I Am Altering The Deal. Pray I Don't Alter It Any Further.

Author : Hila Keren

Date : May 4, 2020

Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts: An Empirical Perspective*, **55 Ga. L. Rev.** __ (forthcoming), available on SSRN.

Have you ever created an account with Facebook, Amazon, Instagram, or Uber? If so, you agreed—with or without awareness—to let the company that drafted your contract a right to change that contract as they may see fit, without your consent. Shmuel Becher and Uri Benoliel's empirical new study focuses on this practice, exposing a remarkable reality. With a focus on the central subset of digitally procured standard contracts, their study shows that 95.8% of the firms on their large sample (479 out of 500) have drafted "a change-of-terms clause that enables the firms to change the consumer agreement." In 94.4% of the cases (472 out of 500), such clause explicitly allowed the drafting company to impose the change one-sidedly. Even to those who, like Margaret Radin, have long argued that standard contracts undermine people's rights and the rule of law, the authors' findings may offer a chilling update concerning the world of contracts. The patterns revealed in *Sneak In Contracts* seem to mimic a famous Star Wars scene in which Darth Vader orders to take the princess and the Wookie to his ship. As you may recall, when Lando protests the order and says it deviates from what was previously agreed, Vader forcefully answers: "I am altering the deal. Pray I don't alter it any further."

One of the central roles of contract law is to hold people responsible for duties they consented to assume by forming a contract. This is one of the main reasons for which, once a contract is formed, Anglo-American contract law limits the parties' ability to change it. In general, even if both parties appear to have agreed to a modification of their original contract, the law would invalidate the alternation if one party coerced the other to consent by exploiting its permanent or temporary superior power. To this end, classical contract law has long required a new and separate consideration to support any change of the initial contract. This formal requirement's rationale is that it demonstrates that the party that otherwise is not benefiting from the alteration received something in return to consenting rather than was forced to agree. Modern contract law added that a valid modification could be achieved even without supporting consideration if both parties had a reason to agree to the change due to new circumstances that called for it. Yet, modified contracts not supported by independent consideration would only be enforced in as much as the revised contract is also fair. Neither the classical nor the modern approach would have allowed drafting parties (or Darth Vader) to establish what is so thoroughly depicted by Becher and Benoliel: a practice that welcomes one-sided alternations of the deal.

Coining the term "Sneak In Contracts," the authors describe the rise to dominance of assumed liberty to modify contracts that is *trifold.* Such liberty includes the drafter's right to change the original agreement *unilaterally*, to do so *expansively*, and to execute it *stealthily.* Their findings compellingly demonstrate how the vast majority of the study's reviewed contracts combined all the mechanisms that comprise sneak-in contracts. First, as already mentioned, 472 large corporations, 94.4% of the sample, awarded themselves the freedom to modify their contracts unilaterally. Second, almost all corporations reserved an expansive right to effectuate a change: for any purpose (476 out of 500), and throughout the entire contractual period (479 out of 500). Third, the lion's share of corporations also took the liberty to make the change stealthily, releasing themselves from the need to let consumers and those who care about their rights know about it. Only 5% to 6% of the 479 corporations that included change-of-terms clauses in their contract promised to notify consumers about the occurrence of a change. All the others (around 94%) refrained from guaranteeing even such a minimal level of transparency. Strikingly and tellingly, *none* of these 479 corporations committed to notifying consumers about the content of the change.

Becher and Benoliel juxtapose these results with the judicial approach to the issue, one they describe as

"underdeveloped, undertheorized and imbalanced." (P.29.) They explain that their empirical project supports previous arguments that sneak-in contracts are unfair, socially costly, and should not be hastily enforced. For one, allowing firms to modify their standard contracts according to their wishes and whims turns the terms of the original contracts into "Bullshit Promises." Moreover, by enforcing such sneak-in contracts, courts educate market actors—stronger and weaker alike—that opportunistic market behavior is legitimate. This message, in turn, increases the incentives to take advantage of consumers' bounded rationality while enhancing consumers' helplessness. What's worse, by affirming the hidden nature of the practice, courts make it much harder for consumer watchdogs to do their salient work—raising awareness of risky changes and putting reputational pressure on opportunistic corporations. In the face of all these problems, the authors agree, regulation is in place. In their words: "the law ought to prevent or minimize firms' ability to take advantage of consumers by using sneak in contracts." (P.36.)

The main policy question is, of course, *how* to regulate the harmful practice. Becher and Benoliel describe the possibility of refusing to enforce sneak-in contracts but immediately express a strong preference for what they call "a subtle approach," (P.37) one that merely attempts to enhance transparency. They argue that requiring firms to first get consumers' consent to the changes they seek to implement would be too costly. They further raise the following common concern—that in response to being subjected to such a new burden, firms will roll the cost to consumers. However, I must disagree with the quick dismissal of the idea of refusal to enforce sneak-in contracts. One critical way in which firms have been "altering the deal" is supplementing their agreements with prohibitions of collective challenges of their acts. Phrased as "waivers," such added terms forbid consumers to engage in both class actions and class arbitrations. The waivers take away consumers' *only* legal way to overcome their systemic weakness: coming together to protect their rights. And, once the method of sneaky modification was deployed to prevent collective actions, consumers are left divided and conquered, forever deprived of the legal tools most necessary to resisting all the biased changes to follow. It is, therefore, hard to see how increasing transparency—even in the sophisticated way suggested by Becher and Benoliel—can help debilitated consumers to legally cope with future unilateral modifications.

While Becher and Benoliel write that "courts often enforce contracts that allow firms to unilaterally amend their agreements," courts around the country appear to be sending mixed messages regarding such enforceability. In a very recent case, for example, the court rejected the consumer's argument that reserving the right to unilaterally change the contract makes it illusory. However, the same court *refused* to enforce a modification that aimed to remove the consumer's ability to use class action by adding a term of "mandatory (individual) arbitration." The fact that courts seem undecided—and many of them hold, as Nancy Kim writes, that "a unilateral right to modify an agreement renders it illusory"—presents, I believe, an opportunity. It allows us to dare to call for a deeper reform than the one proposed by Becher and Benoliel.

Nevertheless, it is certainly possible that the combination of the current political climate and the present structure of the Supreme Court would turn such a call futile. If that will be the case, we may be limited to the authors' "subtle" and very thoughtful set of solutions to the problem they help in comprehending. Then, besides praying, what the authors propose may be all we will have to constrain "Darth Vader firms" from constantly altering the deal. But, before we resort to the limited consolation that more transparency can offer consumers, we should at least try to protect them more meaningfully by insisting on their consent.

Cite as: Hila Keren, *I Am Altering The Deal. Pray I Don't Alter It Any Further.*, JOTWELL (May 4, 2020) (reviewing Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts: An Empirical Perspective*, **55 Ga. L. Rev.** __ (forthcoming), available on SSRN), https://contracts.jotwell.com/i-am-altering-the-deal-pray-i-dont-alter-it-any-further/.