Contracts of Adhesion

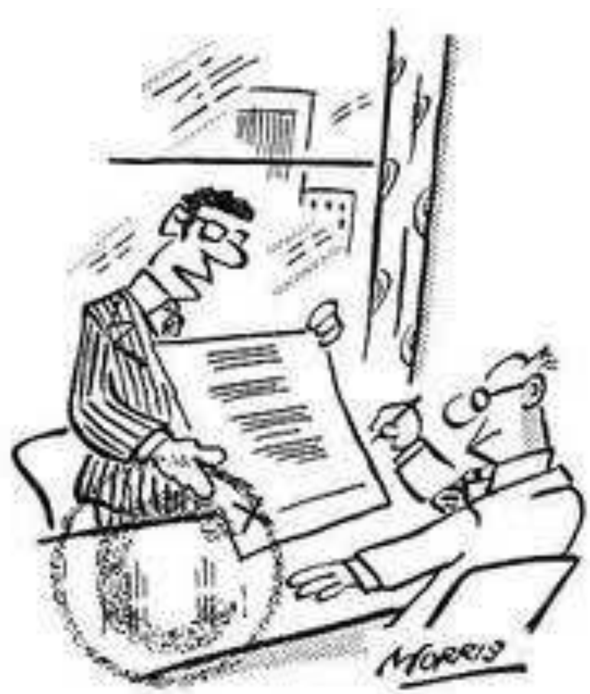
Definition of a **contract of adhesion**-

A contract drafted by one party (usually a business with stronger bargaining power) and signed by the weaker party (usually a consumer in need of goods or services).

ie: **An imbalanced contract where one party has all of the power.**

Example:

You are buying a house and need to borrow money from a bank. You receive a loan document which includes your responsibilities and the bank's responsibilities with respect to borrowing the money. This document is a standard form and you simply review the material and sign. The contract is ‘take it or leave it.’ There is no bargaining or negotiating. The bank is the party in power because it is lending you needed money, and you have no power to negotiate the terms.



"Sign here to indicate you have no idea what you've signed for."

Common uses of contracts of adhesion:

Matters involving insurance, leases, deeds, mortgages automobile purchases, and other forms of consumer credit, home contractor or repair services, auto repair services, services for medical or dental care, and veterinary care.

Also known as boiler-plate contract, adhesive contract, take-it-or-leave-it contract, leonine contract.

Why use Contracts of Adhesion?:

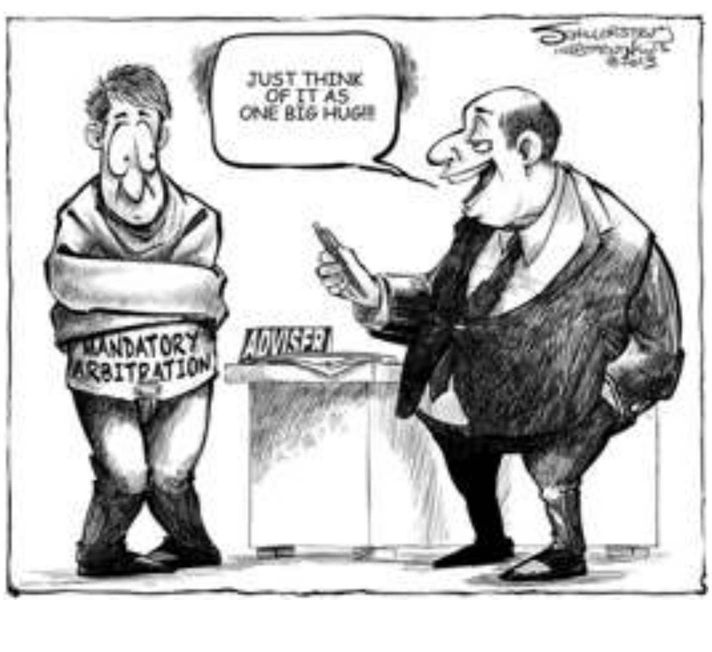
These contracts are efficient for businesses. Agreements between business and consumer are standardized and “take-it-or-leave-it” to avoid negotiating the terms for every exchange.

Upside is efficiency, downside is the potential for incorporation of **unfair terms**.

Questionable provisions in Contracts of Adhesion:

These terms are often hidden in the fine print!

Mandatory Arbitration – limits the signor’s access to the court system as a remedy



Example: third page of a six-page Initial Disclosure Statement sent with a credit card application included the following provision:

Arbitration: The Card Agreement that you will receive with your card if you are approved for credit provides that disputes are subject to binding arbitration. **Arbitration replaces the right to go to court, including the right to a jury and the right to participate in a class action or similar proceeding.** Please read the "Arbitration" section of the Card Agreement carefully.

(emphasis added)

Acceleration Clause

An acceleration clause is commonly found in mortgages and other purchases that are made using multiple installment payments. The clause allows for a party to **demand the full amount due** in the event that the other party fails to live up to the terms of the contract, such as failure to make payments.

Example:

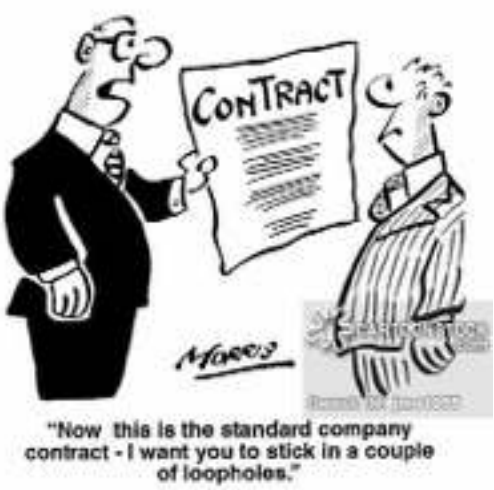
David agrees to buy Rosa's home for three separate payments of $20,000. If David fails to make one of these payments, Rosa can demand that David pay her the balance of the total cost. If he does not pay, he can lose both the home he purchased and any prior payments he made to Rosa.

Sample – Automobile Dealer Loan Agreement:

Upon the occurrence and during the continuance of one or more Events of Default, the **Lender may immediately declare the principal amount of the Loan and the Notes to be immediately due and payable**, together with all interest thereon and fees and out of pocket expenses accruing under this Loan Agreement; provided that upon the occurrence of an Event of Default referred to in Section 10, such amounts shall immediately and automatically become due and payable without any further action by the Lender. **Upon such declaration or such automatic acceleration, the balance then outstanding of the Loan shall become immediately due and payable, without presentment, demand, protest or other formalities of any kind,** all of which are hereby expressly waived by the Borrower and each other Loan Party and the Lender may thereupon exercise any remedies available to it at law and pursuant to the Loan Documents, including, but not limited to, the liquidation of the Collateral.

Unilateral Modification

Unilateral modifications are changes made to a contract by one side, usually the seller. This means that the buyer has signed the contract and has agreed to the terms currently in the contract, as well as any **future changes** that the seller might make to the contract. There does not need to be a separate agreement after a change is made.



Unilateral modifications are not supposed to alter the material or important terms of the original contract. Contracts often contain “change of terms” provisions that allow for the seller to alter certain parts of a contract, such as price, interest rate, or timing, without first telling the buyer. These types of changes are common in Consumer Service Agreements (CSAs), which are longterm agreements such as cell phone contracts, credit card agreements or cable television agreements. One major problem with unilateral modifications is that consumers do not typically receive much notice of any changes made, as they are increasingly being posted online rather than sent directly to consumers.

Example:

Tanesha ordered cable television for her new apartment. Six months later, the cable company increased the amount of its late fee. Tanesha was unaware of the change because the company updated the service agreement online and did not send her a copy in the mail. Because the agreement contained a “change of terms” provision, Tanesha could not negotiate a more reasonable late fee and was stuck paying more than she anticipated.

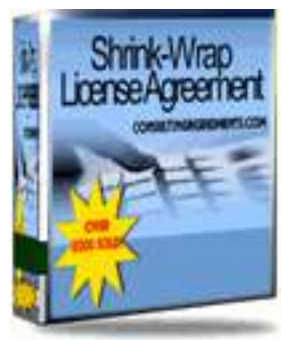
Sample – Cable TV Agreement:

We may change our prices, fees, the Services and/or the terms and conditions of this Agreement in the future. Unless this Agreement or applicable law specifies otherwise, we will give you thirty (30) days prior notice of any significant change to this Agreement. If you find the change unacceptable, you have the right to cancel your Service(s). However, **if you continue to receive Service(s) after the end of the notice period (the “Effective Date”) of the change, you will be considered to have accepted the changes**. You may not modify this Agreement by making any typed, handwritten, or any other changes to it for any purpose.

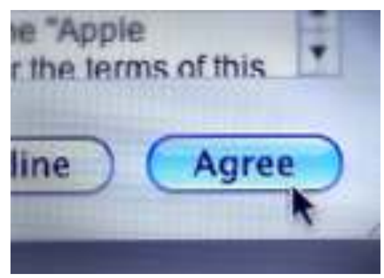
Dangers of Standard Form Contracts:

- Significant provisions like Mandatory arbitration can be hidden in the fine print and in complex, legal language.

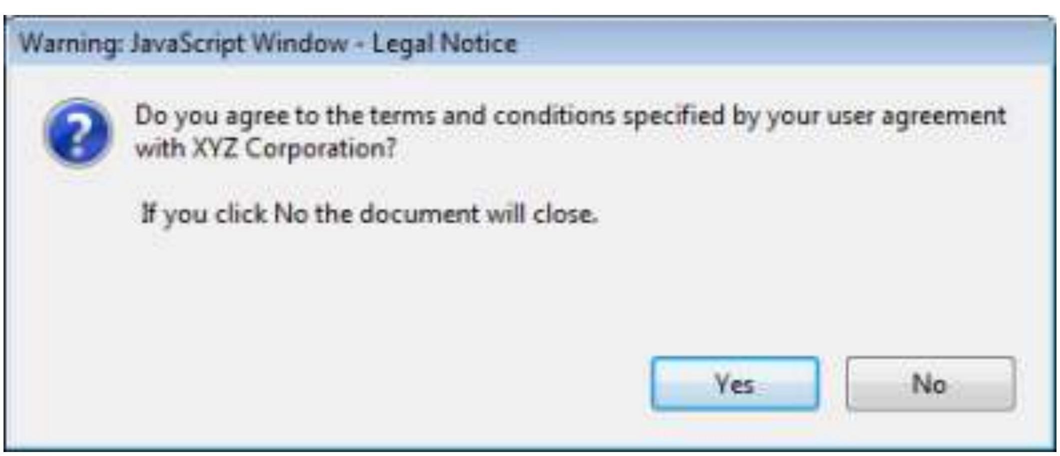
- The full contract may not be presented. Often, standard form contracts will reference terms found in another location
- Consumers feel pressured to sign the contract without asking questions. The signor is put in a difficult position as well because Standard form contracts are often similar in one industry across the board. If you object to the terms of one provider, it may be difficult to find better terms elsewhere.



- ‘Shrinkwrap’ contracts- typically used in software contracts; they bind a party to terms contained even if these terms cannot be seen or agreed to until the product is bought and opened
- terms sent after a contract is made over the telephone (eg in insurance or banking);



- ‘Clickwrap’- when parties are bound by clicking ‘I agree’ or equivalent online; reference may be made to dense text standard terms in a hyperlink, elsewhere on the site, offsite or even on a different website
- ‘browsewrap’- where the terms for use of a website or downloadable product are posted on the website, typically as a hyperlink at the bottom of the screen, and the site user is bound by simply using the product, such as by entering the website or downloading software



How does the law deal with Standard Form Contracts?

Essentially, like any other contract.

A signature legally binds the parties to the contract, whether or not the consumer has read the provisions.

As with any contract, unclear provisions are interpreted in favor of the party who did not prepare the contract. This helps discourage the practice of building in ambiguous provisions to later be interpreted however the contract-maker desires.

Within the United States, there are no legally unfair contracts; however, U.S. courts will declare some contracts void on their face and others may be voidable. If the subject of a contract is illegal, such as the sale of illegal drugs, then the contract is void. Contracts with impossible terms or contracts where one, or both, or the parties are legally incapacitated are other examples of void contracts.

So what should you do?:

European countries have taken steps to guarantee consumer protection in regards to Standard Form contracts and online commerce.

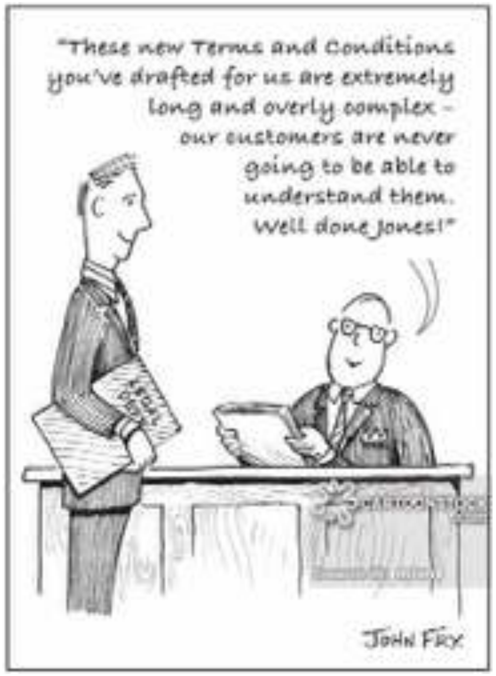
The US has allowed the consumer to take on substantially more risk.

According to faircontracts.org, you should:

- **Contact your state attorney general's office— ask them to require that all businesses that do business with consumers through standard form contracts make those contracts publicly available before a consumer is required to engage in the underlying transaction;**

- **Contact your members of Congress and ask them to eliminate fine print from standard form consumer contracts and replace it with terms and language that everyone can easily read and understand; they should also support with funding the work of the Federal Trade Commission to research the efficacy of current disclosures and to police unfair and deceptive practices;**
- **Contact the Federal Trade Commission in Washington DC and ask them to act to get rid of unfair and deceptive fine print in standard form contracts; they should also require all businesses that do business with standard form business-to-consumer contracts to make those contracts available on their website and at their places of business so that consumers (and third parties, such as the media, scholars, advocates and advocacy organizations) have access to the terms before they engage in any underlying consumer transaction**
- **Send contracts you believe to be unfair or incomprehensible, minus personal information to mycontract@faircontracts.org**

In the meantime, a healthy dose of awareness about contracts of adhesion will help you make smart consumer decisions. Avoid products and services with incomprehensible terms and be wary of agreeing to invisible terms online.



Resources:

faircontracts.org

http://www.law.washington.edu/Directory/docs/Winn/winn_webber_unfair.pdf- Interesting paper about the impact of EU contract law on US Ecommerce

http://legaldictionary.net/adhesion-contract/