

NEXT GENERATION DEAL DESIGN: COMICS AND VISUAL PLATFORMS FOR CONTRACTING

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Abstract: *Major gaps may exist between the legal representation of an agreement (“the paper deal”) and the goals and intentions of its negotiators (“the real deal”). This paper outlines contracting pitfalls and proposes new approaches to the use of visualisation to overcome them. We categorise contract visualisation and introduce comics and visual interfaces for deal-making as examples of two new categories. These approaches open new possibilities for the future for both theory and practice. They also contribute to next generation deal design as a way to narrow the gaps between the real deal and the paper deal, turning contracts into user-friendly communication tools that reflect the true will of the parties.*

1. Introduction: Pitfalls of Current Contracting – the Necessity of Change

Contracts lie at the heart of business deals and relationships. But do they capture the parties’ purpose in entering into their contract? The conventional view of lawyers focuses on drafting enforceable contracts that maximise their clients’ rights and minimise their risks. While these aspects are important, they are seldom the clients’ primary goals. Parties make contracts to reach common business goals and benefits, not to go to court and gain compensation for the other party’s failure. Framing contracts primarily as legal tools is not what clients need or deserve, and moreover not in “legalese”.

By the disproportionate focus on constructing legally airtight contracts, lawyers may be doing their clients a disservice. It forces negotiators to focus on legal issues, disputes, and remedies – to the extent that they feel they are negotiating the wrong things.¹ While the contracts containing such defensive terms seek to provide safer deals, they often lead to lost opportunity, deteriorating relationships, and the erosion of value. Most of the time and money is being spent preparing for failure and disagreement, when the focus should be on succeeding together—the goal that this paper seeks to advance.

¹ See IACCM 2009. The title says it all: “The Top Negotiated Terms: Negotiators Admit They Are On Wrong Agenda”.

Surveys conducted by the International Association for Contract and Commercial Management (IACCM) reveal that contract negotiators around the world spend most of their time on terms relating to risk management and negative incentives. Year after year, the list of Top Negotiated Terms is topped by limitation of liability and indemnities.² At the same time, based on IACCM research,³ the following are the ten pitfalls of today's contracting:

1: Lack of clear scope and goals	6: Relationships lack flexibility, governance
2: Commercial team involved late	7: Contracts difficult to use or understand
3: Failure to engage stakeholders	8: Poor handover to implementation
4: Protracted negotiations	9: Limited use of contract technology
5: Negotiations focus on risk allocation	10: Weak post-award process governance

Table 1: Ten Pitfalls to Avoid in Contracting

These pitfalls present major risks for the companies and their bottom line.⁴ As articulated by Stewart Macaulay, a huge gap exists between the contract as written (“the paper deal”) and the true agreement (“the real deal”).⁵ Adding to the challenges is the fact that according to IACCM research, more than 9 out of 10 managers admit that they find contracts difficult to read or understand.⁶ While our paper focuses on commercial contracting, this is not just a problem of managers working with contracts between businesses, of course. Similar challenges are faced in consumer contracting, public procurement, employment contracts, and contracts between individuals, both online and offline. And in all these contexts, the felt need to produce traditional legal language in contracts (i.e., lawyers drafting contracts for other lawyers)⁷ diverts drafters’ attention away from the needed integration among those who construct the deal, draft the contract, and those who must carry it out.⁸

2. Avoiding the Pitfalls – Facilitating Better Deal Design

The problems – caused to a great extent by the current misalignment of business and legal needs – have not gone unnoticed in research or in practice. Voices calling for a major shift have started to surface, noting how current contracting practices needlessly isolate lawyers, business negotiators, and the people in charge of contract implementation from one another.⁹ Overly legalistic contracts can alienate business people and prevent negotiators from participating fully in creating legal agreements that should be recording the purpose and expectations among the contracting parties.¹⁰ This phenomenon is eloquently captured in the title of a book chapter by Deepak Malhotra, “Great Deal, Terrible Contract”.¹¹

If we want to avoid the current pitfalls and facilitate a better way of working, what can we do?

² IACCM 2015a.

³ IACCM 2015b.

⁴ According to IACCM, on average, companies could be generating over 9 % improvement to their bottom line if they tackled the commercial issues that commonly undermine contract performance. This statistic, and others in IACCM 2015b, is drawn from IACCM research with its global, cross-industry membership, representing more than 12,000 organisations. *See* IACCM 2015b, 4.

⁵ Macaulay 2003.

⁶ IACCM 2015b, 6.

⁷ Berger-Walliser, Bird & Haapio 2011.

⁸ *See, generally*, Haapio & Barton 2016.

⁹ *See, generally*, Haapio & Barton 2016, Haapio 2013a, and Malhotra 2012.

¹⁰ Haapio & Barton 2016. According to Deepak Malhotra, in the process, many key decisions have been left to the lawyers, even in areas where business managers and subject matter experts could (and should) have made an important contribution; the latter, according to Malhotra, are in a much stronger position to negotiate *better* outcomes and relationships, not just *safer* ones (Malhotra 2012, 363–364. *Emphasis added*).

¹¹ Malhotra 2012.

We can start to see contracts and their crafters differently. We can take the Proactive Law approach¹² and see contracts as *business enablers*. In addition to minimising problems and risk, the proactive approach focuses on enabling success and enhancing opportunities. Using the medical analogy, the proactive approach is not only focused on preventing problems or “legal ill-health”. The goal is to promote “legal well-being”: embedding legal knowledge and skills in corporate culture, strategy and everyday actions to actively promote success, ensure desired outcomes, balance risk with reward, and prevent problems.¹³

Contracts contain vital business and relationship information, not just legal provisions: they contain information about roles, responsibilities, and requirements that need to be translated into action. They also contain crucial information about price, payment, product or service characteristics, functionalities, and so on, along with procedures, timelines and milestones that need to be followed. When contracts are seen as business enablers and communication tools it becomes obvious that contracts need to be *designed*, not just drafted.¹⁴ The view of contract crafters shifts from precise-legal-text-producing drafters to that of *designers*.

Organisational scholars have conducted empirical research into an area that is of particular interest here: contract design as a firm capability. When looking into employee skills – those of a firm’s managers, engineers and lawyers – with respect to contract design, they have divided contract terms into five categories: roles and responsibilities, decision and control rights, communication, contingency planning, and dispute resolution, arguing that all five draw on knowledge held by more than one group of employees. Their research shows that much of the knowledge regarding, for instance, how to design roles and responsibilities provisions in contracts resides in managers and engineers, rather than legal professionals, while the knowledge of lawyers is of greatest importance in the fields of contract terms related to dispute resolution and contingency planning.¹⁵ Managers and engineers are often in a better position to identify the most critical decisions from more peripheral ones around which concessions can be made, but this requires cross-professional interaction.¹⁶

Building on the importance of both managerial and legal involvement, how can we engage different professions in the contracting process and help them understand each other’s needs and expectations?

In our previous work, we have looked into what lawyers can learn from designers¹⁷ and software engineers¹⁸. We have explored promising new approaches to better contract and deal design, such as transactional art and visualised negotiations¹⁹ as well as contract visualisation²⁰. Prior research has revealed a number of ways to make contractual information more accessible and understandable, and several suggestions for avoiding current contracting pitfalls have been made.²¹ In this paper, we focus on visualisation. We argue that visualisation can help reduce the barriers to effective communications within an organisation, among and between business negotiators and lawyers, and between the contracting parties.

¹² The approaches known as Proactive Law and Proactive Contracting emerged in the Nordic countries, initiated by a small team of Finnish researchers and practitioners (one of this paper’s authors being among them) in the late 1990s and early 2000s. In the context of contracting, the pioneers of the approach merged quality and risk management principles with Preventive Law, where the focus is on using the law and legal skills to prevent disputes and eliminate causes of problems, and added a *promotive, positive* dimension to the *preventive* dimension. Both dimensions can be instrumental in overcoming the contracting pitfalls. *See, generally*, Haapio & Barton 2016 and Siedel & Haapio 2010.

¹³ Haapio 2013a, p. 39. *See also* Haapio & Barton 2016 and Siedel & Haapio 2010.

¹⁴ Haapio & Barton 2016.

¹⁵ Argyres & Mayer 2007, p. 1065–1066.

¹⁶ Argyres & Mayer 2007, p. 1074.

¹⁷ Haapio & Passera 2013.

¹⁸ Passera, Haapio & Curtotti 2014, Curtotti, Passera & Haapio 2015 and Wong, Haapio, Deckers & Dhir 2015.

¹⁹ Plewe 2008 and 2013, Passera 2015.

²⁰ Passera, Haapio & Barton 2013, Berger-Walliser, Bird & Haapio 2011, Passera & Haapio 2013a and 2013b.

²¹ For ways to avoid the contracting pitfalls identified by IACCM, *see also* Haapio & Barton 2016.

3. Categorisation of Contract Visualisation: Adding Two New Categories

Contract visualisation is an emerging stream of research and practice. Its early applications can be divided to two broad categories: 1) visualisation *in* contracts and 2) visualisation *about* contracts.²² The former refers to inserting images, such as icons, flowcharts, matrices, or timelines in a contract, for instance to highlight, clarify and explain the content,²³ while the latter refers to using images to provide guidance on how to read and use a contract or a set of standard terms and conditions.²⁴ It also includes the possibility of developing a graphical user interface to contracts based on associated text.²⁵ In this paper, we propose to add two more categories: 3) visualisation *as* contracts and 4) visualisation *for* contracts.

3.1 Visualisation *as* Contracts

Visualisation as contracts posits that the visualisation of the agreement is the sole artifact of the agreement. There is no other or underlying text which overrides the visual representation. An early example of this new category is the “Comic Contract” as introduced by de Rooy - representing the parties as characters engaged in a visual interaction or textual dialogue that simultaneously captures the agreement and its story. The comic may be enhanced with scenarios, diagrams or other visual devices.²⁶ The use of text for names, dialogue, complementary narratives, numbers and symbols is not excluded, but only to support the visual format. This goes beyond the idea that the visualisation only serves to enhance the understanding of the contract and not intended to replace its text.²⁷

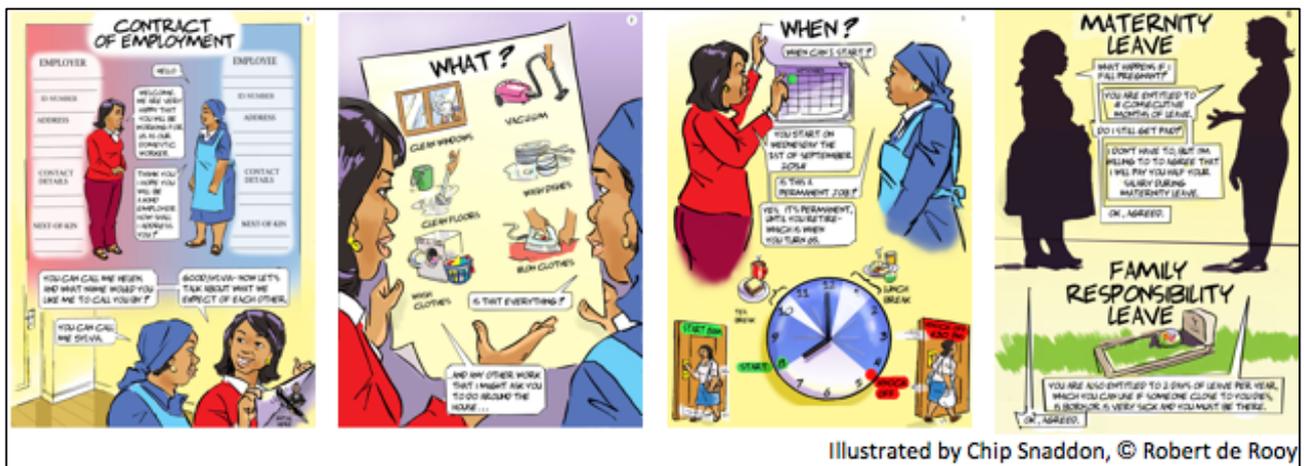


Figure 1: Sample Pages of a Comic Contract

Apart from leveraging all the advantages of visualisation (such as understandability, memorising, and experience of the contract)²⁸ and of stories²⁹, it is a format that allows the contract to be presented

²² Haapio 2013, p. 75.

²³ For examples illustrating how visualisations can be used in contracts themselves, see, e.g., Haapio 2013a and 2013b, Passera & Haapio 2013a and 2013b, and Passera, Haapio & Curtotti 2014.

²⁴ For a visual guide to public procurement contract terms, see Passera, Pohjonen, Koskelainen & Anttila 2013. The NEC contract flowcharts offer another example of images *about* contracts; they expressly state that the flowcharts are not contract documents, they are not part of the contract, and they should not be used for legal interpretation of the meaning of the contract. See, e.g., NEC 2005.

²⁵ Mahler 2013. See also Conboy 2014.

²⁶ For the potential of comics as a medium and for ways to define comics, see McCloud 1994. For *information comics* or *educational comics*, see also Jüngst 2010; for the use of comics in contract education, see Haapio 2013a, 77.

²⁷ Cf. Berger-Walliser, Bird & Haapio 2011.

²⁸ See, generally, Passera 2015, Passera & Haapio 2013(a) and 2013(b), and Haapio 2012.

²⁹ See, e.g., Zack 2013 and 2014.

contextually, i.e. a situational and temporal backdrop, and for the tone or “feeling” (friendly, courteous, formal) of the relationship to be represented. There are other advantages: for example, it allows the contract to be presented in the first and second person, enhancing the relevance, understanding and moral commitment of the parties to agreement. It also invites the benefits of the agreement being presented as a story, and as a sequence of questions and answers, which supports the readability and relevance of the ‘answer’ in the context of the ‘question’.

It is submitted that this category of *visualisation as contracts* would be relevant to contracts where at least one of the parties is not contractually literate or suffers from a reading disability. Early applications could be envisaged, for example, for employment agreements with illiterate or semi-literate people. Other applications could include leases, utility contracts or medical consents³⁰.

The concept of a comic as a contract is not without its challenges.³¹ Designing and drawing such contracts would require a trans-disciplinary effort between the clients, the lawyers, a scriptwriter and illustrator, with obvious cognitive effort and cost implications. There are also views that pictures may be overly ambiguous,³² that the understanding of pictures may too subjective, or that the format may not meet the demands of more complex agreements.

3.2 Visualisation for Contracts

With this category we refer to visualisations that support parties in designing deals and negotiating and making contracts. This category includes visual negotiation tools, such as visual templates for discussion, visual negotiation maps³³ and visual previews of contract terms³⁴.

An example of this category is the *visual interface for online deal-making* as introduced by Plewe³⁵. Informed by negotiation theory it is a generic interface focusing on pre-negotiation, negotiation and contracting within *one* system, thereby bridging the gap between the different mental models for deal-making and creating the legal representation of an agreement. A prototype consisting of various modules based on the visual metaphor of a marketplace is presented allowing for simple interactions such as drag and drop leading to a contractual document.

The system offers several advantages, for example, in the pre-negotiation phase parties may define invisibly to the adjacent side their goals and preferences (in a hierarchical form) either in private or to be shared with supporting negotiators and other partners. The interface directs explicitly the attention for the scope of the potential deal without prematurely limiting it on perhaps irrelevant terms and risks. It also allows articulating speculations and hypotheses about the other side’s goals, preferences and resources and to develop adequate strategies.³⁶

A generic platform supporting various forms of negotiations and contracting enables parties to express and represent strategies and tactics and thereby contributes towards avoiding the pitfalls in contracting shown in Table 1.

³⁰ During her PhD studies, Marietjie Botes has developed a comic to communicate complex genetic research information to the San community in South Africa to enable scientists to obtain adequate informed consent. Her research is expected to be published in 2016. Personal communication 6 November 2015.

³¹ These go beyond the recognized challenges of visualisation in general. For these, see Bresciani & Eppler 2015.

³² A point which has been extensively discussed in classical disciplines such as philosophy and aesthetics as well as in the context of knowledge representation for artificial intelligence and design heuristics.

³³ Passera 2015.

³⁴ Lannerö 2013, with references. For updates, see Related Work, <http://commonterms.org/Related.aspx>. For ways in which the EU has started to pay attention to how contract-related information can be presented so its addressees can access, understand, and actually use it, see Salo & Haapio 2016.

³⁵ Plewe 2013.

³⁶ The representation of strategies is subject to additional modules.

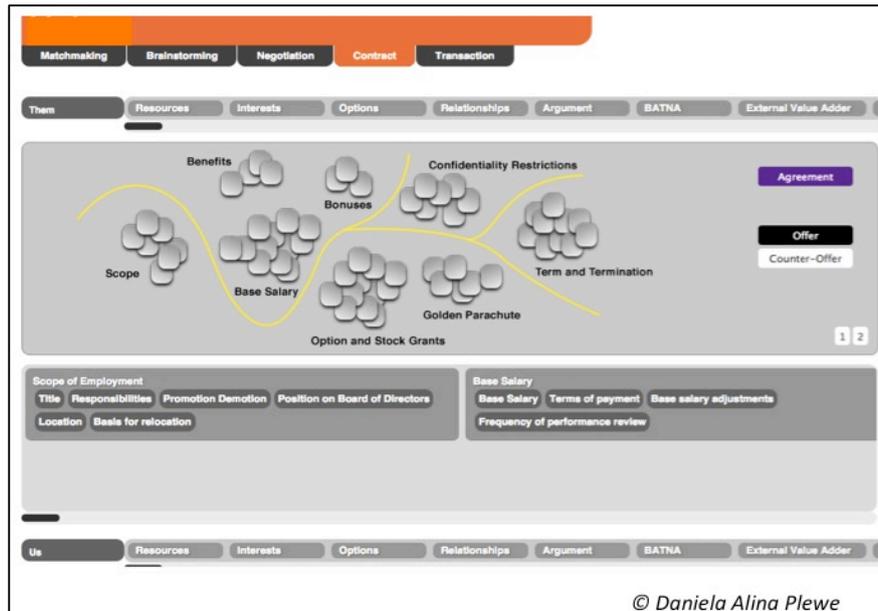


Figure 2: Screen Shot of a Deal Design Platform supporting Pre-Negotiation, Negotiation and Contracting

The actual negotiation is supported by the visual metaphor of a marketplace. All visual elements provide the option to be disambiguated through additional information in textual form. We consider flexibility and “associativity” important criteria for a contracting tool and aim to support brainstorming and creative methodologies as applied to other design processes.³⁷

So called *strategic interfaces*³⁸ facilitate interactions *within* the visualisations and during the actual negotiation process. The platform facilitates the alternate dynamics of offer and counter-offer through highlighted buttons on the marketplace. Users may negotiate in real time or asynchronous, together on site or remotely. By interacting, commenting, and editing items on the marketplace they create and assemble the deal step by step. Individual parts can be agreed upon leading to the overall final agreement. Once all issues have been addressed, the participants may finalise the result as a visual contract.

Parallel developments exist in fields outside the law, for example in project management, network visualisation, and conceptual modelling in information systems research. While we share the view that these developments can provide useful methods that can be transferred to the legal and contractual domain,³⁹ they are beyond the scope of our current work.

4. Conclusion

This paper proposes deal design as a new concept under which different professions can collaborate to reduce the barriers to successful contract negotiation and communication. We illustrate how the parties can use *contract visualisation* for better deal design: not just visualisation *in* and *about* contracts, but also visualisation *as* and *for* contracts, the two new categories we bring to the discourse. Comic contracts and the visual platform for deal-making introduced in this paper hold great promise

³⁷ Further research may take empirical findings with mind maps and notational tools catered to specific creative methodologies, such as design thinking into account.

³⁸ Plewe 2012.

³⁹ See, e.g., Knackstedt, Heddier & Becker 2014, p. 712, proposing an interdisciplinary research agenda. The authors argue that conceptual modeling techniques used in the field of information systems (IS) design to support communication processes in the IS domain should be transferred to the legal domain in order to support communication between legal experts and legal laypersons.

for overcoming current contracting pitfalls. They also offer a range of opportunities for future research. A new approach to deal design can narrow or even eliminate the current gap between the “real deal” and the “paper deal”, ultimately turning contracts into user-friendly communication tools that reflect the true will of the parties and are implemented as intended.

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