Genre blending and contract design

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Abstract C*ontracts are said to be the meeting of the minds. Thus far, there are few possibilities to share what is in the minds of the contracting parties to make such a meeting of minds tangible to the parties themselves and other audiences. This chapter is about the blending of conventional expressions of the minds – genres. I first explain how the concepts are used in this chapter and then discuss the present-day contractual genres in view of a model of five parameters and their dimensions. It is no news that the world and commerce are changing and, consequently, contracting and contracts are also changing. The realization of the changes becomes obvious slowly and incrementally because traditions and conventions represented by genres change slowly. Genres are not static or solid, but dynamic and continuously developed with every instance of contracting. The main concern here is in international commercial interfirm contracting, contract chains and their expression, although a large part of the discussion and suggestions are universally relevant.*

Keywords Genre, Genre blending, Proactive contracting.

<a> 1 Introduction

According to an old saying contracts are the meeting of the minds – not words. As we know, there are still few possibilities to share what is in the minds of the contracting parties other than symbols and icons. Symbols here refer to language according to a branch of semiotics (the theory of signs) where words or symbols are the linguistic manifestations of abstract concepts and thoughts in our minds.[1] Their meaning is based on a negotiated agreement. Icons, again, are representations of humans, objects, or processes in picture format. The third category, perhaps less obvious in the contracting context is indexes, such as indirect references: through inference and our world knowledge we know that smoke is a sign of fire.[2] In intangible commodity markets a contract can be the only tangible element of the contractual relationship. This makes language awareness an increasingly important competence for contract negotiators, because contracts are speech acts that precede every ownership transfer, construction of a building or servicing a production line.[3]

[1] *Stanford Encyclopaedia of Philosophy* available at <https://plato.stanford.edu/entries/peirce-semiotics/> accessed 3 October 2020. Linguistics, the scientific study of language, can be seen as a branch of semiotics.

[2] Perhaps it is not too bold to compare the reasoning process in deliberating whether a contract has been constituted or not to the inference process based on our world knowledge.

[3] The main thesis of the theory of speech acts – saying is doing – is assigned to John L Austin (1962), an Oxford scholar and professor. His speech act theory was published posthumously in John L Austin *How to Do Things with Words* (Cambridge University Press 1962). It is a speech act that constitutes a contract.

This chapter unfolds as follows. After the Introductory section in section 2, I introduce the concepts of genre and genre blending, and I then consider their relationship with knowledge communities and their understanding in the context of commercial contracting. Next, I will set the scene and explain some conceptions and misconceptions that can be detected in the discussion of legal writing in general and contract drafting and interpretation in particular. This discussion is followed by a review of blending genres according to a proposed model of five parameters and their dimensions. Finally, I consider two sets of approaches to contracting and their impact on contracts. The closing section discusses future trends.

<a> 2 Genre

'Genre' is a concept in the analytical toolkit of a number of disciplines. Consequently its definition and uses vary depending on the line of study. In addition to being an analytical tool, genre also refers to the style of expression or a category of art in general language use. It is good to keep these two uses apart especially when discussing law-related data. In this chapter, my understanding of 'genre' relies mostly on linguistics (the academic scientific study of language) and discourse analysis where genre is 'a successful achievement of a specific communicative purpose using conventionalised knowledge of linguistic and discoursal resources'.[4] The key qualifications here are 'successful' and 'communicative'. The criteria of categorising language instances into genres are functional and pragmatic rather than text-external.[5]

Contracting is undoubtedly an activity that calls for the input of a variety of knowledge communities from a variety of disciplines. Contracts and contracting, then, represent a genre which integrates or should integrate the knowledge repositories and genres of a number of discourse communities: lawyers, sales managers, specialists (finance, HR, logistics), project managers, executives, to name just a few.[6] The knowledge of these expert groups should be communicated successfully according to the definition. In this view, it follows that the concept is descriptive and dynamic. Thus it differs from the prescriptive, externally defined and static concepts, as seems to be the case in the conception of genre expressed, for instance, in media and information studies.[7]

For too long, have researchers and contract users seen contracts as belonging exclusively to the legal genre. The consequence of this has led to a vicious circle. Contract drafters aim at writing in a convincing legal style at the surface level ('shall' as a word of authority, formal, scattered with adverbials such as hereby, hereunder, hereinafter, or the various types of conditions: casuistic, relative and concessive) anticipating disputes and litigation and addressing the courts rather than the contracting parties, thus further strengthening the readers' impression of the legal genre.[8] As Barton and others point out, 'traditional terms (...) conjure images of party negotiation culminating in a formal document expressed in text only, and strongly legal in function as well as language, largely addressing courts rather than those who will implement or benefit from the exchange'.[9] Readers and interpreters focus on the highlighted markers of genre that strike them as legal because they belong to different semiotic groups. Every contract is influenced by other contracts, and every contract has

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[4] Vijay K Bhatia, *Analysing Genre: Language Use in Professional Settings* (Longman 1993) 16.

[5] Tarja Salmi-Tolonen, *Language and the Functions of Law: A Legal Linguistic Study*, (Painosalama, 2008) 40.

[6] Stefania Passera, Emily Allbon, Helena Haapio, ' Contract Transformation: Merging Drafting and Design to Meet the Needs of Human Readers' in Marcelo Corrales, Helena Haapio, Mark Fenwick (eds), *Research Handbook on Contract Design* (Edward Elgar 2021).

[7] Cf Robert Waller, 'Transformational Information Design' in Petra Černe Oven, Cvetka Požar (eds), *On Information Design* (Društvo Pekinpah 2016); Osmo A Wiio, *Johdatus viestintään* (Weilin Göös 2000).

[8] For more details see eg Christopher Williams 'Functional or Dysfunctional? The Language of Business Contracts in English' *Rassegna Italiana di Linguistica Applicata* (3/2010) 217-226.

[9] Thomas D Barton and others, 'Reframing Contract Design: Integrating Business, Legal, Design, and Technology Perspectives' in Marcelo Corrales, Helena Haapio, Mark Fenwick (eds), *Research Handbook on Contract Design*. (Edward Elgar 2021).

its impact on the whole genre and unavoidably strengthens the impression of the contract genre's legal style.[10]

Genre in this chapter is firstly 'a recognizable communicative event characterised by a set of communicative purpose(s).'[11] The key here is the communicative purposes of a business contract.[12] The function of a contract has for long been confined to safeguarding the business from the contract partner's potentially opportunistic behaviour, and consequently the communicative purpose has been mainly adverse. This is no longer the whole truth. Contract negotiators and users are entitled to expect much more as a result of their deliberations, negotiations and preparations for their deal, and therefore the contract genre recreates itself little by little. Bhatia points out that a 'major change in the communicative purpose(s) can render a different genre; a minor change or modification again, help us distinguish a sub-genre.'[13] In literary studies, where the concept of genre originated, Todorov put forth an analogical thought.[14] He suggested that only by investigating a genre in relation to other, adjacent genres, are its characteristics highlighted and rendered clearer for observation and analysis. In this chapter, the adjacent genres are at least the legal, the sales, the technical, the marketing, and the management genres.

Secondly, a genre is most often 'highly structured and conventionalised with constraints on allowable contributions in terms of their intent, positioning, form and functional value'.[15] Contracts fit this description perfectly. However, these qualifications are also one cause for the sluggish development of contract design. Conventionality can be an asset because it evokes a sense of familiarity and recognisability in the minds of the contract users and processing the content is made faster and easier. On the down side, conventionality can also block realisations beneficial for the users and is dependent on whose conventions are the strongest.

The primary genre in law-related genres is the law-making genre. Contracts, again, lay down the law for the contracting parties and therefore it is not surprising that a legislative style also trickles down to commercial contracts and can be seen to threaten the contracts' generic integrity.

Thirdly, the constraints mentioned above 'are often exploited by the expert members of the discourse community to achieve private intentions within the framework of socially recognised purpose(s).'[16] Discourse community in the context of this chapter refers to a knowledge community. Bhatia's interpretation of Swales' constraints is that because experts in the field have greater knowledge of the conventional purposes than the non-specialists they have more liberties and can be more creative in the use of genres.[17] Lack of knowledge presents serious constraints for the non-specialists. However, it should be borne in mind here that despite being conventional, genres are not normative. Genres, no more than language, can be reduced to mere rules and checklists. To address these issues, we need to identify the experts and to do that we need to discover what the lines of expertise are and how the power of interpretation can be distributed accordingly. The only way to match the intentions and understanding of the business partners is that they share the knowledge of the genre including its construction, interpretation, and use.[18]

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[10] This refers to the construction of texts with reference to other texts, intertextuality, a term arising from Kristeva's work. Julia Kristeva, 'Word, Dialogue and Novel' in Toril Moi (ed), *The Kristeva Reader* (Blackwell 1986).

[11] John M Swales, *Genre Analysis: English in Academic and Research Settings* (Cambridge University Press 1990).

[12] The communicative purpose and the function of a contract are separate concepts although the linguistic manifestation is shared. Communicative purpose is subordinate to function. See section 5 in this chapter.

[13] Bhatia, *Analysing Genre* (n 5) 13; Salmi-Tolonen *Functions* (n 5) 26.

[14] Genre originates in Aristotle and Plato, see eg Poetics Samuel H. Butcher (ed), *The Poetics of Aristotle* (MacMillan & Co 1902) and George Burges (ed), *The Works of Plato* V*: The Laws*. (Henry G Bohn, 1859.); Tzvetan Todorov, *Les genres du discours* (Editions du Seuil 1978).

[15] Swales (n 11).

[16] Ibid.

[17] Bhatia, *Analysing Genre* (n 4) 15.

[18] Vijay K Bhatia, 'The Power and Politics of Genre' World Englishes 16:3 1997, 364.

One of the issues discussed throughout the book is whether contracts constitute a legal genre or subgenre or a business genre or subgenre.[19] It is important to understand how communicative purposes shape the genres particularly when proposing changes to the conventional forms of expression because they already are identified and mutually understood by the contract users. Any mismatch is noticed by the users.[20]

Below, I will discuss the possibilities of genre blending to overcome the, by now rather rigorous, monolithic conception of genre when communicative purposes and functions change over time.

<b> 2.1 Genre blending

It has already been established that contracting requires inputs from a variety of disciplines. Therefore, one knowledge community cannot own the contracting genre. As Barton and others put it 'Contract Design should not be the exclusive province of any single perspective, expertise, or language system'.[21]

Genre blending here refers to using the characteristics of two or more genres typical of a variety of professional knowledge and discourse communities in one communicative event, such as contracting. Previously the term has primarily been applied to fiction (e.g. horror+scifi+romance or crime+fantasy etc). Genre blending does not break a genre or disguise a genre, for example, a legal message into a marketing message, but signposts so that the users understand the cues of a genre which help anticipate where the text or negotiation is going.

One qualification for genre blending is eclectic which means choosing the preferred features from genres of the knowledge communities that are necessarily part of the contract. The legal qualifications are inescapable and if their expression is diluted or disguised into a meta-legal message that would anyway require an intermediary to interpret it, and this would move the aim even further away.[22] Different readers bring different levels of competence and contexts to their reading. A contract, at its best, could be a genuine polyphony of unmerged voices which is essential to open-ended dialogue.[23] To genre-blend successfully the participants and authors need to be well aware of each of the genres involved, their construction, interpretation and use.

This can prove to be the way to approach contracting, at least throughout the transition from being almost exclusively legal in style, and the communicative purpose being primarily safeguarding towards multifunctional contracts discussed in section (5) in this chapter. Different types of business relationships and their corresponding contractual functions are the keys to the communicative purposes. They are intertwined but hierarchical.

<a>3 Words and deeds

The language philosopher J.L. Austin is usually credited with generating interest in what language does – language in use – because of a surrounding framework of institutional and social conventions about what constitutes a contract and how it is validly entered into.[24] The context, in the sense of a set of recognised conventions (which is what we understand by institutions) provides

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[19] See Passera and others (n 6).
[20] Bhatia *Analysing Genre* (n 4) 14.
[21] Barton and others (n 9).
[22] Compare eg Richard Foley, 'Wealth of Terms – Scarcity of Justice? Term Formation in Statutory Definitions', *Contemporary Issues of the Semiotics of Law: Cultural and Symbolic Analyses of Law,* Anne Wagner, Tracey Summerfield, Farid Benevides Varegas (Hart Publishing 2005).
[23] For the theory of polyphony see Mikhail Bakhtin *The Dialogic Imagination: Four Essays* (University of Texas Press 1981).
[24] *How to Do Things with Words* (1962) is a transcription of John L Austin's William James lectures delivered at Harvard University 1955-1958.

the infrastructure through which the utterance gains its force as a particular type of action. The felicity conditions that Austin proposed for the speech acts he discussed were in fact categorisations of contexts (eg the participants necessary for concluding a contract, the manifest of implicit knowledge and attitude of speaker and hearer(s), etc.). Moreover, Austin emphasised the interactive aspects of both speech acts and the context that encompasses them.

It is generally thought that contracts and contract-related texts are dense with legal vocabulary and terminology and scattered with difficult technical legal terms. This is a misconception and special vocabulary forms only a very small percentage of any contract-related text.[25] Among the data I studied, among the fifteen most frequent content words 'goods' was the most confusing because it contains a number of false cognates.[26] 'Goods' is a good example of the nature of legal term formation. It is a general language word given legal meaning and can therefore be misleading to the general public, but also to lawyers because it has several readings in national laws and uniform international sales law.[27]

My point here is that although some of the most frequent words are polysemous and have several meanings taken out of context, none of them are particularly technical, legal or archaic even if here the legal counsels communicate with each other and the members of the arbitration tribunals – legal expert to legal expert in their own language variety 'lawspeak'.[28]

Needless to say, high frequency alone is not decisive because one term/word missing or one occurrence only can be enough for a successful communicative event. If legal terms and content words are not the cause for the general observations, we need to look elsewhere to find the source of difficulties.

Instead of a mere surface level calculation and description, the purpose of this chapter is to develop explanations and suggest remedies.

<b> 3.1 Deeds

The ideas that constitute the basis of Austin's speech act theory are, in short, as follows: in the locutionary act we are 'saying something', while in the illocutionary act we are 'doing something', such as giving a warning or making a promise. For example, the same utterance can be either a promise or a threat depending on the participants of the communicative event and the context. One crucial distinction between promises on the one hand and threats on the other is that a promise is to do something for you, not to you, but a threat is to do something to you, not for you.[29] In recognising, for instance, pre-contractual promises, it is crucial to consider the illocutionary force of a speech act.

A contract or an agreement is a speech act which precedes the transference of ownership of property or construction of a building. As speech acts, contracts are promises, in other words acts of

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[25] For more details, see Tarja Salmi-Tolonen 'Negotiated Meaning and International Commercial Law', in Vijay K Bhatia , Christopher N Candlin, Paola Evangelisti Allori (eds) *Language, Culture, and the Law: The Formulation of Legal Concepts across Systems and Cultures* (Peter Lang 2008). The calculation was done with *WordSmith Tools 6*, the memoranda are available at <www.cisg.law.pace.edu> accessed 1 December 2020.

[26] The most frequent words are always form words or grammar words such as articles and prepositions in any English text. The type token ratio here is 3.6, which indicates that the vocabulary is rather narrow; see also (n 25).

[27] John Honnold *Uniform Law for International Sales* (Denver 1991); Convention on Contracts for the International Sale of Goods (CISG) 1980; See also Viola Heutger 'Towards a Common Legal Understanding' *London Law Review, 1*(2), (2005), 205-215; The paradox of competing interpretations of legal terms is discussed in Tarja Salmi-Tolonen, 'On the balance between invariance and context-dependence: Legal concepts and their environments', in Dennis Kurzon, Barbara Kryk-Kastovsky (eds) *Legal Pragmatics* (John Benjamins 2018).

[28] I coined this expression to refer to lawyer to lawyer talk. It is analogical to 'seaspeak' and 'airspeak' referring to radio-messaging at sea and air-traffic control strictly between professionals. See eg Peter Strevens, Edward Johnson 'Seaspeak: A project in applied linguistics, language engineering, and eventually ESP for sailors' The ESP Journal Vol 2 Issue 2 (1983) and Fiona A Robertson, Edward Johnson, *Airspeak: Radiotelephony Communication for Pilots,* (Prentice-Hall 1988).

[29] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969).

committing. The partners are 'placing themselves under an obligation to bring about the state of affairs expressed in the propositions'.[30] Parties make a promise to act according to their roles as suppliers or buyers. By saying so they also constitute the contract. It is these pragmatic features that constitute what are usually referred to as felicity conditions, in other words, what it is that needs to be in place for a promise to be felicitous. The context is more important than the actual surface level words. Introductory formulas such as 'we hereby promise ...', though often used, are not obligatory. A promise is still 'happy', if the felicity conditions are fulfilled. The formulas and phrases can be called genre or style markers or rituals or sometimes frozen expressions.[31] They mark the speech act and indicate the convention, but they are not the necessary and sufficient features – the institutional context is.

<b> 3.2 Monologue or dialogue

While collecting data for my contribution to an international project on international commercial arbitration discourse, I found that a repeated remark in arbitration awards was to the effect: each party has explained what they meant by the disputed terms, but there is no explanation of a mutual meaning or understanding of the terms and conditions.[32]

This observation leaves us wondering why when the issue is about mutual understanding – an agreement. One explanation can be found in the popular misconception also known as the conduit metaphor.[33] Meaning-making and meaning transfer are much more complex processes than assuming that words are boxes where we insert our thoughts and transfer them to the interlocutor or in this case specifically to the business partner who then opens the box and finds our thoughts as we had put them in. The conduit metaphor and other metaphors comparing human communication to inventions in technology, such as radio transmission, and their appreciation in various times in history have kept this myth alive.[34] Shared words are not necessarily the same as shared meanings. Conceptual systems are changing and changeable within science and they create different ways of perceiving phenomena. Natural language is not a code. Our thoughts cannot be coded and then decoded – meanings need to be negotiated.[35] Meaning is a consequence of words and phrases rather than their inherent quality. Interpreters of a message do not get information from an expression as such but the use of the expression in order to have access to information they already possess. Therefore interpretation and meaning are always to some extent subjective.[36] Consequently contract negotiators should not presume equal understanding on the basis of a rule-governed system, but accept that meanings and understandings are negotiated in the framework of an open dialogic universe.[37]

Contracting is very much about cross-professional activities involving cooperation across different fields of expertise and interdisciplinary competences. Interpretation is unavoidably context-dependent and very much dependent on the negotiators' ability to disseminate and share

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[30] Bruce Fraser, 'Hedged Performatives' in Peter Cole, Jerry L Morgan (eds) *Syntax and Semantics. Volume 3: Speech Acts.* (Academic Press 1975).
[31] Martin Joos, *The Five Clocks* (Harcourt, Brace & World 1967).
[32] The parties of the dispute were invariably Finnish, the chosen language Finnish, the first language of the parties, and yet the disputes escalated because of a lack of mutual understanding.
[33] Identified in Michael J Reddy, 'The Conduit Metaphor: A Case of Frame Conflict in Our Language About Language' in Andrew Ortony (ed), *Metaphor and Thought* (Cambridge University Press 1979).
[34] Great inventions in the history of science have always influenced all lines of study eventually. The metaphors used originate from natural sciences and discoveries, engineering, social sciences, biology, technology or electronics.
[35] Salmi-Tolonen Negotiated Meaning (n 25).
[36] Terence Moore, Carling Christine *Understanding Language: Towards a Post-Chomskyan Linguistics*, (Macmillan Palgrave 1982) 11-12.
[37] Edda Weigand, Marcelo Dascal (eds) *Negotiation and Power in Dialogic Interaction*. (John Benjamins Publishing Company 2001).

their expert knowledge to allow the parties to set the contract in a context where they have equal opportunities to make the right inferences.[38]

Given that meanings are always to some extent subjective, the expressions do not even have to be ambiguously written to create several readings for different interpreters.[39] Any language use, be it spoken or written, gives users a wide array of means to choose from. The choices are not only syntactic and semantic but also require rhetorical judgments, involving the knowledge of the subject matter and its conventions.

<a> 4 Conceptual framework

Design evokes mental images of human-made form and formation, surface and landscapes. Every discipline finds its own interpretation of the vogue in time. The meaning of design has been enhanced and extended. Where it was previously associated mostly with the material and visual world and designers, it is now associated with intangible and abstract ideas and thinking. In the design thinking of this chapter, there is no universal form for structuring knowledge, but it is socially constructed and negotiated. There can only be 'a consensus of an agreement'.[40] Consequently shared meanings are negotiated meanings.

Good design should be fit for the purpose it is expected to serve and the function it is expected to fulfill. Contract design bears similarities with proactive contracting in that it is outcome- and solution-oriented, anticipating and taking initiative.[41] Form also carries meaning and therefore form and content are inseparable. Form and content can be studied as two sides of a sheet of paper, but to tease them apart would mean changing them both at the same time.[42] Only too often language and words are seen as simple surface-level questions that are easily fixed with the help of superficial readability indexes, and the fact that language is intertwined with the complexity of issues agreed on, ignored. Nevertheless form and design are always subordinate to function, communicative purpose and content.

Function comes first, and the functions of contracts are the functions of language used. In the words of the father of functional grammar MAK Halliday, 'language is the way it is because of the functions it has to fulfill'.[43] Digital technologies have reconfigured spaces in commerce and made many transactions possible online. They have also introduced substantial changes to communication among organizations, institutions, communities and individuals. Even before the digital transformation, the restructuring of the networked economy from one-time sales transactions to long-termed value relationships and the shift from sales to services had started together with increasing awareness of corporate responsibility. These developments demonstrate that there has to be a shift in the functions of contracts, and it inevitably follows that the design of contracts will change one way or another.

Despite the developments in digitalization and commerce, contract documents as a genre strike us as being traditional and even archaic.[44] Tailor-made and adaptable contract documents may be impossible, for instance, in e-tailing where the agreement text is all-inclusive and fit for all

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[38] See Robert Waller 'Designing Contracts for Human Readers' in Marcelo Corrales, Helena Haapio, Mark Fenwick (eds) *Research Handbook on Contract Design* (Edward Elgar 2021), and on Paul Grice's cooperative maxims and conversational inference in Paul H Grice 'Logic and Conversation' in Peter Cole, Jerry L Morgan (eds), *Syntax and Semantics 3. Speech Acts* (Ablex, 1975).

[39] Moore, Carling (n 36).

[40] Kenneth Bruffee, 'Social Construction, Language, and the Authority of Knowledge: A Bibliographical Essay'. *College English*, 48 (1986) 773-790.

[41] See Kaisa Sorsa (ed), *Proactive Management and Proactive Business Law: A Handbook* (Turku University of Applied Sciences 2011) 37-84.

[42] Ferdinand de Saussure, *Cours de linguistique générale*, (Payot 1916).

[43] Michael AK Halliday, 'Language Structure and Language Function', in John Lyons (ed) *New Horizons in Linguistics* (Penguin 1970).

[44] See also Williams (n 8).

purposes. This, of course, is confusing for consumers who find that a lot of the terms and conditions are incomprehensible for the simple reason that they have nothing to do with their purchase. A case in point can be found in Amazon freeware game engine Lumberyard service terms below.[45]

> 57.10. Acceptable Use; Safety-Critical Systems. *Your use* of the Lumberyard Materials must comply with the AWS Acceptable Use Policy. The Lumberyard Materials *are not intended* for use with life-critical or safety-critical systems, such as use in operation of medical equipment, automated transportation systems, autonomous vehicles, aircraft or air traffic control, nuclear facilities, manned spacecraft, or military use in connection with live combat. However, *this restriction will not apply* in the event of the occurrence (certified by the United States Centers for Disease Control or successor body) of a widespread viral infection transmitted via bites or contact with bodily fluids that causes human corpses to reanimate and seek to consume living human flesh, blood, brain or nerve tissue and is likely to result in the fall of organized civilization.[46] (emphasis mine)

First of all compliance with AWS Acceptable User Policy is required. Interestingly, the terms are imposed on the user/customer indirectly 'Your use …', instead of the more common, much criticised imperative 'The User shall not …'. Amazon's innovative approach is spoilt by the many 'do nots' in the continuation which lists the exemptions and what kind of use is not accepted, and furthermore exceptions which do not apply to these not accepted. [47] Double negatives always challenge the reader's intake and very often they show that even the drafter of the term gets confused. The service clause also spans out towards the end and is therefore cumbersome for the reader to process particularly as most of the ways to use the service never even occurred to the reader/customer/user before. Discontinuity is also characteristic of legislative texts and the same practice seems to prevail in contracts.[48]

Digitalization has changed meaning-making and the processes of both writing and reading online. Jones and Hafner maintain that 'the affordances of digital tools can have a profound effect on the kinds of meanings that people can make (...) as well as their ways of thinking and doing'.[49] The development of practices is often multimodal, collaborative, intertextual, mobile, and designed for wide and diversified audiences. We need more data-based research on the contracting genre to explain why contracting and other law-related genres are transposed onto the web retaining their traditional forms. In e-tailing in particular, one would have expected to see more signs of innovation. The fairly fast and dramatic change and tension between tradition and innovation in digital contexts is potentially the only explanation for contract terms in writing to remain unchanged and identical irrespective of new business models and the medium. [50]

The expression and style of legislation inevitably trickle down to other genres or subgenres containing prescriptive documents or other prescriptive private documents. In principle, contracting partners are free to choose how they draft their agreement. The reasons why legislative language is the way it is can be found in each jurisdiction's history, politics, type of society, and language.[51] The reason why other genres follow suit can be found in the generally recognisable authoritative style which is formal and sometimes archaic.

Even legislative language and style do change, but slowly in pace with society. It is the vocabulary where we first detect the change. New concepts and terms denoting them are created and some concepts, objects and trades become obsolete. Sometimes, the terms and words stay but their meanings are extended or changed. Terms, in other words, the linguistic manifestations of

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[45] <https://en.wikipedia.org/wiki/Amazon_Lumberyard> accessed 15 November 2020.
[46] <https://aws.amazon.com/service-terms/> accessed 15 November 2020.
[47] AWS, Amazon Web Services is a subsidiary of Amazon providing on-demand cloud computing platforms.
[48] Salmi-Tolonen 'Negotiated Meaning' (n 25).
[49] Rodney H Jones, Christoph A Hafner, *Understanding Digital Literacies: A Practical Introduction* (Routledge 2012).
[50] See Passera and others (n 6).
[51] Many expressions in English legal language stem from the history of England and legal English. There is no semantic or pragmatic reason to use binomials in international commercial contracting but for adding legal style. For the history of legal English see Risto Hiltunen, *Chapters on Legal English. Aspects Past and Present of the Language of the Law.* (Annales Academiæ Scientiarum Fennicæ Ser. B, Tom. 251 1990)

abstract concepts and conceptual systems that have a definition accepted within a special field of expertise are usually those parts of special language that readers first notice in contracts. Generally speaking, non-experts in law usually find many more terms than experts in that particular field do. They mistakenly think that all the words they do not understand are legal terms and vice versa ordinary every day words can be legal terms because they are defined in law or have been given a meaning in a court ruling, such as 'bath water', or 'tool'. The exercise I described in subsection (3.1) above demonstrates this. The only term that is confusing is 'goods' which is not well defined.[52]

On the other hand, much of the criticism for more than half a century and even today focuses on form words such as adverbs and conjunctions that indicate the relationships between the promises, issues, ideas and timelines.[53] Contract users may find these surface level stylistic features disconcerting and archaic, but as far as I know there are no academic scientific studies on whether they have disturbed the contract functions.

Commercial contracts in cross-border global scale transactions drafted in English are often constructed between organizations whose working language is English, but whose personnel do not have English as their first language. Although there are no studies to prove it, a general observation is that it seems to be safer for the second-language speakers not to change the conventional style and expression. Also, non-law clients may find the conventional style, or what they recognise as legal style, more convincing and secure than the general language style.

One of the catalysts of the international commercial arbitration study mentioned above was the observation that monologue, litigation and legal discourse had colonised ADR practices and communication, which is still supposed to be very much a dialogue, with the help of the neutral to find solutions to the dispute. [54]

In the real world of commerce, business ethics, mutual trust and common business practices are essential. The partners are initially engaged in dialogue and seek mutual success in the open-ended dialogue universe. Risks may arise but they are still avoidable, if recognised or foreseen and dealt with using proactive and pre-emptive measures through dialogue between the parties to a contract. If a conflict does arise, the situation becomes more difficult; the dialogue is disrupted and gradually moves towards a monologue where actual reality is taken over by factual reality and finally a legal reality. If a conflict has to be resolved in litigation, the contract of the parties is taken out of their hands and translated into a language unknown to them – the legal language, the language of judges and lawyers – 'lawspeak'.

> 5 Blending genres

Contracting as a genre can no longer be treated as a monolithic entity of a simple agreement and a semiotic handshake. Traditional views on the role of contracting did not pay much attention to the possible role of contracts as a means for supporting today's business forms as knowledge repositories or being fed from several knowledge repositories nor as sources for disseminating knowledge. Currently contracting takes as its key characteristic feature the communicative purpose that gives a particular genre its meaningful and yet typical cognitive structure.

<b> 5.1 The impact of a business model on the choice of contract design and genre

[52] Honnold (n 27).

[53] See eg David Mellinkoff, *The Language of the Law* (Boston: Little, Brown and Company 1963); Williams (n 8).

[54] Unfortunately the real and the ideal do not exactly meet any more. This became obvious during the research projects we conducted under the leadership of Professor Vijay K Bhatia of the City University of Hong Kong.

Structural business decisions and types of collaboration are the decisive determiners when deliberating contract design and hence the appropriate genre-blend. Contracts reflect the strategic business and legal decisions an organization makes to promote its business goals and ideally, according to the principles of proactive law, using law to its advantage.

Contracts exist in time and space. Consequently, the temporal dimension, the term of a contract, is one of the dominant parameters of a transaction. In addition to the time dimension, I will consider four other parameters and their dimensions of genre blending using three ubiquitous business models and three knowledge repositories aligned with the title of this handbook: business, legal and technology.[55] This model comprises a selection of parameters and dimensions explaining some necessary and unnecessary practices. I hope to provide a new perspective for designing contracts that fit for the digital context.

This analysis model is not based on a particular theoretical framework because here I am more interested in the actual constructing and construing the contract as a message in an institutionalised context. The aim here is to propose a research framework for assessing different types of contracts and understanding their dimension in view of the dynamic variety of blends for an optimal design.

On a scale of surface vs deep analysis, I am aiming at a thick analysis rather than thin, in other words not so much on the surface level trying to point out genre typical markers, but rather a deeper functional analysis.[56] The genre approach provides a thick description and tool for arriving at explaining significant form-function correlations.

Depending on the line of business, for instance, machine manufacturing and sales, a contract term can be a short-term one-time machine delivery. In that case, the contract design can be standardized and repeatable. It is unrealistic to think that businesses engaging in thousands of sales or purchase transactions per day could conduct detailed negotiations every time. The temporal dimension makes these deals 'simultaneous' and therefore static.[57] The scope is limited to the seller's selection of products and specifications. The contract then is the main tool for risk allocation.

In case the machine manufacturer also offers aftermarket services such as maintenance, the contractual relationship calls for a different approach to the relationship and preparing for internal and external contingencies. This model is a hybrid model containing both a short-term static part and a more dynamic longer-term part.

Dynamic long-term contracts call for a flexible approach.[58] Therefore the third business model I will discuss in order to explicate the genre blending analysis is a life-cycle contractual relationship where the contract partners' businesses are intertwined creating value for both, which is a truly dynamic contractual relationship.

The fourth analysis model I propose is for assessing value chain integrity and should be shared by all contractors whatever their chosen business model or strategy is in international markets.

The purpose of the analysis model is to help understand the blending of knowledge repositories and consequently ease choosing a contract design for better serving the contract users. Particular attention is paid to the following parameters concerning each of the three contractual relationships: strategy, knowledge base, function, speech act, and information dynamics. Below, I

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[55] In reality, there naturally are many more, but three prototypical models suffice for a qualitative basis of analysis.

[56] For thin and thick analyses see Clifford Geertz *The Interpretation of Cultures* (Basic Books 1973).

[57] See eg Vesa Annola *Sopimuksen dynaamisuus. Talousoikeudellinen rakennetutkimus sopimuksen täydentämisestä ja täydentymisen ohjaamisesta* (University of Turku 2003); for the 'simultaneous' aspect see Kalle Määttä 'Epätäydellinen sopimus' in Vesa Kanniainen, Kalle Määttä (eds) *Näkökulmia oikeustaloustieteeseen 2* (Gaudeamus 1998).

[58] Ibid; Tommy Roxenhall, Pervez Ghauri 'Use of the Written Contract in Long-lasting Business Relationships' Industrial Marketing Management 33, 2004. 261-268.

will first explain each parameter and its dimensions briefly and then their occurrence in each business model and finally in order to summarise and present the findings in a collective table.

<b>5.2 Introduction to the parameters and dimensions

The parameters I use to analyse each business form are: strategy, function, information strategy, knowledge base, and integrity, each have further four dimensions, which I consider to be essential in all contracts. I will highlight in each case the one, which I find predominant in the blend, but not, of course, excluding the others. All the business forms should share the value chain parameter. I should once more emphasise here that this framework is designed for research analysis purposes and a tool for finding an appropriate blend for a certain type of business rather than describing all possible business forms and dimensions or providing practical guidelines for crafters. [59]

<*c*>5.2.1 Strategy

For the analysis, I chose three prototypical business forms based on strategic business decisions where time is of the essence 1) short-term one-time sales-purchase transaction, 2) sales plus services (maintenance) and 3) long-term relationship. According to the temporal dimension I categorise them as 1) static, 2) hybrid (static + dynamic), and 3) dynamic contracts.[60]

<c> 5.2.2 Function

In 2006, Eckhard and Mellewigt observed that the discussion of contractual functions was shifting away from the strict safeguarding focus and identified three trends in the literature concerning interfirm contracts. The three trends and the functions to serve them are the 'safeguarding' of the parties' investments, 'coordination' of the exchange process, and 'contingency adaptability' to cope with future disturbances.[61] In this day and age, it is necessary to complement these three with a further one concerning CSR and committing the value-chain to it. This one I will describe as a separate model of analysis applicable to all business models. For the purposes of this model, which approaches contracting deductively, a more fine-grained model of functions would not be helpful. A pilot test of the functions shows that there is a lot of overlap in the propositional content between the functions and a more fine-grained categorisation would only result in an abundance of fuzzy-edged categories.[62]

<c>5.2.3 Speech acts

This parameter is concerned with modality, as many of the functions of contracts are best explained in terms of modality. Modality reveals the pragmatic purposes of the agreed rules and represents the communicative interaction between the parties. Attention is also drawn to the connection between modality and speech act theory, which was already touched upon above.

The context, in the sense of a set of recognised conventions (which is what we understand by institutions), provides the infrastructure through which the utterance gains its force as a particular type of action. When we consider the context of contracts, we find that many of the conditions are found in mandatory laws, such as who has a competence for concluding a contract and the implicit

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[59] Salmi-Tolonen T, 'The relevance of genre in commercial contracting' (forthcoming)
[60] Cf Annola (n 57).
[61] Björn Eckhard, Thomas Mellewigt 'Contractual Functions and Contractual Dynamics in Inter-firm Relationships: What we Know and How to Proceed' The Academy of Management (2006).
[62] It is also important not to confuse function for purpose. See Salmi-Tolonen 'Relevance' (n 59).

and explicit knowledge of the participants. [63] Moreover, Austin emphasised the interactive aspects of both speech acts and the context that encompasses them.[64]

In brief, according to Austin's speech act theory in the locutionary act we are 'saying something', while in the illocutionary act we are 'doing something', for instance, making a promise.[65] It is the pragmatic features that constitute what Austin refers to as felicity conditions. In other words, what is needed to make a promise and what makes it valid and therefore felicitous or successful.[66]

A prerequisite of genre is 'successful achievement of a specific communicative purpose' as stated above.[67] I would like to stress in particular the requirements 'successful' and 'communicative purpose'. 'Successful' here equals Austin's felicity conditions depending on the context. By 'communicative purpose,' I refer to the contracting parties' intended effect and the speech act constituting that effect. It takes into account the shared knowledge of the participants involved, the contracting parties.[68]

As was pointed out earlier, it is true that a certain expertise allows the writers to exploit genre constraints to achieve effectiveness in their writing while still operating within the generic rules and conventions.[69] Similarly expertise allows the specialists to vary their expression according to different audiences. Furthermore, different business forms and different phases of a contract have varied communicative purposes.

The communicative purpose of contracts is, generally to express the mutual will of the contracting parties. As the world of commerce grows increasingly complex, the more versified the communicative contracting purposes become. In this perspective, the thought based on the theory of speech acts that the normativity of contract language refers to 'imposing duties on the supplier' or 'issuing an obligation' to limit risks is far too simple and unequivocal.

I have categorised the speech acts according to Searle's taxonomy into five categories and they vary depending on the dominating knowledge base required in each model. The five categories are 1) assertives, 2) directives, 3) commissives, 4) expressives and 5) declarations.[70] I will explain each category in the analysis concerning each business form below.

<c>5.2.4 Knowledge base

It is inevitable that different knowledge communities see the contractual functions from different perspectives. Lawyers emphasise determining which obligations and liabilities are included and which are excluded. They are also expected to pay particular attention to regulatory requirements and default rules.[71]

For a business professional whose main interest is to secure a successful business deal and a good business relationship, lawyers' concerns may be set aside – particularly if they are expressed in typical 'lawspeak'.[72] The knowledge of generic conventions constitutes power and privilege in relation to experts in other fields. However, one should bear in mind that it is always dangerous to jump to conclusions and make generalisations of prototypical types of professionals.

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[63] Austin (n 3, 24).
[64] Ibid.
[65] Austin (n 3).
[66] Ibid.
[67] Swales (n 11).
[68] For more on pragmatics and communicative intent, see Levinson, Stephen C, *Pragmatics* (Cambridge University Press 1983). 16-17.
[69] Bhatia (n 5)16.
[70] See John Searle, 'What is a Speech Act?' In Ian Hutchby (ed) *Methods in language and social interaction 1* (Sage 1965) 1-16.
[71] Helena Haapio, 'Business Success and Problem Prevention through Proactive Contracting' *Scandinavian Studies in Law*, Vol 49, 150-194, 156 (Stockholm Institute for Scandinavian Law 2006).
[72] See (n 29).

Technical knowledge is by and large based on science, technology and known specific facts concerning the products in the particular line of industry in question.

A valid question here is whether we are talking about negotiated meaning or communicative power?

<c>**5.2.5 Information dynamics**

The key feature in choosing an information strategy is 'the intent that gives a particular genre its meaningful and yet typical cognitive structure'.[73] The concept of information dynamics covers the distribution of given and new information and information structure of the contract.[74] In pragmatics, causes are functions and contexts.[75] It is the extralinguistic context and function that cause the phenomena and therefore underlie the explanation. For my part, I am resolutely of the view that analysis itself is distinguishable from and distinct from the activity analysed. Designing a research framework for an academic scientific study is not the same as designing contracts.

The dimensions chosen are 1) temporal, 2) directive, 3) expository and 4) procedural.

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[73] Candlin CN, 'General Editor's Preface' in Bhatia VK *Analysing Genre: Language Use in Professional Settings* (Longman 1993).

[74] See eg Nils-Erik Enkvist 'Experiential iconism in text strategy' *Text* 1:1 (1981) 97-111.

[75] Levinson (n 72)

<b>5.3 Discussion

In order to summarise and better illustrate the blend of the predominant dimensions of each prototypical business model according to the parameters that have an impact on genre, explained above, I designed Table [X]1 below.

TYPE OF RELATIONSHIP	**SALE/PURCHASE**	**SALE+AFTERMARKET**	**LIFE-CYCLE**	**ALL**	**PRE-DOMINANT DIMENSION**
PARAMETER					
STRATEGY	SIMULTANEOUS STATIC	COLLABORATIVE HYBRID	ELASTIC DYNAMIC	SHARED VALUES	
FUNCTION	SAFEGUARDING	COORDINATION	ADJUSTABLE	INTEGRITY	
SPEECH ACT	COMMISSIVE	DECLARATION	EXPRESSIVE	ASSERTIVE	
KNOWLEDGE BASE	LEGAL	TECHNOLOGY	BUSINESS	SOCIAL	
INFORMATION DYNAMICS	DIRECTIVE	PROCEDURAL	TEMPORAL	EXPOSITORY	

Table [X]1 Summary of the parameters and dimensions according to business forms

Research on the organization of interfirm relationships has moved towards the examination of contractual design. As strategy-decisions a company's comprehension of functions and information dynamics precedes design: a model to evaluate a suitable blend or at least raise awareness of the parameters and their dimensions can be useful.

I base my contract function categories on Eckhard and Mellewigt's findings and then add one which I find necessary in this day and age – value chain integrity.[76]

The research purposes decide how fine-grained an analysis tool one needs. Some degree of overlap is almost unavoidable. The more limited the data are the more detailed categories are needed, and vice versa, the larger and more varied the data the fewer the categories.[77]

Different knowledge communities see the contractual functions from different perspectives. In this day and age, however, the concept 'knowledge community' is inevitably diluted as ever more interdisciplinary research is encouraged. Contracting, in particular, calls for multidisciplinary approaches both in theory and in practice. Lawyers emphasise determining obligations and

[76] Eckhard, Mellewigt (n 65).

[77] I have tested this with some of my classes using real data and found that construing even the three functions for analysis produces overlap and fuzzy edges that are too wide to be useful for research purposes.

liabilities and what kind of a constellation should be included or excluded. A legal professional's role is also to assess the regulatory requirements in each business model.[78]

A business-professional's main interest is to secure a successful business deal and a good business relationship, but especially managers need a sufficient knowledge base in law and also in the technology concerning their line of business. The knowledge of generic conventions constitutes power and privilege in relation to experts in other fields. It is obvious that I am promoting here the integrationalist view and genre blending (the zipper method). Good cross-professional communication practices are not sufficient but require cross-professional knowledge to support them.

In order to ease performance risks, contracts may supply the relationship with a clear definition of the parties thus acting as a 'coordination' device by aligning expectations.[79] This is taken into account in the hybrid model above.

To cope with unforeseen challenges that may emerge from the market or the environment when the collaboration is already in progress, contracts have to serve a third purpose successfully. 'Contingency adaptability' function deals with the specification of principles or guidelines on how to handle unexpected situations.[80] This is particularly crucial in a long-term relationship model.

<a> 6 Conclusion

Genres are dynamic, intentional and audience-oriented classes of communicative events with sets of communicative purposes.[81] Contract design represents a domain-specific activity, but that domain is multi-specific. The domains universally involved are business and law, and the rest depends on the field of industry in question. There are basically two options here to look at the negotiating contract design and genre: a segregationalist approach or an integrationalist approach. A segregationalist point of view sees contracts and contracting as separate specialist genres – a business genre or a legal genre or a technical genre – so that it is possible to detect the business parts and the legal parts of a contract, the three not necessarily interacting. An integrationalist approach, again, involves business, legal and technical interacting and negotiating, disseminating knowledge and communicating the will of the parties.

While assessing the qualifications describing the segregationalist approach, one cannot avoid noticing that many of them are familiar from the traditional approach to contracting – legal separate from business and sales – the silo effect. Although the contract negotiators are often business and sales professionals, the drafters of contract documents are often lawyers. When a contract is understood as a deal and business relationship, the lawyers enter the scene after marketing and sales have done their part and translate the ready-negotiated terms into 'law'.[82] This being the case, many contract managers understand the lawyers' role to mean applying red tape, restrictions and omission of business opportunities. This became obvious while interviewing contract managers for an earlier study whose primary finding for my part was to suggest recontextualising contracts and contracting.[83] Many of the contract managers called for more business-savvy lawyers to support

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[78] Helena Haapio, 'Business Success and Problem Prevention through Proactive Contracting' *Scandinavian Studies in Law*, Vol 49, 150-194, 156 (Stockholm Institute for Scandinavian Law 2006).

[79] Kyle Mayer, Nicholas Argyres 'Learning to Contract: Evidence from the Personal Computer Industry' Organization Science Vol. 15 (2004) 395-410.

[80] Yadong Luo 'Contract, Cooperation and Performance in International Joint Ventures' Strategic Management Journal, Vol. 23, (2002) 903-919.

[81] Swales (n 11) 45-58.

[82] I chose not to use 'legal language' or 'legalese' here because they can be interpreted too narrowly with pejorative connotations. Hence 'law' because I refer to both form and content.

[83] Corporate Contracting Capabilities, a research project funded by the national Agency of Finland and the Academy of Finland. Tarja Salmi-Tolonen 'A Multidimensional Topic Requires a Multidisciplinary Approach', in Soili Nystén-

today's business forms, various types of collaboration networks and life cycle models, to name only a few. On the other hand, Siedel, among others, expresses the thought that managers who are thoroughly grounded in the law are positioned to make sound business-based legal decisions and proposes a reactive, preventive and proactive four-step legal plan for managers: management understanding the law, coping with legal concerns, developing strategies and solutions to prevent future legal problems, and reframing legal concerns as business concerns and opportunities.[84]

The intergrationalist view seems to fit today's contracting better. Contractual relationships are long-term relational relationships, and all the different knowledge repositories are needed. This calls for mutual understanding and a multidisciplinary approach, both inter- and intrafirm. Each discourse community has its own expert domain and knowledge locus, but since the objectives are shared each team needs to keep their eye on the ball concerning other teams' whys, whats, and wherefores. This is not possible without interprofessional communication. Intradisciplinary 'lawspeak', 'salespeak', and so on, are possible in varying blends: interdisciplinary speak requires contractual multiliteracy and open dialogue.[85]

Somewhere in between safeguarding, coordination, adaptability and integrity, knowledge communities meet in contracting. Contractual multiliteracy is the requirement already today and more so in the future. What we need now is more research on contractual realities to see whether there is a fit between the word and the world.

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[84] George Siedel, 'The Cfo, Shareholder Value Creation, and the Law' *Corporate Finance Review*, Vol 11(1) 5 (2006-07-01).

[85] See (n 66).

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