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Flexibility and Stability in Contracts

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"Flexibility" and "stability" can have strongly diverging relationships in the minds of those who deal with commercial contracts. For some, flexibility *fights* stability. "Flexibility" in their minds is synonymous with confusion, inefficiency, disruption, and lawsuits—and therefore with higher costs and lesser profits. For others, however, flexibility is a *source* of stability, prompting communications that lead to broader understanding of needs, capabilities, opportunities, and trust.

Both perspectives are understandable, and each may be valid. The wrong sort of flexibility in a contract may lead to higher costs and frustration; the right sort of flexibility may enable better commercial relationships. The goal is to find ways to enhance positive flexibility, without introducing disruption and potentially extortionate renegotiation of contract terms. The first step toward providing stronger flexibility *together with* stronger stability is to consider flexibility (and contracts generally) not exclusively in legal terms, but instead as patterns of communications among various people involved in commercial exchange.

This article explores *collaboration* and *visualization* as promising tools for enhancing contract flexibility even while enhancing stability. Better collaboration seeks stronger communication among the contracting parties, their lawyers, and those who will implement the contract. The flexibility introduced could rebalance and better integrate the commercial, personal, and business relationships that comprise a contract. Visualization techniques enable those stronger communication patterns. By using graphic images in the various documents that comprise and support contracting, the *process* of creating those documents becomes more inclusive. Furthermore, the *substance* of contracting goals, terms, and underlying assumptions becomes more transparent and usable to broader segments of the commercial community.

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1. Introduction

Imagine two business people having a conversation about contracts. Chris begins by saying, "I do not understand this idea of bringing flexibility to contracts. The whole notion seems contradictory. For me, the point of making a contract is to bring predictability to a future that seems full of uncertainty and risk. If I want my business to change along with circumstances, why should I make a contract in the first place?"

Kim replies, "In my business, contracts are not necessarily about trying to lock in some vision of the future. Whatever vision I can imagine right now is likely to be incomplete or even wrong. And so if I create some artificial permanency, think of all the opportunities I will have lost if I cannot adapt to the changes I did not anticipate. I need to invest in commercial relationships: to build networks of contracting partners who I can trust and grow with. I can do that best by making contracts now that are flexible and collaborative."

"But how can you count on making a profit with an arrangement like that," responds Chris. "How can you possibly set a price in the contract if you don't know what your duties will be? And how can your production or delivery teams know how to plan and implement their responsibilities if the contract isn't clear?"

"I am not talking about making contracts that are ambiguous or incomplete," says Kim. "I agree that the wrong kind of 'flexibility' can lead to instability or confusion, and therefore higher transaction costs and quality control problems. I don't want to abandon clarity; not at all. I want contracts to be *more* clear, and to more people. I want to understand my contracts thoroughly, and I want all of my engineers and sales people to understand them as well. Like you, I don't want ambiguity either in language or legal rights; but I *do* want contracts that are flexible in positive ways."

Kim continues, "I want my contracts to be resilient to challenges, and to enable me to seize opportunities as they come along. I want my contracts to help me identify how I can improve my product, my service, and my strategic planning. If my contracts set up the right sort of ongoing communication, internally and externally, I can get the sort of information I need for quality control and potential innovation. Getting my contracting partners to supply this

feedback is far more realistic and honest than trying to foresee the future.

"No way," says Chris. "You are just asking for trouble. Once we get a contract signed, I want to put it in a drawer and forget about it. The best contract is one we never have to read or even hear about. After it is made, a contract is just a fail-safe for the lawyers if we get sued. Talking about a contract while it is being implemented—especially inviting feedback from the other party—just invites whining. Or even worse, it opens me up to exploitation. There is no profit in listening to problems—if I invite that, our buyers will just want us to shave prices. So I tell my lawyer, 'make sure that litigation will not hurt us. Shift every risk we can to the other side, and make sure to include any disclaimers or other protections the law can give me. Make contracts as tough and absolute as we can get away with. That way, people will know they can't mess with us.' I need bulletproof legal protection and I expect my lawyer to provide it."

"My contractual counterparts are spread across the globe," says Kim. "I cannot trust that the law will really be that certain in resolving our contract disputes, no matter how strongly we try to write the contract. We cannot always predict what the applicable law will be, nor what that law will specify once we determine which law will govern. And even if we can manage to prevail legally, trying to enforce a judgment in a foreign country is an expensive nightmare. Worse, at the end of an unreliable effort toward legal solution, we might be left with a terminated contract and poisoned relationships."

Kim continues: "My contracts are often interdependent. I cannot afford to view any contract in complete isolation. I need webs of exchange that can expand and shrink as new opportunities arise, maybe even in the middle of implementing an initial contract. So I would not want to sue a counterpart over most disagreements, just to achieve some short-term gain or personal vindication. If circumstances change—which we fully expect and hope to steer in a way that is profitable for us—then we will adapt to whatever reasonable needs of our contractual partners that can help make this happen. I need for my lawyer to design something that does not get in the way of what I want to accomplish by artificially freezing the future, or turning my counterparts into antagonists the first time a problem arises. I need a contract that is open-minded about changed circumstances, and one that alerts me well in advance of needed adjustments."

"Sorry," concludes Chris, "you just don't live in the real world."

Which speaker is right? The first speaker's (Chris') concerns about flexibility seem familiar and somehow prudent. But the second speaker's (Kim's) goals also seem plausible, even if untraditional, and in the long run perhaps more productive. Can both speakers be "right," at some level? ***If so--if both perspectives are legitimate--could we craft contracts that satisfy both speakers?***

We believe that each speaker presents a point of view that must be taken seriously—legally, economically, and psychologically. Although we clearly favor the approach of Kim, the views of Chris are heartfelt and will not change overnight. We believe that contracts will not realize their full potential for generating value until both perspectives are better understood, and taken into account in the design of contract processes and documents. For example, does Chris really want "inflexibility" as such? Is that the real interest of business people, or is the real interest something deeper? Does Chris seem to demand rigidity only because "flexibility" shows up as synonymous with confusion, inefficiency, disruption, and lawsuits—and therefore with higher costs and lesser profits?

What if we were able, *without causing any of those costly disruptions,* to find a way to provide the positive sort of flexibility that Kim wants: flexibility that prompts communications that are clear, transparent, comprehensible, and participatory, and that lead to broad understanding of needs, capabilities, opportunities, and trust. Would Chris still resist? Most business people want relationships that are more flexible. In a poll taken among the members of the International Association for Contract and Commercial Management (IACCM), nearly 90% said that "flexibility and greater agility" are important for their contracts.[4] Managers also want (at least sometimes) relationships that are more trusting and personal.[5]

Such data reveal that "flexibility versus inflexibility" is not the underlying issue. The basic task is to create contracts that provide frameworks by which businesses can realize the best

[4] IACCM Poll (2011) http://contract-matters.com/2011/09/21/stuck-in-a-negotiation-rut/, last visited August 18, 2014.
[5] Macaulay, Stewart (2004) "Freedom from Contract: Solutions in Search of a Problem?" 2004 *Wisconsin Law Review* 777, at pp. 790–795.

possible exchange and relationships, and which enable the strongest growth and innovation. Lawyers and others who construct contract documents and processes should realize that *some* sources of flexibility are undesirable: they are antagonist to achieving basic economic and strategic goals. Drafting contracts ambiguously, so that the parties cannot understand their rights and responsibilities, leads to the sort of disruption and disputation which Chris fears. *Other* sources of flexibility, however, actually *promote* economic and strategic goals. Initial entitlements, roles, and requirements must be clear. If they are not, then trouble will predictably arise, slowing down deliveries and payments and endangering relationships and trust. If a dispute arises, any negotiation about the dispute will be made more difficult because the parties will not know who must buy out whom.[6]

We should not think of flexibility in contracts exclusively in *legal* terms. That is primarily how Chris thinks of flexibility: "I either have my rights, or I don't; any source of 'flexibility' endangers my rights." But flexibility in contracting can be better understood as Kim does: as *patterns of communications* among various people that could be more diverse and enabling. Making legal rights fuzzy is not flexibility; it is just confusion and an invitation to start arguments. Opening out understanding and communication among all those who work with and through contracts is positive flexibility.

Contracts designers need to develop processes and documents that imagine goals beyond securing legal rights and duties, even while they do not lessen basic security. Lawyers and other contract crafters must be open to the possibility that if they focus *exclusively* on legal rules, they will not see the potential for positive flexibility.

2. The Role of Lawyers

We are not alone in calling for lawyers to be more mindful of the prospects for positive flexibility in contracting, and to be more supportive of the broader understanding of contracting that is represented by Kim. George Dent, for example, writes about the emergence of new kinds of contracts and strategic alliances, and how each of those

[6] Calabresi, Guido and Melamed, A. Douglas (1972) "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*",* 85 *Harvard Law Review* 1089, at pp. 1093–1096.

movements suggests the need for greater collaboration and contract flexibility. Lawyers should, says Dent, become "enterprise architects." [7] He identifies the futility of relying on legal liability to ensure compliance, for example, in contracts for the sale of goods or services:

> Many …deals entail a requirement or expectation of extensive future dealings. Even in a single sale of goods the parties must often collaborate on delivery, installation, operation, and maintenance after the closing. Further, the parties often envision future intercourse between themselves (sometimes formalized in a long-term or "relational" contract) and with others, so they want to establish trust and cooperation and burnish their reputations.
>
> In contracts for services (which now comprise most economic activity), collaboration is even more important. The services rendered and the cooperation needed are often so complex that contract terms can only vaguely sketch the parties' duties. Proving a breach in court, then, may be impossible absent flagrant misconduct so that litigation is of little value in enforcing reasonable expectations. In many service and long-term sales contracts, the parties also expect to modify terms before the agreement expires. Given the impossibility of drafting and enforcing precise performance obligations, the parties often employ indirect solutions, like fair and efficient exit and termination arrangements.[8]

As with service contracts, strategic alliances also flourish through better understanding, collaboration, and adaptability. Dent identifies the need for structures that enable that flexibility. He also identifies, however, the challenge of avoiding the unnecessary costs, frustration, resentment, and possible opportunism when contracts are unclear about the rights and duties of the parties:

> In joint ventures and other strategic alliances (such as licenses, dealerships, and franchises), the parties' collaboration after the closing is the whole purpose of the deal. Written terms, then, are even less useful than in service and long-term sales contracts. A writing can fix some measurable ancillary duties, such as how much money a party will contribute and what personnel it will second to the venture. The primary duty, however, cannot be precisely defined; it must often be described in such vague terms as "best efforts."

[7] Dent, George W. (2009) "Business Lawyers as Enterprise Architects", 64 *Business Lawyer* 279.
[8] Id., at pp. 289–290.

> The limited utility of the writing does not mean, however, that drafting is easier or less important or that the lawyers' role is less significant--quite the contrary. …
>
> Alliances often last for many years. In setting the scope of the venture, the parties do not want a fixed plan but flexibility to handle unexpected contingencies. If a venture is defined too broadly, it could include activity that a partner could pursue (more) profitably alone or with a third party. If it is too narrow, one party may appropriate the knowhow of its partner, hence denying the partner the fruits of its efforts. Vague contract terms may preserve flexibility but foster uncertainty about who owns opportunities that arise out of the venture or that come to one partner from an outsider. Parties in an alliance often start small and see what happens; if the venture prospers, they expand it. Lawyers must craft a structure to suit the alliance through various stages or, at least, not pose undue difficulties when modification of the venture is needed.[9]

The needs for positive flexibility are not confined to contracts for the sales of goods or services, or to strategic alliances. In their study of lawyer practice in the "Silicon Valley" centered in Palo Alto, California, legal historian Lawrence Friedman and others identify how successful lawyers draft contracts that are better suited to the evolving needs of their clients:

> *Congruence of Legal and Business Styles.* The claim that the legal style of [Silicon Valley] practitioners suits the clients' styles of doing business is one of the most intriguing, if also one of the hardest to pin down. We have been told by some local lawyers, for example, that the typical venture financing document is shorter than its New York City counterparts…. Its language is more general. It does not try to spell out contingency plans for every conceivable event that could go wrong, but assumes that the parties will be able to cooperate sufficiently to work out flexible adjustments to changing circumstances. Such deals have the 'high-trust' or 'relational' character that sociologists of law and business attribute to communities of traders or firms engaged in long-term ongoing relations.[10]

[9] Id., at pp. 290–291.

[10] Friedman, Lawrence M., Gordon, Robert W., Pirie, Sophie, and Whately, Edwin (1989) "Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report", 64 *Indiana Law Journal* 555, at p. 563.

More generally, Friedman, et.al. describe the strongly pragmatic approach of these lawyers, and the two-way communications that enable a style of lawyering that the authors dub "Facilitative Law":

> *Facilitative Law.* The Silicon Valley lawyer not only works with engineers, he thinks of himself as a kind of engineer—a legal engineer. His job is not just counseling or advising on what the law is; his job is to solve problems: to take a principle, a task and 'engineer' it legally, showing how it can be done, or be done best. It is not his job to say something can't be done, but to show how it *can* be done. In his view, the New York or Boston lawyer lacks this facility, this attitude, or has it to a lesser degree…
>
> [Quoting one of these lawyers:] "I think the most interesting legal problems are the ones where a client comes in with a new technology or a new problem and there is no form book to go and change the dates and names. You really have to stare at the ceiling and say, 'Gee, if I were in this business, what would be the asset I would want to protect, and how would I commercialize it, and what would have to be the legal form of protection, and what would the documents have to look like, so that commerce wouldn't be impeded every time you wanted to make a sale?' . . ."[11]

The metaphors employed by Dent ("enterprise architects") and Friedman ("engineers") to describe the activist role of these lawyers are consistent with our emphasis on the need to *design* for positive flexibility. Lawyers must consciously imagine contract structures that will promote full understanding of the purposes and provisions of a contract, and that will put the right people together for the right sorts of conversations and feedback. Lawyers as proactive designers will find ways to promote understanding and productive communication. Those are the qualities that will advance positive flexibility without bringing in the effects of negative flexibility.

Chris above concluded the fanciful conversation at the outset of this chapter by accusing Kim of not living in the "real world." For a growing number of observers, however, the real world is moving in Kim's direction. New attitudes are unfolding about the relationship between legal frameworks and business methods and goals. More and more, legal frameworks will be judged by their effectiveness in facilitating and guiding business cooperation rather than as

[11] Id., at pp. 562–563.

mere formal expressions or memorials of past business decisions.

In the sections below, two methods are highlighted for advancing positive flexibility. The first is "collaborative contracting" which promotes communication, cooperation, and trust between the parties to a contract, but also between the parties and the lawyers who may be responsible for its drafting or negotiation. The second is "visualization," which strongly promotes both clarity and understanding among all those who are affected by a contract. Both collaboration and visualization are important to achieving positive flexibility. All of the people who participate in contracting must communicate better with one another, at each stage of the contracting process. But fully understanding both the goals of the contract and the particulars of responsibilities under the contract are preconditions for those communications being positive and productive.

3. Collaboration

The emphasis on collaboration—among the parties to the contract, between the lawyer and business client, and within the various functions and departments of a company that must plan, craft, negotiate, and implement contracts—reflects the need to reverse some historical trends. Those trends are most visible if one views contracts not as mere documents, and not as isolated transactions. If one instead sees contracting as comprised of three relationships—an exchange relationship, a set of personal relationships, and a legal relationship—then two patterns emerge.

The first pattern is that the three relationships seem less connected now than they were in an earlier era and simpler economy. When contracts primarily involved face-to-face transactions about animals, crops, or land, the relationships integrated almost spontaneously. The economic exchange was easily understandable, and likely informed by physical examination of the animal or land being traded or by the community reputation of a person whose services were being hired. The personal relationship may have been ongoing—the parties may have already known one another, or been part of families that interacted in various ways. Finally, the legal relationship was not complex. The consideration was paid, and the ownership transferred; or the service was performed in a workmanlike fashion, and the fee then became due. The three relationships comprising contracts overlapped significantly, and almost

naturally, as in Figure 1 below.

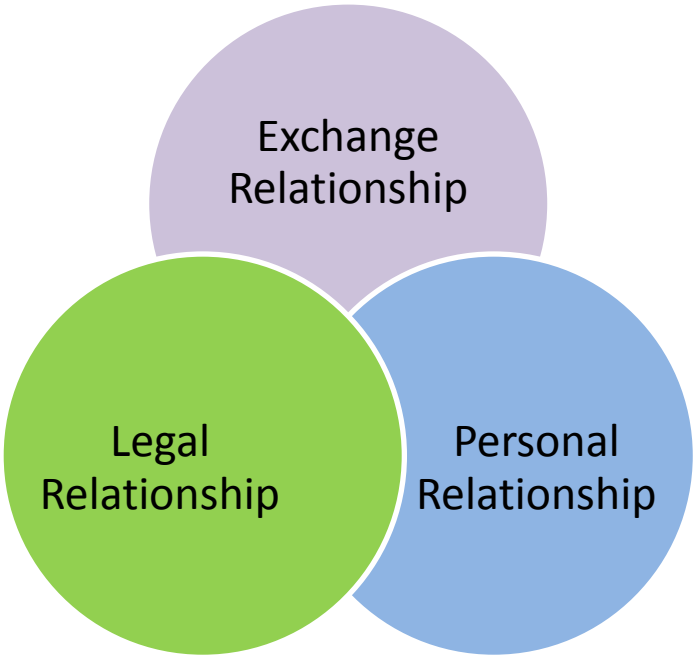

Figure 1: Contracting as Overlapping, Integrated Relationships

As the economy gradually modernized, however, exchange became more complex, less personal, and more dominated by legal professionals and their language. The result was that the three relationships of contracting began to drift apart.

Further, a second trend appeared: the legal circle became proportionately larger than the other two circles. Contracts took on greater formality, and the surrounding legal concepts elaborated. The result is that contracts became longer, and with denser, legal language; and when that happened the document became less accessible to the parties who were engaged in the economic exchange. The personal relationship may also have become harder to maintain, as one of the effects of a strictly legal relationship is that the parties are assumed to operate "at arm's length."

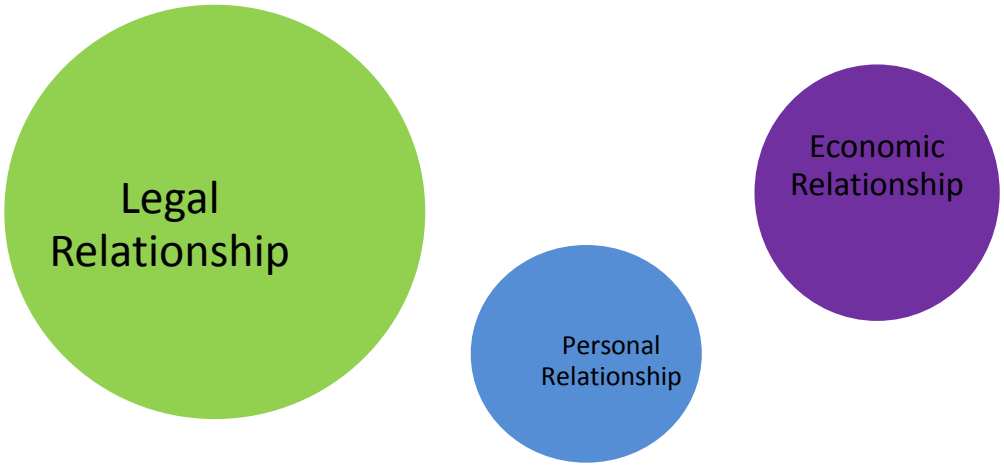

Figure 2: Contracting as Disconnected, Legally Dominated Relationships

When the three relationships of contracting are well-balanced and the overlaps are significant, communication and trust are easier to establish. Where the relationships are disconnected, and especially where the legal circle looms large over the others, communication becomes more difficult. Contract law may be characterized as creating a "smart" system in which users (i.e., business people or others needing to create or implement contracts) have a marginal role on the outskirts of an elaborate system that is operated by experts (i.e. lawyers and judges) and comprised of complex internal workings that are inaccessible by the users.[12] Users become dependent on experts to translate the users' needs into a narrow sort of input for which the system is designed. The effect of such a system is to neglect or even de-value non-legal concepts or communications.

The communications structure of contract law, in other words, privileges legal ideas and vocabulary. That helps to explain why contracts become almost unreadable to those who are not legally trained and therefore tend to be neglected by the business user. More ominously the exclusive, specialist qualities of legal discourse tend to discourage general non-legal communications about matters that are specified in the contract. Indeed, contracts frequently contain a "merger" or "entire agreement" clause that formally disqualifies any significance for conversations that take place prior to the signing of the agreement, like the following:

[12] Lessig, Lawrence (2001) *The Future of Ideas: The Fate of the Commons in a Connected World*. New York: Random House (pp. 26–34).

> This instrument contains the only agreement of the parties relating to the subject matter and correctly sets forth the rights, duties, and obligations of each to the other in connection with it as of this date. Any prior agreements, promises, negotiations or representations not expressly set forth in this Agreement are of no force or effect.

"Collaboration" is therefore a conscious effort to introduce stronger communications into contracting. The formality of this effort and some of the structures that it recommends are reactions against the current influences that tend to discourage or narrowly channel conversations about contracting.

Bringing the three relationships of contracting closer together, and with better balance, is not easy for either lawyers or business managers. For lawyers, collaboration requires first that they de-emphasize legal rules to some extent, in favor of harnessing the power of economic and personal relationships. Healthy economic and personal relationships need not rely solely on legal rights. Where lawyers work toward making the economic and personal relationships stronger, therefore, the burden of dealing with risks does not fall exclusively on airtight legal language in the contract.

Lawyers should therefore embrace the value of non-legal communication. That in turn requires that the lawyers learn much more about the economic exchanges that are the subject of the contracts. They should treat their clients more like partners who are capable of contributing significantly to the success of the lawyer's efforts. It also means that lawyers should make far greater effort to make their contracts readable by non-lawyers, a topic addressed further in the "Visualization" section below.

For managers, collaboration requires first that they not abdicate too much responsibility for formal contract processes to their lawyers. As suggested above, the relationship should be one of a partnership, and not one in which the manager looks after all "business" aspects of the contract while the lawyer is in charge of the "legal" aspects. Those categories are not pristine. More importantly, conceiving the categories as strongly distinct is one reason that the economic exchange and legal circles have drifted apart. Lawyers and managers should understand each other's worlds as fully as possible.

Managers should also understand the worlds of their employees and any subcontractors.

Managers should flatten hierarchies that, for example, prevent production or sales personnel from making suggestions about the terms of prospective contracts or the implementation of existing contracts.

Finally, managers should invest time in talking with contractual counterparts about contract goals, risks, and implementation. In many cases managers should not be reluctant to share information about the economic or strategic interests that prompt willingness to enter into a contract. The underlying interests of a company do not give away negotiation strategies—it does not mean that a manager invites exploitation. Instead, managers should explain the broader interests of their company as a prelude to negotiating the contract.

Informing the other side about the basic goals for the exchange, rather than insisting solely on particular clauses, introduces a positive flexibility: by knowing the underlying interests the other side may be able to devise ways to satisfy those interests in novel, more efficient ways. If so, both parties have benefitted. Even without such breakthroughs, educating the other side of a negotiation about one's underlying interests will help maintain cordial personal relationships in the event that the negotiations break down. Both parties will better understand the basic constraints or intensity of certain needs, thus preventing anger and resentment if a deal cannot be struck.

A contract designed to prompt the positive flexibility of collaboration would consciously follow certain principles or values. Forrest S. Mosten, an expert advisor about collaboration in the context of divorce, lists some of those attributes:

- Respect and dignity for the other party and other professionals
- Direct and open communication with the other party and professionals
- Voluntary and full disclosure of relevant information and documents necessary to make agreements
- Use of interest-based negotiation to try to meet the needs of both parties.[13]

[13] Mosten, Forrest S. (2009) *Collaborative Divorce Handbook: Helping Families Without Going to Court*. San Franscisco: Jossey-Bass (p. 21).

What sorts of clauses might appear in a collaborative contract? In a preamble, collaborators might pledge any of the following:[14]

- to improve the quality of information they share, focusing from the beginning on their underlying interests and the risks they perceive;
- to work toward clauses that share risks in a balanced way, striving for maximal realization of *both* parties' interests;[15]
- to communicate in regularly scheduled meetings about the progress and quality of performances;
- when needed, to cooperate and perhaps even provide affirmative assistance toward another party's performance of its contractual duties;
- to work toward understanding and accommodating the needs of one another in response to changes, and to be open to modifying terms where conditions suggest the need for adjustment; and
- in the event of a dispute, to negotiate in good faith and to seek mediation and other alternative dispute resolution methods where initial efforts at negotiation fail.[16]

This list prompts at least three caveats.[17] First, consultation entails time and expense, and some items on the list may not be deemed efficient for some contracts.[18] That said, every contract builds a personal relationship, for better or worse. Sometimes what may appear to be unnecessary conversations, given the small dollar value of a particular contract, will be a worthwhile investment that leads to more significant future ties.

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[14] This list first appeared in Barton, Thomas D. (2012) "Collaborative Contracting as Proactive/Preventive Law", in Berger-Walliser, Gerlinde and Ostergaard, Kim (eds.) (2012) *Proactive Law in a Business Environment*. Copenhagen: Djof (p. 125–126)

[15] If one party consistently forces the other to accept unbalanced risks, the subordinated party may eventually be forced into breach–at which point both parties very likely lose value. Accepting a balanced sharing of the risks throughout the contract, even where opportunistic rent-seeking is possible, may well produce the best results over the life of a contract (or relationship). Crawford, Jacqui and Cummins, Tim (2010) *Collaborative Contracting: Is It Achievable?*, Webinar conducted under the auspices of the International Association of Contract and Commercial Management (IACCM), https://www.iaccm.com/resources/?id=3446&cb=1408349619 / https://www.iaccm.com/resources/download.php?f=Ask_The_Expert_Recording-Jacqui_Crawford-April10.mp3

[16] Macaulay, *supra* note 5, at pp. 784–788

[17] *See* Barton, *supra* note 14, at pp. 126–127.

[18] Id.

Second, some of the provisions suggested above may not be legally enforceable.[19] This does not necessarily undermine their value, however, toward prompting useful conversations. Although initial legal entitlements should be as clear as possible, using non-legal language to expand beyond legal certitude can be a step toward positive flexibility. Finally, could collaborative language give room for exploitative behavior? [20] Are such provisions naïve? Recall that most managers say they want relationships that are more trusting and personal.[21] We should take them at their word.

4. Visualization

In contexts from cell phones to automobiles, from field guides to instruction manuals, "usability and user-experience are considered important dimensions of quality. Not so in contract drafting." [22] As noted above, contracts evolved to carry a strong focus on "legal quality" and enforceability. Yet "[w]hile clients want their agreements to be enforceable, they also want contracts that enable them to achieve their business goals."[23] Business decision makers have long complained about contracts being overly legalistic and difficult to work with. There is often a wide gap between deal-making and deal-drafting; managers drive the former, while lawyers drive the latter. Lawyers' drafting easily alienates clients, including the executives and domain experts whose contributions would be crucial to the success of those contracts. But if clients disengage too much from the process, there is a danger that, echoing the title of a book chapter by Professor Deepak Malhotra, a *great deal* ends up with a *terrible contract*: "Great Deal, Terrible Contract".[24]

As noted in the "Collaboration" section above, it is crucial that the people who participate in contracting communicate well with one another, at each stage of the contracting process. In

[19] Id.
[20] Id.
[21] Macaulay, *supra* note 5, at pp. 790–795.
[22] Haapio, Helena (2013) "Designing Readable Contracts: Goodbye to Legal Writing—Welcome to Information Design and Visualization," in *IRIS 2013 Proceeding, IRIS 2013* at p. 447.
[23] Id.
[24] Malhotra, Deepak. (2012) "Great Deal, Terrible Contract: The Case for Negotiator Involvement in the Contracting Phase" in Goldman, Barry M. & Shapiro, Debra. L. (eds.) (2012) *The Psychology of Negotiations in the 21st Century Workplace. New Challenges and New Solutions* New York: Routledge (pp. 363–398). For a more general discussion of the topic, see Haapio, *supra* note 22 and Haapio, Helena (2013) *Next Generation Contracts. A Paradigm Shift.* Helsinki: Lexpert.

complex contracts covering complex projects, for example in information and communication technology (ICT), equipment supply, or construction, a number of business managers and domain experts participate in writing and reading contracts in addition to legal professionals. At the writing stage, these often include technical experts who contribute to scope, specifications, requirements documents, testing and approval processes, as well as output and performance definitions. Beyond legal and technical terms, contracts often contain sophisticated financial terms and project-related timelines and procedures: hence finance and HR departments might also be involved. The backbone of a contract is hardly ever made from scratch but compiled using forms, templates, or clause libraries. While these are typically designed by lawyers, deal-specific information is required from other professionals, mostly business managers and engineers. [25] During negotiations, meetings are arranged and changes made to the contract, again activating lawyers, business managers, technical experts, and engineers on both sides. Once made and signed, contracts need to be implemented, and project managers and operational teams take over. The contents of the contract need to be translated into action. In order for businesses to reach their goals, contract-related communication must be effective.[26]

This chapter makes the point that visualization can promote both clarity and understanding among those who are affected by a contract and advance positive flexibility. What do we mean by visualization and how exactly can it be used in the context of contracting processes and documents? What can visualization do that traditional contract (or legal) writing cannot?

Visualization – adding icons, tables, charts and images to supplement text – is a core part of information design. Information design applies graphic design principles to information in order to communicate the information more effectively. It is the process of identifying, selecting, organizing, composing, and presenting information to an audience so that it can be used efficiently and effectively by that audience to achieve a specific purpose.[27]

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[25] Argyres, Nicholas and Mayer, Kyle J. (2007) "Contract Design as a Firm Capability: An Integration of Learning and Transaction Cost Perspectives", 32 *Academy of Management Review*, at pp. 1060–1077.

[26] Passera, Stefania and Haapio, Helena (2013) "Transforming Contracts from Legal Rules to User-centered Communication Tools: a Human-Information Interaction Challenge." *Communication Design Quarterly Review,* , Vol. I, Issue III, pp. 38–45, available at http://sigdoc.acm.org/wp-content/uploads/2012/09/CDQ-April-1-3-FINAL.pdf.

[27] Hayhoe, George F. (2012) "Telling the Future of Information Design", 1 *Communication Design Quarterly Review* 23. http://sigdoc.acm.org/wp-content/uploads/2012/09/CDQR_1-1_Fall2012.pdf.

The ultimate goal of information design and visualization is clear communication and enabling users to interact with the information. The selection of methods used is based on what is best suited to express the particular information at hand, to the particular user group, in a particular context. For easier reading, more prominence needs to be given to what is more relevant to the user.[28] Text alone can seldom provide prominence or salience to a piece of information. Visualizations can be used to do this, to make sure that the most important points are not lost.

Visualization puts the user—in our case the business people and the client —in the center. For clients, the core of contract design should be securing the performance the parties expect, not just a contract. It is not enough to know how to write well; one should also learn to engage others in the process, elicit information, and communicate the core message effectively to the different readers. If we take the goal of contracts as communication tools seriously, the contract drafter's job changes from merely drafting a clear, enforceable contract (along with appendices) to *designing communication* with multiple user groups and varying information needs.[29]

In just one example of how complex information can be far more effectively communicated, consider Figure 3 below. It sets out graphically the gradual transfer of ownership—together with particular business and legal risks, rights, and duties—over a 15 year contractual relationship between a supplier and purchaser of equipment.[30] "The delivery process of complex industrial machinery is lengthy, and different responsibilities change hands from supplier to purchaser in different moments in time. A multiple timeline can help summarize this, providing a clear summary to the key persons involved. A higher level of awareness, in return, not only prevents misunderstandings, but also provides better insights for effective risk and change management."[31]

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[28] Albers, Michael J. (2007) "Information Salience and Interpreting Information" in *SIGDOC '07 Proceedings of the 25th annual ACM International Conference on Design of Communication,* 22–24 October, El Paso, Texas. New York: ACM, pp. 80–86.
[29] *See* Haapio, Helena (2013) *Next Generation Contracts. A Paradigm Shift, supra* note 22, pp. 63–68.
[30] This chart first appeared in Haapio, Helena, Passera, Stefania, and Barton, Thomas D. (2013) "Innovating Contract Practices: Merging Contract Design with Information Design", in *Proceedings of the 2013 IACCM Academic Forum on Integrating Law and Contract Management: Proactive, Preventive and Strategic Approaches*, Ridgefield, CT: IACCM at p. 43.
[31] Id.

Figure 3. Multiple timelines showing the transfer of ownership and the allocation of risk, costs and responsibilities between parties (© 2012. Aalto University. Image by Stefania Passera. Used with permission.)

5. Conclusion

By analyzing and advocating the conscious introduction of flexibility into contracting, this article challenges some deeply-rooted assumptions about how we think and act in the law and business. Industrial-era production methods and institutions imagine stability and progress to be achieved by constructing machines that operate predictably and consistently. A world of perfect design is one that needs no tinkering or repair: a need is perceived; a method is imagined for satisfying that need; power is harnessed that is sufficient to sweep aside obstacles to that method; and the machine is set in motion to replicate standardized outcomes. Ideally, no further human input is required; tinkering evidences flaws in design or the breakdown in operation.

And so it is imagined to be with traditional contract processes and documents: Identify a need; imagine transactions to satisfy the need; create a contract that, aided by the power of the law, will replicate and secure those transactions with machine-like performance. No need to consult the contract after its expert creation: doing so is evidence of breakdown. To solicit broad participation and communication in the formation or implementation of a contract is to

insert amateurism, confusion, and uncertainty. That is the real world, says Chris.

But flexibility, in contracting as well as in decision-making, marketing, product design, planning, and probably every other aspect of business, is increasingly seen as a virtue rather than a weakness. Contracts backed by the power of the state were imagined to be capable of constructing an impervious future. But in a world of constantly accelerating change and crumbling borders, the law may no longer have the power to decree the future. Progressive businesses may not want that anyway. They understand that the future is neither pre-destined nor inexorable.[32] It is folly to believe we can fully predict it, and dangerous to attempt to fully construct it. Uncertainty is best managed through constant feedback and small adjustments.[33] That is best achieved from setting up processes that connect, not separate. Innovation comes from imagining and embracing alternative futures, not from suppressing them. Imagination is advanced by sharing ideas and interests, not by efforts toward secrecy or obfuscation. Visualization carries values about effective communication, which is the foundation of collaborative relationships, which in turn enable innovation, efficiency, and trust. As noted among Silicon Valley lawyers and their clients, the most technologically innovative industries demonstrate the most collaborative and flexible attitude to contracting. Kim seems to have the backing of recent history, and hopefully of the future.

Finally, though, it bears repeating that the perspective of Chris, relying on the law to provide stable expectations, is not only legitimate but in some ways vital. The legal theorist Niklas Luhmann understood law as a social process toward stabilizing normative expectations,[34] which in turn enables just those small adjustments that help cope with change. Clearly stated legal rights in a contract provide a helpful foundation of party expectations. Those expectations become more secure and more accurate when the parties talk forthrightly and cooperatively.

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[32] Popper, Karl (2013, first published in 1957) *The Poverty of Historicism.* London, NY: Routledge.
[33] Id., at section 20–21 (at pp. 58–70).
[34] Luhmann, Niklas (1985) *A Sociological Theory of Law,* London: Routledge & Kegan Paul, at pp. 40–73; *see also* Barton, Thomas D. (1986) "Expectations, Institutions, and Meanings: A Review of Niklas Luhmann, *A Sociological Theory of Law*" 74 *California Law Review,* at p. 1805.

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