which rejects the idea that contract terms have a "plain meaning"–applies a relatively subjective context-sensitive standard as a guideline for contract interpretation. Similar to the UCC, the *Restatement* allows extrinsic evidence

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[107] For a detailed discussion regarding the unconscionability doctrine *see, e.g.,* Robert A. Hillman, *Debunking Some Myths about Unconscionability: A New Framework for U.C.C. Section 2-302,* 67 CORNELL L. REV. 1 (1981).

[108] *See supra* IV.A (noting that unfair terms might be a dominant reason that leads venders not to approve contracts).

[109] I address in more detail the common law duty to read contracts and its interaction with the proposed GHL idea *supra* Part III.

as part of the interpretation process.[110] Common law courts have generally followed this path.

Commentators argue that in the context of commercial contracts between sophisticated parties–such as large firms–courts should abandon the flexible attitude and apply a more "textualist" attitude as the default theory of interpretation.[111] Such approach is strongly justified in contracts executed among sophisticated and experienced firms. Yet, I believe a different default theory should be considered for the interpretation of consumer SFCs. In my view, courts should be vested with wide discretion to admit extrinsic evidence when dealing with non-approved contracts while revealing a stingier attitude towards extrinsic evidence in pre-approved contract cases. One possible explanation for this distinction should be noted here. If we assume that non-approved terms are trickier for consumers, it is then plausible that unfavorable terms are more frequently accompanied by sellers' oral explanation or advertisement, aimed at mitigating consumers' concerns with respect to the contract's content[112] or to shift their focus to other product's characteristics.

Since sellers dominate the drafting process and have the ability to tailor their SFCs according to their needs, allowing extrinsic evidence in the process of contract interpretation is likely to undermine their interests as incorporated into contractual terms. Allowing extrinsic evidence in the process of contract interpretation is likely to increase sellers' probability of losing a case while complicating litigation and raising its costs. This, in turn, will create another incentive for sellers to approve their contracts, thus blocking, at least to some degree, consumers' potential claims based on extrinsic evidence.

(d) Expanding Approval Immunity. The other side of the coin is augmenting the scope of immunity accorded to pre-approved contracts. In achieving this goal we might consider the following aspects: the timeframe for which approved terms are immune from legal claims; the scope of the immunity (i.e., what array of claims are basically excluded from discussion once raised against approved contract terms); the burden of proof on consumers who argue against standardized provisions; the kind of evidence that is allowed and required in order to challenge the ordinary meaning of approved terms, and so on. Clearly, the stronger the immunity the approval carries, the more likely it is that sellers will use it.

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[110] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 209-217 and accompanying official notes.

[111] *See* Schwartz & Scott, *supra* note 92, at 568-92.

[112] Such representations, for instance, can take the form of explaining why the danger and the likelihood that those one-sided terms will afflict consumers are low and thus should basically be ignored.

3. Contact Approval & Supra-compensation[113]

Punishing (retribution) and deterring defendants, compensating plaintiffs, and inducing potential plaintiffs to take legal actions are among the most classical objectives of damages remedies in the common law.[114] Contract remedies are traditionally designed to compensate the promisee for the loss resulting from a contract breach; rather than to force the breaching party to perform[115] or to punish him for his breach.[116] As compensation is perceived to be the desired norm, many legal scholars have repeatedly argued that punitive damages are inappropriate in contract cases.[117]

Current legislation follows the anti-punitive damages path, and the general rule is that punitive damages should not be assessed for a breach of contract *per se*. Section 355 of the *Restatement* provides that "punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."[118] Similarly, section 1-106 of the UCC endorses the expectation interest principle, while the official comment negates the concept of punitive damages.[119] Accordingly, an empirical survey conducted in 1999 by William Dodge revealed that thirty-nine American jurisdictions do not allow punitive damages for contract breach unless the plaintiff can establish the existence of an independent tort; whereas twelve jurisdictions allow punitive damages in contract cases yet only under limited circumstances.[120]

From a law and economics perspective, punitive damages are usually perceived to be anomalous in contract law for two prominent reasons. First, punitive damages undermine the basic principle of "efficient breach." Since performance will occur even where breach is more efficient (*ex post*), punitive damages result in inefficient performances.[121] The theory of "efficient breach" is now employed by scholars, legislatures and courts as an

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[113] The terms supra-compensation, over-compensation and punitive damages will be used interchangeably in order to refer to legal awards that exceed the compensatory level of an aggrieved party. It should be clarified here that the term "punitive damages" ought not to be understood simply as a punishment. In most cases, there might be other justifications for this award (rather than "punishment"). *See, e.g.,* Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1988 WIS. L. REV. 131 (1998).

[114] *Id.* at 136.

[115] *See, e.g.,* E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970) ("our system, then, is not directed at compulsion of promisors to prevent breach; rather, it is aimed at relief to promisees to redress breach").

[116] *See e.g.,* Marc Galanter & David Luban, *Punitive Damages and Legal Pluralism,* 42 AM. U.L. REV. 1393, 1404 (1993) ("Generally, American civil law views its remedial purposes as distinct from punishment… In short, the law is hostile to carrying out the parties' contractual scheme to punish the breaching party").

[117] *See, e.g.,* 5 A. Corbin, Corbin on Contracts 437 (1964); 11 Williston on Contract 209 (W. Jaeger 3rd ed. 1968).

[118] RESTATEMENT (SECOND) OF CONTRACTS § 355.

[119] Comment 1 of § 1-106 states that contractual remedies "do not include consequential or special damages, *or penal damages*" (emphasis added).

[120] William S. Dodge, *The Case for Punitive Damages,* 48 DUKE L.J. 629 (1999).

[121] *See, e.g.,* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 131 (5th ed., 1998). For a challenge of the economic perspective *see*, *e.g.*, Dodge, *supra* note 120; Galanter & Luban, *supra* note 116.

ordinary explanation of why punitive damages should not be awarded in contract cases.[122] The second major explanation against punitive damages in contract law is based on an *ex ante* observation. From an *ex ante* perspective (and even if parties can re-negotiate before breaching the contract), parties consider precautions that can decrease the possibility of breach. Allowing punitive damages will thus result in precautions that are excessive and unjustified.

However, this analysis should not be understood to argue that punitive damages never can be justified from an efficiency standpoint. Even from a law and economics perspective, punitive damages might be acceptable in under-enforcement cases.[123] Since not all aggrieved parties sue, promisors that consistently breach their contracts are generally well-situated. This is especially true where factors like legal expenses for prevailing litigants and reputation damage due to consumers' suits are relatively negligible. By allowing over-compensation the law can respond to the problem of under-enforcement.

While the concept of allowing supra-compensation in these cases is just and efficient in theory, it is difficult to implement in practice. Usually, it is very problematic to know how much to add to the plaintiff's loss, and awkward to estimate with any accuracy how many aggrieved parties did not sue[124] and what quantum of damages they faced. Obviously, this question is particularly difficult in dynamic markets, where the degree of under-enforcement varies from time to time and from one industry to the other. Furthermore, allowing punitive damages changes the set of considerations consumers face when deciding whether to bring a suit to court. Once punitive damages are allowed, the degree of under-enforcement is likely to change.[125]

Nevertheless, one additional way to broaden the potential average loss for sellers who opt to use non-approved SFCs is by considering supra-compensation. In this context, there might be a few justifications which rationalize a more relaxed attitude towards over-compensation for non-approved contract terms. I consider those explanations next.

(a) Lowering/Shifting the Burden of Proof. Sellers who do not obtain contractual approval are more likely to gain from under-enforcement. This premise might be especially true if we assume that approved contracts are less likely to include unfair terms that might result in legal disputes or consumers' exploitation. Hence, when dealing with approved contracts, even if the probability of enforcement does not change, the pool of aggrieved consumers gets smaller, and the benefit that the seller can gain from

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[122] *See, e.g.,* Dodge, *id.* at 631. Many courts have grounded their opposition to punitive damages on an economic analysis. *See, e.g.,* Thyssen, Inc. v. Taiwan Int'l Lines, Ltd., 777 F.2d 57, 62 (2d Cir. 1985); Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E. 2d 975.

[123] Another kind of contract cases that might justify punitive damages occurs when dealing with opportunistic, rather than efficient, breaches. *See* Dodge, *id.* (referring to a large number of references that support this argument (especially footnote 14)). Yet, it seems plausible to assume that opportunistic breaches are a negligible factor in SFCs cases.

[124] Though the issue of class actions may be related to this analysis it is beyond the scope of this paper.

[125] And *see* Schwartz, *supra* note 105, at 402-3.

incorporating one-sided terms (insofar as they can be mistakenly approved) is correlatively reduced.

Another possible argument for distinguishing between approved and non-approved contracts in this context is that unfair terms may prevent buyers from bringing their cases before courts in the first place,[126] especially where buyers are not fully aware that the terms at stake may be invalidated.[127] Where approval means immunity against consumers' suits, it might make sense to lower the burden of proof faced by aggrieved buyers who seek punitive damages to encourage litigation against unscrupulous sellers.[128] In other words, using a lower burden for awarding punitive damages for non-approved contract terms will correspond with the likelihood that a seller will benefit from under-enforcement because of inclusion of unfair terms.

An additional idea worth examining would be an approach where *prima facia* evidence of under-enforcement shifts the burden of proof to sellers who did not gain approval for their contracts. Recall, that the practical problem of proving the degree of under-enforcement is one of the main reasons for which punitive damages are deemed inappropriate from an economic perspective. By the same token, the approving mechanism–which has the potential of minimizing under enforcement–is a precaution that only sellers can take. Following this logic, it seems reasonable to not allow sellers to benefit from consumers' inability to satisfy the level of proof (which is required in order to be awarded with punitive damages) where an available tool that decreases under-enforcement (i.e., contract approval) is in hand.

Two more concrete scenarios can be noted here. First occurs where a plaintiff can show that there is some level of under-enforcement, but its exact degree cannot be clearly proved. Alternatively, it might be that a plaintiff cannot prove under-enforcement in his particular case, but he can prove under-enforcement in similar fields of commerce. The proposal here is that in such cases, courts will shift the burden of proof, insofar as under-enforcement and supra-compensation is at stake, to sellers who opted not to gain approval.[129]

(b) Minimizing Litigation. Allowing punitive damages enlarges individuals' potential benefit from legal disputes and thus provides a higher motivation for plaintiffs to litigate. Though punitive damages are awarded

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[126] *See* Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contracts Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue,* 15 BEHAV. SCI. & L. 83 (1997).

[127] On the face of it, this argument can defeat itself since it is even more valid when dealing with approved terms (i.e., it is very unlikely that consumers will try to attack approved contract terms that enjoy immunity). It should be clear that this danger is not a challenging one since approved contract terms are presumed to be fair.

[128] This is aside of the normative goal of deterring opportunistic behavior; and *see supra* note 123.

[129] In this respect, the idea expressed here is similar in some ways to Professor Amar's idea about searches. According to Amar, a search warrant (which can be viewed as an *ex ante* approval given by a third-objective party) can be viewed and used as an immunity from damages claims in relation to criminal searches, while searches that are conducted without a warrant should be exposed to potential damages liability. *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1175-81 (1991).

much less frequently than usually assumed,[130] these relatively small numbers of cases, that enjoy a high degree of publicity and public attention, have a powerful effect on potential plaintiffs.[131] Since the costs of litigation are basically socially wasted, punitive damages may be undesirable as a factor encouraging excessive litigation.[132]

This rationale can be applied in order to attain a somewhat contrary conclusion in our context. Getting a contract approved is a precaution that sellers can take *against* legal claims thus avoiding, *inter alia*, the risk of paying punitive damages. Allowing punitive damages for unapproved contracts might increase litigation, but only with regard to *unapproved* contracts. Accordingly, this will provide sellers with an additional incentive to approve their contracts. Where sellers are afforded the option to immunize their SFCs contract immunity is likely to block the possibility of punitive damages awards and thus substantially *reduce* litigation. Put differently, since sellers are the ones who can make use of this proposed precaution and are the lowest cost-avoiders, exposing them to punitive damages when they opt *not* to approve their contracts will provide an additional strong incentive for using the GHL mechanism.[133]

(c) Political and Social Values in Consumer Protection Policy. In western liberal cultures, it is believed that governments ought to be restrained and limited from regulating every area of life. Yet, this fundamental approach leaves a lot of space for private entities and initiatives, which can sometimes gain enormous power.[134] The vast power that is obtained by large corporations might, in some cases, conflict with individual freedom and allow brutal interference in the private sphere and in individual private lives. In order to keep and enhance the concept of enforcement endowments, punitive damages are normatively desired since "it encourages a pluralist

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[130] *See* Galanter & Luban, *supra* note 116, at 1411-15 (referring to and relying on a few researches who exhaustively traced punitive damages award cases).

[131] Judge Kozinski, for example, has regarded punitive damages as "a golden carrot that entices into court parties who might otherwise be inclined to resolve their differences"; Oki America, Inc. v. Microtech Int'l, Inc., 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring).

[132] *See e.g.,* Galanter & Luban, *supra* note 116, at 1410 ("those who are affronted by what they see as excessive litigiousness often target punitive damages as a major problem"); Dodge, *supra* note 120, at 691-92. Yet, as Dodge acknowledges, when it comes to punitive damages arising from a breach of contract there is also a plausible assertion that allowing punitive damages will *decrease* litigation ("making punitive damages available for willful breach of contract will encourage promisors who would previously have been inclined to breach to negotiate with their promises for releases"); Dodge, *id.*, at 681.

[133] Theoretically, this can turn out to be a double-edged sword. There is still a danger that allowing punitive damages when dealing with non-approved contracts will create a large volume of litigation which will not be off-set by the amount of litigation that is reduced due to pre-approve SFCs. Yet this danger is not that severe. It may be efficient to allow punitive damages for contract breach since the breaching party can usually re-negotiate with the other party for a release. This renegotiation is likely to be cheaper than the assessment costs of litigation necessary to determine the expectation damages of an aggrieved party. And *see* Dodge, *supra* note 120.

[134] Some corporations not only gain economic power but also political influence. This is mainly achieved by donating large sums of money to political parties.

dispersal of law enforcement responsibility."[135] A pluralist dispersal of law enforcement responsibility, in turn, helps to minimize the chances that conglomerates will indeed have the ability to threat the private sphere.

Against this general background it is worth noting that sometimes there are fundamental rights (e.g., human dignity, privacy and freedom of contracts) that are infringed by sellers who exploit consumers or treat them in a degrading manner via SFCs and contracting practices.[136] I further believe that this kind of social harm for consumers is generally under-estimated, under-enforced and consequently under-compensated. This is especially true, I think, since often it is the more vulnerable and less-represented groups of consumers who are exposed to this kind of behavior.[137] Supra-compensation, therefore, can serve as a norm projection which guarantees that firms will not under-estimate some social values and norms.[138] Similarly, it can help to promote strict compliance, regardless of efficiency concerns or the degree of under-enforcement. If we believe that some norms and rules justify strict compliance,[139] we might conclude that punitive damages are a justifiable mean to achieve such compliance. For all these various reasons, allowing such damages can serve as an important measure to address infringement of consumers' rights.[140]

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[135] Galanter and Luban, *supra* note 116, at 1446.

[136] In a way, this argument resembles Kant's maxim of treating human as objects, rather than means. For an interesting attempt to provide an ideal of respectful community that promises and contracts create *see* Daniel Markovits, *Contract and Collaboration,* 113 YALE L. JOUR. 1417 (2004).

[137] An additional argument is that where contractual relations are characterized with a high degree of dependence and trust, fiduciary principles justify punitive damages. A common example is a bad faith breach of an insurance contract. *See* Dodge, *supra* note 120, at 636-37 (detailing other exceptions for awarding punitive damages and pointing out this rationale). Additional consumer products and services that can be part of this group are, for instance, those provided by banks, credit cards and utility companies, and technical support for essential merchandise.

[138] That a norm or a value is under-estimated is a problematic issue which involves normative considerations beyond the scope of this Article. At this stage it is enough to point out that punitive damages can serve as a norm projection, signaling the resentment of the law from a given behavior or attitude; *see* Luban & Galanter *supra* note 116, at 1430-32.

[139] Human dignity, an abstract non-pecuniary notion, might serve as an important example as it is not frequently compensated for in consumer contract cases: many people do not feel comfortable assigning a price to such a value; it is difficult to prove and quantify it as a matter of damages; some people would rather respond to private insults or humiliations outside of the legal system; and others would feel that bringing their case to court is likely to deepen their embarrassment or frustration. With this as a background, one may better understand the argument that punitive damages "are perhaps the most important instrument in the legal repertoire for pronouncing moral disapproval of economically formidable offenders"; Galanter & Luban, *supra* note 116, at 1428. The authors further explain in detail the rationale that follows the retribution argument, which in turn relies on Hampton's analysis of retribution. According to this analysis, firms as wrongdoers sometimes consider themselves as especially valuable; whereas, the customer (the victim) is degraded to a "low" person, one that does not matter that much and thus "deserves" to be treated badly.

[140] To be sure, there are practical countervailing arguments not to allow punitive damages awards. One important argument is that juries are not a reliable institution for transforming this consensus to a dollar amount award; *see* Cass R. Sunstein, Daniel Kahneman & David

Arguably, one of the purposes of approving contracts is minimizing such exploitation and infringement of fundamental rights by sellers. It is then reasonable to argue that sellers who do not seek approval for their contracts are more inclined to use unfair terms or practices which exercise such exploitation. Thus, sellers who choose not to approve their SFCs are more likely to infringe rights without fully compensating for their harms. Allowing punitive damages when dealing with unapproved contracts can help off-set this undesired situation. To make this proposal more complete, I further suggest allocating a substantial part of these punitive damages awards to the GHL Institute. This practice will prevent unjustified windfalls and, at the same time, help finance the GHL system.

To summarize, a more relaxed attitude towards punitive damages under the framework sketched here will achieve a few important objectives. First, it will provide sellers with another incentive to use the GHL system. Second, it will increase consumers' motivation to sue sellers for harms derived out of unfair non-approved provisions. This will address, at least in part, under-deterrence and under-compensation. Third, it will project important values, encourage compliance with valuable norms, and enhance pluralist dispersion of law enforcement accountability. Last, as a by product, allocating a substantial part of punitive damages awards to the GHL Institute will assist financing its activities.

4. "Interaction Costs": Approval Costs and Fees

High expenses associated with prior approval will lead sellers to refrain from using it. Among other things, it is necessary to consider whether sellers should pay a fee for contract approval; how this fee should be determined; and, if and where contract approval is a mandatory requirement, how it should influence the approval fee.[141] Accordingly, an effort should be made

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Schkade, *Assessing Punitive Damages,* 107 YALE L. J. 2071 (1998). Accordingly, scholars have suggested some means to overcome or minimize this alleged problem; *see* Dodge, *id.* at 696 ("For example, a majority of states now require that a plaintiff prove the conduct warranting punitive damages by clear and convincing evidence. Review by the trial judge and by appellate courts may also limit excessive punitive damages awards. Or a state might choose to vest the decision of how much, if any, punitive damages to award in the judge rather than the jury…"). Closely related, it is also argued that juries are vested with too much discretion when awarding punitive damages, a fact that introduces unpredictability to contractual relations; *see* Dodge, supra note 120, at 695 (citing Judge Kozinski). For this reason, Rubin suggests that juries should constitute "moral outrage" with compliance, which is assumed by him to be a more concrete object "with obvious sources of empirical data that can be used to measure it"; Rubin, *supra* note 113, at 150. Yet, others argue that the fear of exaggerated punitive damages awards is overblown, as empirical data demonstrates that such awards are relatively infrequent and reasonable in size; *see, e.g.,* Steven Daniels & Joanne Martin, *Myth and Reality in Punitive Damages,* 75 MINN. L. REV. 1 (1990).

[141] For discussing this issue *see infra* VI.C. It is also important to note that out-of-pocket costs are likely to influence–at least to some degree–product and services prices. It is reasonable to assume that sellers will try to distribute at least some of these additional costs on the general pool of consumers by increasing the prices of products and services. For further discussion of this potential response *see infra* VII.B.

to provide approvals in a timely fashion while minimizing procedural and administrational requirements. While these ideas are self-evident in theory, implementing them in practice may not be that easy. All of these considerations have important consequences for the institutional composition of the GHL, its procedures, its standards, and its funding. I will return to this issue below.[142]

C. Incentives for Consumers

Up to this point we focused on the perspective of sellers, trying to provide them with an array of incentives sufficient for using the GHL mechanism of prior approval. As a supplementary factor, if *consumers* are encouraged to shop for approved contracts, sellers will be even more inclined to use this system.

There are some reasons for consumers to shop for approved contracts. First is the promise of quality that approval is supposed to carry. Consumers are likely to prefer approved contracts which are examined by an expert institution, rather than examining the contract themselves or simply ignoring the contract they enter. Under the framework developed here, consumers can actually use the GHL Institute as an agent (or a third party) that is equipped with superior knowledge, experience, and incentive and thus is able to overcome their own biases and mistakes. An additional cause that can influence consumers' decision to shop for approved contracts is related to the application of the duty to read discussed above.[143] Recall, that consumers are exempted from reading the fine print of approved SFCs. This exemption should further induce consumers to shop for pre-approved contracts.[144]

The analysis here assumes that consumers will be able to distinguish easily among approved and non-approved contracts and contract terms. Hence, it might be reasonable to consider *imposing* on sellers a *duty* to clearly indicate the fact of contractual approval on the face of their contracts,

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[142] *See infra* Part VI.

[143] *See supra* Part III.

[144] One might argue that giving approved contracts a strong immunity against legal claims will undermine consumers' tendency to shop for approved contracts. The somewhat counter-intuitive rationale behind this assertion is that consumers may be disinclined to give up their legal right to sue sellers on the basis of contractual terms incorporated into SFCs. Yet, I do not find this argument persuasive as it attributes too much rationality and sophistication to consumers. Even if consumers do care and value the right to dispute unfair provisions, there is no basis to assume that they will favor this right over a third-party contractual guarantee. *Ex ante*, consumers are likely to devalue such rights due to over-optimism. *Ex post*, as noted, many different reasons lead consumers not to engage in legal disputes against large firms.

Additionally, the idea that consumers might care deeply about such rights overlooks the fact that in many SFCs the fundamental right to sue sellers is firmly restricted by arbitration clauses; it ignores peoples' uncomfortable feelings that are inherent to litigation, and neglects to acknowledge the fact that many consumers trust their assertiveness and aggressiveness, rather than the contract language, to solve disputes *ex post*. While marginal-litigation-lovers-extremely-sophisticated-consumers might favor unapproved contracts (since those contracts are much easier to attack in courts), there is no reason to conclude that the majority of consumers would exercise a similar preference.

rather than just *allowing* them to do so.[145] This will not only guarantee that consumers will indeed be able to realize that a contract has been approved, but might as well achieve other positive consequences. It can serve as an indication for potential buyers that there is no reason to carefully read approved terms, thus economizing on their time and limited attention. Furthermore, it can provide buyers with a better understanding as to the prospects of launching litigation and disputing the terms they accept. It will also increase the likelihood that SFCs will become a patent aspect from consumers' perspective; and, closely related, it might as well promote competition among sellers to engage in contract approval.[146]

D. The Case for Mandatory Approval

Discussing the incentives for using the GHL system relies on the presumption that sellers are not obliged, as a mandatory requirement, to submit their contracts for approval. The preference for such a voluntarily regime is based on the idea that the system can, and should, create incentives for both sellers and consumers to use the approval mechanism. A few additional facts indicate that the approving mechanism should be a mandatory one. First, a mandatory approval system requires the approving institution to be equipped with abundant resources, such as a large body of employees and specialists from various fields.[147] Second, it undermines some fundamental concepts of the freedom of contracts, since it invites a harsh intervention in the market of contract terms. Third, a mandatory regime is also likely to encounter a serious opposition from strong interest groups that represent business interests. Businesses, as repeat players, have ample incentives to undermine the value of such a system.

However, we might yet wish to consider a mandatory approval requirement in restricted areas of commerce or specific types of contracts.[148] Areas of commerce that should be strictly scrutinized are, I believe, of four kinds (or any combination between the following four): (i) Markets that are associated with consistent cognitive problems;[149] (ii) markets where consumers have much at stake and less opportunity to gain experience and knowledge (as typical one-shot players);[150] (iii) markets that address

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[145] The Good Housekeeping Institute, for instance, does not require sellers to include the certification seal on their products. Indeed, there are many manufacturers who opt not to do so. There might be various reasons for this phenomenon, *see supra* note 19, which may be valid to our context as well. Additionally, the Israeli Standard Contract Law does not impose such a duty, and some sellers indeed opt not to indicate the fact of approval on the face of their contracts.

[146] If we are nonetheless reluctant to impose on sellers a duty to indicate contractual approval, we might consider ways to encourage them to do so. One way would be to charge a lower approval fee for approved contracts that noticeably indicate the fact of approval on the face of the approved contracts.

[147] And *see infra* VI.A.

[148] And *see* Mann, *supra* note 74.

[149] Suspect fields are, for instance, rent-to-own transactions, insurance contracts, and credit card agreements.

[150] A good example of a market that combines these two characteristics is purchasing a house. Since buying a house is the most significant and expensive transaction the average

vulnerable type of consumers, such as elderly people or those who are not familiar with the local language or culture; and (iv) markets that are associated with a high volume of activity.[151] Thus, although in most fields of commerce a voluntary regime should be preferred, some exceptions might be justified on one of the grounds mentioned here.

V. THE CASE OF MISTAKEN APPROVAL

Certain mistakes are thought to be inevitable. While many mistakes are of no legal importance, some mistakes influence others' actions, legal rights and entitlements. The law is called upon to address the latter kind of mistakes.[152] In contract law, for instance, mistakes are usually discussed in the context of contract formation.[153] In our context, consumers might fear being left with the burden to pay for the negative consequences associated with erroneous approvals. This concern might undermine consumers' trust in the approving institution. Thus, it is necessary to consider what happens when a GHL approval is given (or denied) by mistake.

The first situation to be examined is the following: A consumer signs an approved contract (let's say, for furniture shipment service) without reading its content and while relying on its approval. The approved contract contains a term which exempts the seller (in our case, the service provider/mover) from liability (for the shipped items) even if the damage was deliberately caused by the service provider or his employees. Later on, the shipped items are damaged, and it turns out the sellers' employee damaged them deliberately. The service provider (the mover) insists that according to the approved contract, the risk in such an event should be allocated to the buyer. Further assume that the approval was given by mistake. All actors in this scenario allegedly behave in good faith: The consumer when relying on the

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family enters and there is substantial potential for psychological limitations, this market is one that deserves special scrutiny. For a broad discussion *see* William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Physiological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083 (1984).

[151] By imposing certain limits on the number of transactions that can be made with a non-approved SFC, we can get at the most commonly used consumer contracts (i.e., mainly those used by the most powerful firms) while not imposing too high a burden on all retailers and the approving body. Under this category we might include bank agreements, credit cards contracts, rent and sale of cars, flight tickets, and the like. This rationale is applied, in a way, by the USDA. As noted *supra* I.B., small businesses are exempted from the USDA Organic Inspection mechanism as long as they do not sell more than a specific, relatively low, annual amount.

[152] And *see* Hanoch Dagan, *Restitution and Unjust Enrichment: Mistake* 79 TEX. L. REV. 1795, 1795 (2001) ("Many of… [human] mistakes are inconsequential or self regarding…. Law is invoked, however, when more than one person is involved in the drama"). In his article Dagan discuses mistakes with regard to unilateral conferral of benefits. Another kind of mistakes which is discussed in the literature is mistakes that involve compromises. *See, e.g.,* Marc Galanter & Mia Cahill, "*Most Cases Settle": Judicial Promotion and Regulation of Settlements,* 46 STAN. L. REV. 1339 (1994).

[153] *See, e.g.,* Mark P. Gergen, *Liability for Mistake is Contract Formation,* 64 S. CAL. L. REV. 1 (1990).

approval; the seller when asking for it; and the approving body when granting it.

This scenario raises two primary questions. First, it is necessary to determine who should bear the financial risk for that mistaken approval. Second, it is important to clarify who should bear the burden to litigate and take legal actions in light of such mistakes. By exploring these questions we will also make a preliminary determination as to what kind of liability should an approval bear (if at all) and whether approval by the GHL system is exposed to judicial review and judicial modification. Each of these questions embraces a secondary set of related issues examined below.

A. The GHL should bear the Financial Risk

One might argue for a *caveat emptor* rationale that justifies allocating the risks to *consumers*. According to this line of reasoning, facing a mistake is one of the risks that consumers encounter in return for being able to rely on (regularly valid) approvals. However, the flaws of this approach are quite apparent. First, from an economic perspective, holding consumers liable for mistaken approvals will induce consumers to take excessive precautions *ex ante*. It will also undercut their confidence and willingness to rely on the proposed mechanism. Moreover, if consumers are left with the burden of bearing the financial risks that follow mistaken approvals, it will eliminate most of the consumers' incentive to initiate legal actions *against* mistaken approval. This, in turn, will reduce the ability of the legal system to correct such mistakes and mitigate the negative effects of unfair provisions. Furthermore, allocating the risk to consumers contradicts our sense of fairness, since consumers in such cases do not have a reasonable way to avoid such liability. It seems unfair to hold consumers liable for terms that they are not supposed to read (since the meaning of approval is exemption from reading), and with which they did not have a chance to become acquainted. This is especially true once we recall that one main purpose of this system is to encourage consumers to shop for approved SFCs and free consumers from the burden of reading them. Thus, a rule that holds consumers liable for mistaken approvals will undermine many of the principles that support the GHL solution.

Continuing this line of reasoning, it does not seem reasonable to hold *sellers* liable for mistaken approvals as well. If we prefer a system in which sellers are liable for mistaken approvals, it might result in excessive precautions taken by them. As before, this option contradicts our sense of fairness. Sellers who apply for an approval in good faith should not be held responsible for mistakes that are not within their control. Moreover, if the approval that is given to contracts is not reliable and does not contain a good degree of insurance against mistakes, it might discourage sellers from using the approval mechanism. Again, one can argue that this is a risk that sellers have to face while enjoying the merits of this system. This argument is not credible. The GHL Institute should be able to provide sellers with solid approvals, which will serve sellers' interests and allow them to plan and invest resources based on the approval they gained. This is especially true if

we recall that the main hurdle to making this system operational is sellers' willingness to use it.[154]

That the risk should be allocated to the approving body is further supported by various arguments. First, it follows our intuition about fairness, as it is grounded on a normative attitude which aspires to respect individuals' autonomy. People should be held liable for their mistakes and should not be allowed to pass on the negative consequences of their actions absent a compelling reason. An additional possible fairness consideration, from a distributive justice standpoint, is that we should avoid enriching the general public at the expense of one firm or an individual consumer. In other words, we might prefer not placing the liability of mistaken approval on private parties where society as a whole (i.e., the general pool of consumers and sellers) benefits from having SFCs examined and approved by an independent third-party.[155]

Allocating the risk of mistaken approval to the GHL Institute is justified on an efficiency basis as well. The approving body is the best cost-avoider. The approving institute has the relevant information in assessing the terms at stake.[156] It has a broad perspective, which allows it to best evaluate the risk of an error. In addition, the GHL Institute is the best avoider since such errors occur in a process that is under its control, authority and supervision. Therefore, the approving institution should be better able to develop procedures that will be effective in mistake-reduction. Moreover, holding the approving body liable for its mistakes provides the GHL with a powerful incentive to perform its work in a careful manner.[157] It will also increase the likelihood that the approving body will learn from its mistakes and implement necessary changes that can minimize the prospect that mistakes will recur.

Another justification for allocating the costs of mistaken approvals on the approving body should be outlined here. Facing the risk of irreversible mistakes, people might tend to avoid interactions they would otherwise have or might take excessive precautions before engaging in socially desired interactions. As Dagan asserts, "[b]oth alternatives are not only wasteful from an economic standpoint, they are also harmful to autonomy," since these circumstances "may lead people to interact with one another in an intolerably thoroughgoing, rigid fashion."[158] Knowing that consumers and sellers will not be held liable for the financial consequences of mistaken approvals will better allow them to relieve their interactions from this burden.

To be sure, one can argue that there are some flaws in allocating the risk of mistaken approvals to the approving body. One such argument is that people and institutions are better positioned for estimating their *own* losses,

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[154] Sellers' incentives are discussed in detail *supra* Part IV.

[155] *Cf.* Gergen, *supra* note 153, at 48 ("It may be significant that the issue in these cases is the allocation of loss between the government and a private party and not the allocation of a loss between two private parties, if we find the prospect troubling that all of society might be enriched at the expense of the one firm").

[156] *And see* Gergen, *id.* at 19-20 (proposing that the loss due to mistakes in contract formation should be allocated to the party who has superior relevant information).

[157] Dagan further argues that financial institutions are more responsive to these kinds of incentives than individuals. Dagan, *supra* note 152, at 1820.

[158] *See id.* at 1799-1800.

rather than requiring assessment of losses that might occur to *unknown* third parties. Thus, the argument goes, the GHL Institute is likely to have problems in assessing the risk of mistaken approval since it will have to evaluate other unknown and undefined parties' potential losses. This last argument has some merit, but it does not outweigh the other considerations that support assigning the risk to the approving body. This is especially true since the GHL, as an institution, is expected to have superior ability to insure and spread the costs of mistaken approvals. Under appropriate circumstances, moreover, the GHL Institute might limit the insurance given by the approving body to a fix amount, expecting consumers and sellers to take their own precautions where important and very expensive transactions are at stake.

One clarification might be required at this point. The analysis and conclusion presented here is accompanied by the simplifying assumption that liability for mistaken approval should not be divided between different parties (as may happen under tort law). If we relax this assumption, we might reach a somewhat different conclusion. One suggestion is that where institutions confer mistaken benefits on individuals (in our case, sellers), the most efficient liability rule declares that individuals are held liable for a limited fix sum;[159] whereas, the mistaken institution is held responsible for the remaining amount.[160] In this respect, forming a simple liability rule (that will be easy to adjudicate and apply) is necessary in order to minimize litigation.

Though well justified, the conclusion that the approving body will be liable for mistaken approval has an enormous influence on the approving institution and on the way it should function. Under this understanding, the GHL should be able to provide the market not only with professional inspection of SFCs, but also with some degree of assurance that its approvals will be done in a competent, faithful, and non-negligent way.[161] The approval

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[159] Determining the exact amount of this limited-fix-amount-liability is a context-dependant challenge that will not be undertaken here.

[160] This is done, for instance, in the context of credit cards agreements between credit card companies and consumers. Dagan justifies this rule on a few grounds: First, it avoids administration costs associated with the determination of losses. Second, the asymmetric liability rule is supported by the presumption that "institutions are better positioned than individuals to insure, self-insure, or otherwise spread the losses that cannot be avoided." In addition, individuals and institutions have a different mistake-avoidance capacity. Dagan, *supra* note 152, at 1818-20. *See also* Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments,* 66 TEXAS L. REV. 63 (1987), which inspires Dagan's discussion.

[161] Reducing negligent mistakes, however, does not eliminate the possibility of errors in judgments which can result in mistaken approvals. By the same token, it should be clear that the approving institution will be held liable for all kinds of mistaken approvals, whether negligent or not. If the approving body will be held liable only for negligent mistaken approvals, it will result in (i) excessive litigation (aimed at determining whether negligence is the case); and (ii) undermining an important part of the approval's significance and purpose (as cautious buyers will nevertheless read approved contracts to assure there are non-negligent mistakes insofar as they trust their knowledge, experience or expertise to reveal such mistakes).

should be supplemented with a sort of insurance against losses that might be incurred by the market participants because of mistaken approvals.[162]

B. The Burden to launch Legal Actions

Accepting the conclusion that the approving institution should be liable for its mistakes and provide insurance for buyers and sellers, we should next inquire about the best way to revoke mistaken approvals.[163] Since consumers are those who enter approved contracts and have the incentive to guarantee the existence of "best practice" terms, consumers are naturally the ones that should have the burden of initiating legal actions that will challenge mistaken approvals.[164] Relying on consumers to launch *litigation*, however, is problematic. As explained above,[165] many factors might prevent consumers from bringing their cases before the courts. Therefore, if the system wishes to rely on consumers to mitigate the problem of mistaken approvals, one should consider other alternatives–rather than litigation–that will be available for consumers and consumer groups to attack provisions that were mistakenly approved.

Following this logic, consumers or perhaps consumer organizations should be allowed to apply for invalidation of approved contracts to the approving institution itself.[166] By allowing this, we might be able to overcome some of the impediments that cause consumers not to launch litigation. It should be possible for the approving institution to establish a cheap, simple and flexible way for consumers to complain and deal with approved contract terms. Making this alternative consumer-friendly and assuring that consumers will not have to face some of the crucial problems

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[162] Once an approval was found to be mistaken, it should be revoked. The immediate effect of repealing an approval would be twofold: First, the approving institution would have to reimburse the party who incurred losses as a result of a mistaken approval. This compensation should include losses suffered as a product of the mistaken approval itself as well as litigation (or other incidental) expenses. Second, the seller would be barred from indicating the approval on future contracts; i.e., the approval would be deemed void. In such cases, sellers would arguably have to incur the direct losses derived from an invalidation of previously given approval, and the indirect costs that will result from the need to avoid the use of previously printed contracts that specify the fact of approval.

[163] An implied assumption in this analysis of approval invalidation is that SFCs brought before the GHL for examination would not be exposed to pre-approval attacks by consumers and consumer organizations. This is so, since the preferred regime is one that will generally avoid creating an adversarial procedure where consumers (or consumer organizations) and sellers argue over approval before it is granted and while the approval request is being examined. Yet, an adversary process might reduce institutional capture which will result in pro-sellers decisions. *See* Gillette, *supra* note 11, at 1007-08. This issue requires further discussion and thus is left for further development.

[164] Interestingly, under this framework consumers are likely to learn that a mistaken approval was given only at a relatively late stage, when a dispute arises. At the time of contracting, consumers are likely to refrain from reading the approved SFC thus not realizing the acceptance of lopsided yet approved terms.

[165] *Supra* IV.B.1.

[166] A similar approach has been chosen by the Israeli statute, which allows consumer organization to apply to the special tribunal for annulment of unfair contract terms. *See supra* note 44.

that characterize "regular" litigation will promote enforcement by consumers.[167] It will be less formal, less complicated and less expensive in comparison to a formal legal process.[168] Moreover, such an approach would promote unified and efficient decisions. The approving body has reviewed the debated contract in the past, it is familiar with its background, and it will be equipped with the necessary expertise with which courts are not always equipped.[169]

C. Judicial Review: Annulment by Courts

Decisions made by the approving body affect sellers' and consumers' legal rights and behavior. Accordingly, the approving body can make two main kinds of mistakes. First, it might be mistaken in granting an approval to a contractual term which does not deserve one. Up to this point, it is this scenario that has been addressed. Second, the approving body can deny approval of contractual provisions that are efficient and just, that *do* merit an approval. Under this second scenario, it is the sellers, not the consumers, who would have the incentive to challenge the decision made by the approving body.[170] An effective and intuitive response to both scenarios is to allow judicial review of the decisions made by the GHL.

Common law courts are historically perceived to be the adequate institution to perform this kind of task. Though definitely not a flawless institution, judicial review is an important component of the rule of law. Furthermore, courts are vested with the responsibility of shaping contract law and consumer protection doctrines and policy. It is thus more than reasonable to allow the judiciary to review the decisions made by the GHL Institute. Judicial review will also strengthen the approving body's image and trustfulness in the eyes of both consumers and sellers. Hence, courts should be granted the authority to review the GHL decisions, just as they review other institutions' decisions, actions and inactions.

VI. FUTURE CHALLENGES AND FURTHER REMARKS

Designing and creating an institution is a complex challenge. The previous Parts addressed some of the most conspicuous and important challenges that will arise with respect to the creation of the GHL Institute. However, some additional issues are important to acknowledge. This Part points to a few specific matters that should be kept in mind and explored in the implementation of the GHL solution.

A. Institutional Identity

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[167] Tailoring the exact mechanism that will be available for consumers to confront approved contracts is a challenge left for future consideration.

[168] This is so, since the GHL is assumed to be more consumer-oriented and less bureaucratic then courts.

[169] Arguably, this might as well reduce the social waste resulting from litigation.

[170] I here assume that while the seller will have the ability to challenge the decision not to approve his contract, he will nevertheless be restricted from suing for damages due to such a mistake.

Having an institution vested with authority to approve SFCs inevitably raises the question of institutional identity. The analysis above provides some insights into its appropriate characteristics. The main goal in this respect is to ensure that the GHL will not suffer from the same problems that afflict legislatures and judicial bodies. One of the most important concerns, for instance, is to be sure that this proposed body is designed to have minimum exposure to rent-seeking interest groups and lobbying,[171] and is able to approach the issue in a comprehensive manner.

The GHL should be able to provide strong incentives to sellers to use the mechanism and should be granted the resources necessary to make it function and enforce its requirements. A central institution backed by governmental funds seems the preferred type for this function and its correlative goals. Though establishment of an administrative body is intuitively appealing,[172] its shortcoming should not be overlooked.[173] Hence, there might be positive attributes to other types of bodies–such as nonprofits–as well.[174]

The institution's governance structure should have a very open and adaptable design, but determining the optimal composition is another challenging task. Clearly, the chosen composition can influence the institution's ability to fulfill its purpose, but it can also affect the public's confidence in it,[175] hence the success of the entire initiative. As a starting point, the analysis above suggests that its members should include those with expertise in law, economics, psychology, consumer behavior and marketing.

B. Is a New Institution Necessary?

Crafting a new institution is an expensive and complex task. Therefore, a preliminary issue to be considered is whether one of the existing institutions is not suited to the role of approving SFCs. A cogent response to this question at this early stage is difficult to provide, but the Federal Trade Commission (FTC)[176] is one example worth keeping in mind.[177]

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[171] A detailed discussion of the institutional vulnerability to capture appears at Gillette, *supra* note 11, Part III.B.

[172] *Cf.* Russel Korobkin, *The Efficiency of Managed Care "Patient Protection" Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1 83-84 (1999).

[173] Gillette, for instance, questions the ability of an administrative body to perform a thorough analysis of SFCs, which requires it not only to absorb economic studies, but also "to evaluate the findings of the expert staff and incorporate those findings into decisions that ultimately generate political implications": Gillette, *supra* note 11, at 1002.

[174] *See* Kavin Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075, 1101-02 (2006) and sources cited there (suggesting that nonprofit entities can play an important role in drafting SFCs and recommending a presumption of enforceability for such privately approved contracts).

[175] For example, an institution that is too consumer-oriented will result in sellers' unwillingness to use the proposed mechanism. On the other hand, an institution that is strongly influenced by sellers' interests and interest groups will not win consumers' acceptance.

[176] Established in 1914, the FTC is a well known independent agency, with the primary objective to protect consumers. To fulfill it, the FTC "works to ensure that the nation's

Harnessing the power of an existing agency such as the FTC may advance the GHL mechanism in various ways; a few prominent ones are briefly noted here. First, using an institution that currently exists will reduce establishment costs (because mechanisms and apparatuses that already function will be utilized). Second, it will use the expertise and knowledge already accumulated in this body.[178] Third, it will take advantage of the reputation from which the FTC already benefits. Fourth, it will place the initiative of contract approval in a more general context of consumer protection and marketplace efficacy. Fifth, from a potential employees' perspective, working in an established and wide-ranging body will be more appealing than working in an institution whose function is limited to approving SFCs. This, in turn, should enhance the prospects of attracting skilled professionals.

C. Institutional Guidelines, Procedures and Scope of Authority

In light of the analysis suggested here, the GHL Institute should be mandated to help reduce market failures and augment economic efficiency. However, it is debatable whether there will be contracts that the GHL Institute cannot competently analyze or decide whether to approve.[179] In these cases it might be wise to require the approving institution to signal to consumers what the uncertain terms are. This can be done, for example, by demanding that these problematic terms be flagged and specifically consented to.[180]

Another tricky question concerns the consequences of denying an approval request. One aspect deals with the terms that are deemed problematic at the time of inspection. On the one hand, if we want to protect consumers from unfair terms, maybe contract terms that were denied approval should be declared void and sellers should be prohibited from using them. On the other hand, such a result would reduce sellers' willingness to submit their contracts for approval in the first place. Considering that the approving body is not a judicial entity, since denying an approval can be based on other considerations than unfairness, and taking into account

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markets are vigorous, efficient and free of restrictions that harm consumers," while acknowledging that "[m]arkets also work best when consumers can make informed choices based on accurate information." *See* http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm. The FTC is in charge, *inter alia,* of enforcing federal consumer protection laws, which are aimed at preventing undesired behavior that might harm consumers. Also, the FTC "conducts economic research and analysis to support its law enforcement efforts and to contribute to the policy deliberations of the Congress, the Executive Branch, other independent agencies, and state and local governments": *id.* The FTC's numerous initiatives and responsibilities include, for instance, the famous "National Do Not Call Registry" initiative; proposing broad guidelines governing the sale of used vehicles– *see* 16 C.F.R. § 455; enforcement of antitrust law; and combating manipulative telemarketing practices.

[177] Gillette, *supra* note 13, at 983, mentions the Consumer Product Safety Commission as another possible alternative for performing such a task.

[178] For instance, the FTC adopted a set of standardized non-salient contract terms in the context of the mail order industry. *See* Mann, *supra* note 74, at 916.

[179] *See supra* II.A.

[180] Some means to achieve this goal have been discussed *supra* Part II.B.

sellers' incentives, declaring non-approved contract terms void seems too harsh a measure.[181]

Another important aspect to consider is determining whether approval requires payment of an approval fee. Requiring payment as part of an approval procedure makes the "interaction cost" more expensive,[182] thus undermining the sellers' incentive to approve their contracts. On the other hand, requiring a fee might be necessary for financing the GHL function. It might even make the approval more valuable (increasing its reputation, knowing that people tend to appreciate what they pay for more than what they get for free). In addition, an approval fee imposed on sellers will also help to ensure serious intentions to use the approved contract in commerce. Lastly, it will take advantage of the human's tendency to commit to sunk costs.

Assuming that sellers pay for contractual approval, another related procedural question is whether there should be different fees for different kinds of circumstances and approvals, and whether sellers should be required to pay (the same amount) even in cases where the approval request has been denied. We already noted above the ability to utilize and manipulate the size of the fee in order to achieve desired consequences. I suggested, for example, that a lower premium can be charged where the fact of approval is noted on the face of the contract.[183] Likewise, a lower premium would be charged for SFCs that are approved as a whole (rather than those that are only partially approved).[184]

In addition, we might opt to employ different fees for different types of transactions and contracts.[185] Alternatively, the fee could also take the form of a kind of insurance premium that is assigned to the approved contract on account of its commercial nature.[186] Lastly, the fee can be derived from both factors. According to this third option, sellers who were denied approval will pay only the part of the fee that correlates with the institutional costs of inspecting a contract.

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[181] One alternative would be to force sellers to specify on their contracts that certain terms were found problematic by the GHL. Other alternatives can be to require conspicuous representation of such terms or a separate consent. In addition, we might create a committee that would negotiate *ex ante* problematic terms with their drafters. Another option would be to have a list of terms that were denied approval open to the public. According to this option, in case of future litigation or before committing to an important transaction, consumers will be able to accompany their argument against controversial terms by referring to this list. If this method is chosen, measures should be taken in order to insure that this list is available to the public and easy to search and use.

[182] *See* the discussion *supra* IV.B.4.

[183] This would make it easier on consumers to shop for approved contracts; *see supra* text accompanying note 146.

[184] *See supra* II.A.

[185] Under this reading, sellers that were denied approval will nevertheless have to pay for submitting their contracts for an institutional examination by the GHL.

[186] This alternative becomes attractive when we recall our conclusion *supra* Part V, that the approving body should be able to back its approvals by providing some kind of insurance for sellers and consumers. If this alternative is chosen, sellers who were denied approval will be exempted, at least to some degree, from paying the fee.

An additional important matter is the relation between the GHL solution and current legislation and SFCs doctrines. After setting the system, it would still be necessary to deal with standing legislation aimed to protect consumers who contract via SFCs. It seems plausible to assume that the justifications of some statutes and consumer protection initiatives will be substantially changed under the GHL solution (while others should be left untouched). Existing contract doctrines and current regulation will play an important role in developing the GHL solution, and substantial guidelines should be advanced gradually.

D. Approval and Its Retrospective and Indirect Consequences

The analysis above focused mainly on prospective consequences that might arise in light of the fact that an approval is asked for, given, or denied. Yet in addition to its future-directed consequences contract approval has a whole array of retrospective and indirect implications. These include, for example, the way in which the GHL approval will affect transactions made under an SFC prior to its approval (assuming the contract was used in commerce before and after being approved); whether an approval can be used as *prima facia* evidence of fairness for contracts and contract terms that are similar or identical to ones that have been approved; whether the fact that a contract or a term (or a similar one) was denied approval can be used as a *prima facia* indication of unfairness, and what meaning, if any, should be attributed to a seller's decision to change or omit terms before submitting his contracts for approval (when the changed or omitted terms are subsequently disputed). None of these issues can be settled at this early stage, and are thus left for future development.

VII. ADDRESSING SOME GENERAL OBJECTIONS

This Part tackles three general objections, not yet discussed, regarding the creation of the GHL Institute. Attending to these general concerns will also provide a rough overview and summary of some of the most important issues that this Article has confronted.

A. Excessive Costs

The argument of excessive costs maintains that the costs of creating the GHL mechanism are likely to exceed the benefit gained through its establishment and operation. While it is true that crafting this alternative solution is costly, I do not think that those costs outweigh its benefit. First, it is well-known that most transactions entered into by individuals, including some of the most important ones, are executed via SFCs. The significance of the problems associated with SFC cannot easily be exaggerated, especially when keeping in mind the more vulnerable groups of consumers.[187] Creating

[187] Such groups are susceptible to both *ex post* and *ex ante* discrimination. *Ex ante*, sellers who can distinguish different kinds of consumers might offer poor contracts to disadvantaged ones. *Ex post*, sellers might not grant relief to underprivileged consumers, knowing that the harm such consumers are able to inflict on the firm is rather negligible.

a system that will allow traders to approve their contracts will have an enormous influence on the SFCs that govern much of our everyday life. Hopefully, it will also promote trust and confidence between sellers and buyers.

Moreover, the argument of excessive costs inflicted on sellers fails to acknowledge the fact that this mechanism can benefit traders as well. As noted, contract approval hopefully can reduce transaction costs and increase public confidence, as well as reduce legal fees and expenses paid to lawyers who draft excessively long SFCs,[188] which virtually no one is able, or has the time or patience, to read and understand properly. Additionally, it has the potential of seriously reducing social waste that results from litigating consumer cases.

Finally, there might be some ways to reduce these costs or handle them cleverly. One such idea is to allow an existing body–such as the FTC–to perform the GHL function.[189] Allocating a substantial part of punitive damages awards to the GHL Institute is another interesting proposed method.[190] Additional means, such as requiring sellers to pay some kind of fee in order to obtain an approval,[191] should be examined as the solution develops.

B. Passing the Costs onto Consumers

The second general argument against the approach developed in this Article is that the GHL solution will induce sellers to offer better terms, but consumers will be the ones to pay the price for these improved provisions. Slightly restated, sellers will externalize the costs associated with the GHL mechanism to the general pool of consumers by raising products prices. Consumers will end up paying for upgraded contract terms they do not necessarily value.

I do not find this a persuasive argument. First, while it is true that sellers might bear some costs, this argument, like the previous one, ignores the fact that the GHL approach would *reduce* some expenses and maximize profits as well.[192] Second, even if sellers do not offset their expenses with the benefit they derive from the proposed GHL mechanism, it is not obvious that they will be able to pass the costs fully onto consumers. In some markets sellers may bear (at least some of) the costs generated by the new regime. Third, even if consumers end up paying higher prices for better terms, the GHL proposal will help them to avoid contract provisions they do not know how to

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See, e.g., R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information,* 47 HASTINGS L. J. 635, 673-75, (1996).

[188] For articulating the general argument that American contracts are long and for detailing the possible reasons for this phenomenon *see* Clair A. Hill and Christopher King, *How do German Contracts do as Much with Fewer Words,* 79 CHI-. KENT L. REV. 889 (2004).

[189] *See supra* VI.B.

[190] *See supra* IV.B.3.

[191] *See supra* VI.C.

[192] *See supra* IV.B.4.

evaluate accurately.[193] This promotes consumers' ability to shop efficiently, and better respects their autonomy. Additionally, assuming that the harm caused by unfair SFC terms is frequently underestimated, consumers might be better off letting an independent, professional and objective entity evaluate contract provisions, even if prices ultimately rise as a result. Last but not least, it is important to keep in mind that the mechanism proposed here is basically voluntary. Consumers will still have the possibility of entering unapproved contracts and avoiding those allegedly additional costs.

C. Contract Shopping Will Eventually Be Eliminated

The third general allegation against the GHL solution is that it will create a new equilibrium where all sellers offer the same set of approved terms. Therefore, the argument goes, consumers will lose their ability to shop for different contract terms. It might as well be argued that under this proposed system (which promotes less heterogeneity in contractual terms) sellers will be able to collude much easier, and price fixing will become more common.[194] Maintaining consumers' ability to shop for different contracts and contract terms, according to this argument, is an important value which ought to be protected as it assures consumers' ability to face different kinds and levels of risks (represented via different contract terms and prices).

Though appealing, this argument is wrong for at least four main reasons. First, it presupposes that currently consumers can (and do) shop for different contracts that the market is presumed to offer. This argument is frequently fallacious–either because of uniformity of contractual terms in some fields of commerce[195] or because of extreme contractual complexity that accompany others.[196] Second, even if contract shopping occurs, if one option is maintaining the ability to shop between fair and unfair contracts; whereas the other option is eliminating contract shopping by creating only fair contracts, then there is no true value in the first alternative.[197] Third, the argument

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[193] Moreover, one might argue that if consumers are willing to pay this allegedly higher price, this can be viewed as a signal that they get and pay for what they want and prefer.

[194] For an in-depth analysis of the relation between SFCs, transaction costs and collusion over price and contractual terms *see* David Gilo and Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects,* 104 MICH. L. REV. 983 (2006).

[195] This is especially true since various fields of commerce are likely to suffer from some kinds of uniformity of contractual terms. For the argument that competitive firms draft comparable terms in their SFCs *see* Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 430-31 (1990). Areas that seem to suffer from this type of problem are, *inter alia,* SFCs for car rentals, bank accounts, airline tickets, and the like.

[196] This may be the case, for instance, in the credit card industry; *see* Mann, *supra* note 74, at 927-29 (discussing standardization of contract terms in the credit card industry and contracts, and proposing that pre-approved terms will enhance competition over price-related provisions which consumers are better capable to understand). Mann further opines that standardizations of terms might in the long run increase consumers' ability to comprehend their agreements and assess them correctly: *id.* at 929.

[197] *See also* Mann, *id.*, at 927 (referring to Arthur Leff's views and explaining that "consumers are better off with the higher price (or lower quantity or quality) of the product that comes in a market without the choice to accept the prohibited terms").

ignores the simple fact that in many contexts there might be more than one set of fair and efficient terms.[198] Whereas sellers who wish to gain contract approval will be excluded from using some terms (which are deemed unfair), sellers will be nonetheless free to choose among those terms that *are* perceived to be fair and efficient. As noted, different terms might be deemed efficient for different kinds or groups of consumers.[199] Hence, consumers will still have the ability to shop for contracts that match their true preferences. Fourth, since the proposal here is to create a voluntarily system, in most fields of commerce consumers will still have the ability to choose between approved and unapproved terms.[200] The more accurate argument, therefore, is that contract versatility might be *reduced* and *restricted*, rather than *eliminated*. However, this will mainly benefit consumers as a class.

CONCLUSION

Many commentators acknowledge the signing-without-reading problem and the behavioral biases that come into play when dealing with consumer contracts. The phenomenon of SFCs has been analyzed through numerous prisms, most notably those based on economics, psychology, and consumer-protection (fairness or distributive) standpoints.[201] All of this invaluable scholarly work suggests important insights into the way the law should understand and treat SFCs. Still, the leading solutions and approaches that have been proposed and advanced thus far do not amount to a suitable framework that can accommodate conventional contract law. The inevitable result is that consumers are left with inadequate protection, so that social welfare and efficiency are undercut.

Accordingly, this Article proposes and develops an alternative approach, based on a voluntarily pre-approval system for consumer SFCs. As detailed throughout, the overall outcome of this alternative solution is promising. First, it will considerably negate the main market failure that SFCs create, namely obligational asymmetric information.[202] Besides having the potential of being more effective, this alternative approach has merits which current methods lack: it will increase social welfare by reducing transaction costs;[203] diminish socially undesired litigation over standardized contracts;[204] and advance trust among buyers and sellers, thus promoting market participants' autonomy. Moreover, the GHL approach takes a notable step toward minimizing the alleged anomaly that punitive damage awards create in

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[198] This argument responds to the fear of seller's plotting and price fixing as well.

[199] *See*, *e.g., supra* text accompanying note 56.

[200] There are some fields of commerce which are dominated by sophisticated consumers who might not value third-party approval that much. In addition, if approved contracts do indeed end up being more expensive, some consumers might opt to save this additional premium and face unapproved terms, relying on legal system relief, their experience, expertise, and assertiveness, or simply trusting to luck.

[201] A recent illustration of this statement is the articles that are part of the Symposium on *Boilerplate: Foundation of Market Contracts*, 104 MICH. L. REV. (2006).

[202] *See supra* Parts II, III.

[203] *Supra* Part IV.

[204] *Id*.

consumer contract cases.[205] Additionally, it better reconciles the tension between the general duty to read and the common practice of signing without reading.[206] Lastly, the alternative established here is much more sensitive to consumers' bounded will-power and bounded rationality since it takes these aspects into consideration in many different aspects.[207]

Developing a mechanism of prior third-party approval, tailored to the context of consumer contracts, is a neat tactic. The need for a novel solution that can be implemented while promoting concepts of both fairness and efficiency is manifest. A large body of literature suggests that a fresh approach to SFCs is indispensable. Knowing that the "devil is in the details," this Article undertook the task of developing an alternative approach to consumer contracts. There is yet much more work to be done and hurdles to overcome, but the long-lasting puzzle of consumer standard form contracts can be differently and wisely resolved.

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[205] *Supra* IV.B.3.

[206] *Supra* Part III.

[207] For a few examples noted throughout this paper *see, e.g., supra* Part II.C (opting for a binary approval regime *inter alia* due to consumers' cognitive limitations); Part III (proposing not to impose a duty to read approved contracts *inter alia* due to consumers' bounded rationality); Part IV.D. (acknowledging cognitive biases which might justify mandatory approval in some fields of commerce); Part VI.A (proposing to include psychologists and behavioral economics experts in the GHL Institute composition); text accompanying notes 82-84 (opining that the idea of consumers delegating their role in contract formation to the GHL Institute might be a superior approach since consumers are not always competent to evaluate standardized terms correctly).