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PROMOTING BUSINESS SUCCESS THROUGH CONTRACT VISUALIZATION

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INTRODUCTION

With the tremendous growth of outsourcing and networking, inter-firm contracts have increased in both number and complexity. Several trends might explain this phenomenon. Component parts are being increasingly purchased from specialized suppliers in various parts of the world.[1] Firms are shifting from intra-firm vertical integration toward inter-firm collaborative processes, also called value-chain "disintegration".[2] The object of the contract—what is agreed upon—is becoming more indefinite and complex. For example, there has been a shift from readymade products to full-package services and life-cycle products.[3] Finally, competitive pressure is sharpening the focus on continuous improvement and innovation. Because innovation is increasingly collaborative in today's economy, customers, and users play a key role as innovation co-creators.[4]

The emerging organizational networks and new business models need to be supported by contracts prepared in accordance with these changing business goals.[5] How formal contracts impact transaction success, firm relationships, and ultimately individual and collaborative firm performance when two or more firms interact has mainly been examined under an economic lens.[6] Recent empirical research proves

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1 *See generally* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 436 (2009).

2 *See generally* Gary Gereffi et al., *The Governance of Global Value Chains*, 12 REV. INT'L POL. ECON. 78, 79–96 (2005); Timothy J. Sturgeon, *Modular Production Networks: A New American Model of Industrial Organization*, 11 INDUS. & CORP. CHANGE 451 (2002).

3 *See generally* Vaula Haavisto, *Contracting in Networks*, *in* 49 SCANDINAVIAN STUD. L., A PROACTIVE APPROACH 237, 244–45 (Peter Wahlgren ed. 2006) [hereinafter A PROACTIVE APPROACH].

4 *See generally* Matthew C. Jennejohn, *Collaboration, Innovation, and Contract Design*, 14 STAN. J.L. BUS. & FIN. 83 (2008); Haavisto, *supra* note 3.

5 *See generally supra* note 1.

6 Libby Weber, Kyle J. Mayer & Rui Wu, *The Future of Interfirm Contract Research: Opportunities Based on Prior Research and Nontraditional Tools* 123, *in* ECONOMIC INSTITUTIONS OF STRATEGY (Jackson Nickerson & Brian S. Silverman eds., 2009). *See generally* Oliver E. Williamson, *Why Law, Economics and Organization?*, 1 ANN. REV. L. SOC. SCI. 369 (2005).

the growing importance of contracts for the value chain of today's interconnected enterprises.[7] Accordingly, the contracting capabilities of companies and their legal resources become a potential source of competitive advantage.[8] A good contract should be not just an offensive or defensive risk management tool but a handbook for performance and a vehicle for mutually beneficial cooperation between the parties.[9]

Nevertheless, many business people still view contracts as a necessary time-consuming evil[10] or an administrative burden with which someone must be bothered. They would prefer to refer contract-related matters to legal professionals and just sign where necessary. The problem is not limited to standard forms and small print. In today's networked business, too many contracts that are much too long require more reading time than most managers can afford.

Furthermore, contracts contain concepts and language that non-lawyers often find overly complicated, obscure, and unappealing. This is because most contracts seem to be written by lawyers for lawyers. Lawyers and the language they use are part of the problem. When law students learn legal writing and are advised to write for their audience, the "audience" refers to judges, arbitrators, and opposing lawyers in a dispute. No wonder lawyers write as if the users of contracts were only judges and other lawyers. On top of this, of course, they get paid twice: once for drafting contracts that only the lawyers understand, and again for interpreting what these contracts mean.[11]

So business people may enter into contracts every day without examining them, becoming accustomed to not worrying about whether or not they understand them. In fact, the problem is seldom an actual inability to understand, but instead a reluctance to make the effort. Some managers may believe that if a contract was prepared or reviewed by a lawyer, then there is little need for another review. Others may perceive the utilization of a detailed written contract as a signal of mistrust of the other party. Some managers may view the terms of the contract as little more than an emergency reference if unexpected contingencies arise. They believe they understand the agreement's "true terms", thus they feel no need to thoroughly consider the written language.

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[7] *E.g.*, KAISA A.E. SORSA & TARJA SALMI-TOLONEN, CONTRACTING IN TRANSITION (Apr. 16, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1120919; Soili Nysten-Haarala et. al., *Contracting Capabilities in Industrial Life-Cycle and Service Business* (research summary), at 3, *available at* http://wanda.uef.fi/oikeustieteet/siviili/CCC%20Research%20Report.pdf (last visited Dec. 29, 2010).

[8] George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641, 667–68 (2010); Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 728 (2010); Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378, 383 (2008); Nicholas Argyres & Kyle J. Mayer, *Contract Design as a Firm Capability: An Integration of Learning and Transaction Cost Perspectives*, 32 ACAD. MGMT. REV. 1060, 1061 (2007).

[9] *E.g.*, R.J. Smith, *Risk Identification and Allocation: Saving Money by Improving Contracts and Contracting Practices*, 12 INT'L CONST. L. REV. 40 (1996).

[10] *See* Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457 (2000).

[11] *See generally* Steven Weatherley, *Pathclearer: A More Commercial Approach to Drafting Commercial Contracts*, L. DEP'T Q., Oct.-Dec. 2005, at 39, *available at* http://www.iaccm.com/members/library/files/pathclearer%20article%20pdf.pdf (last visited Dec. 4, 2010).

Such approaches to contracting are harmful and can impose unnecessary risks and costs on the parties. We argue that it is important for business people to actually read and understand the contracts they enter into. This is particularly true if contracts are drafted by lawyers who are not involved in the underlying business decision, or do not know the details of the negotiation between the business partners or their long-term business objectives. As a consequence, these contracts may not properly reflect the underlying business goals. Furthermore, lawyers typically view contracts from the perspective of legal risk management. They are trained in litigation and draft contracts in a way to protect their client's interest and minimize risk in the event of nonperformance. Conventional contracts often neglect the cooperative element of modern inter-firm relationships. We propose a new proactive vision of contracting that is directed towards using contracts and the law as a strategic tool, improving business outcomes, creating value, and preventing problems through close collaboration between lawyers and business managers.

In this article we first describe the proactive, ex ante approach to contracting and law[12] and its foundation in the emergent research field of law and strategy and organizational contract research. As clarity and a shared understanding is a prerequisite for this proactive and collaborative approach to contracting, we then introduce our metaphor, contracts as *visible scripts* for the parties to follow. Finally we inquire into whether the visualization of contracts, the description of their scope and terms through visual means rather than the written word, can have a beneficial impact on the contracting process and the value capacity of organizations.

Rather than reviewing court cases examined elsewhere about ignorance or reluctance to read contracts or the consequences,[13] we inquire into the question of whether visuals can aid individuals to read contracts regardless of their legal background. We also address whether visuals can increase comprehension of key contractual terms. In addition, we consider whether such visual scripts can aid the use of contracting processes and documents proactively to promote business success.

Thus, the intent of this article is not to propose that visual contracting fits every occasion or that graphics be integrated into every commercial agreement. Neither do we suggest that visuals should become a binding legal element of the contract, but rather an illustration of the scope and terms and a means of communication between different professions, especially lawyers and non-lawyers. The practice and discipline are far too new and the necessary research far too sparse to argue for a broader implementation. Rather, the purpose of this paper is to discuss the structural weaknesses inherent in traditional commercial contracting, examine the potential of visual contracting, and provide some specific applications where visualization tools might be most effective or most easily applicable in commercial practice. With this work we also hope to bridge the gap between literature on visualization that is gaining momentum amongst scholars in Europe and a North American academy which may be less informed of the power of legal

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[12] *See generally* A PROACTIVE APPROACH TO CONTRACTING AND LAW (Helena Haapio ed., 2008); A PROACTIVE APPROACH, *supra* note 3 (collecting articles about this topic).

[13] *See, e.g.*, Scott J. Burnham, *How to Read a Contract*, 45 ARIZ. L. REV. 133, 133–34 (2003).

visualization techniques.

Visualization techniques have already been studied to good effect through improving the comprehension of jury instructions via the use of flowcharts[14] or other illustrations,[15] the use of visual and audiovisual evidence in court proceedings,[16] and the use of decision trees to facilitate making complex decisions. Visualization tools might be similarly useful outside the trial scenario. For example, visualization can illustrate whether to sue or settle, by graphically illustrating the options, probabilities, and possible outcomes.[17] The more questions that researchers ask, and the more opportunities that are brought that can possibly benefit from contract visualization, the more rapidly this field will grow beyond its embryonic state into a useful area of study and practice.

I. THE PROACTIVE APPROACH TO LAW AND CONTRACTING

Legal certainty is an important factor in facilitating successful business transactions.[18] Contracts are expected to provide businesses with predictable outcomes and legal certainty. Yet contract interpretation remains the largest single source of contract litigation between business firms.[19] Sometimes when we look at court cases or complex contracts it seems that business people are ordered to tread through unknown regions to find the safe routes. It is too late when they hit a minefield; it is not in businesses' interest to develop case law around disputes which should have been avoided. Instead, businesses need to recognize the "mines" in advance and prevent them from causing harm.[20] This is where the proactive approach enters the picture. The word "proactive" implies action and a forward-looking, *ex ante* focus. Being proactive is the opposite of being reactive or passive. It involves acting in anticipation, taking control, and self-initiation, instead of reacting to failures and shortcoming as traditional law usually does.

The idea of an *ex ante* view or proactivity in law is not new in itself. It has been known for years that the earlier a dispute or a potential dispute is addressed,

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[14] *See generally* Carolyn Semmler & Neil Brewer, *Using a Flow-Chart to Improve Comprehension of Jury Instructions*, 9 PSYCHIATRY PSYCHOL. & L. 262 (2002).

[15] *See generally* Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 LAW & PSYCHOL. REV. 67 (1998).

[16] *See generally* Colette R. Brunschwig, *Towards Visual and Audiovisual Evidence in Criminal Proceedings*, MMR-Aktuell 2010, 308737 (2010), *available at* http://rsw.beck.de/rsw/shop/default.asp?sessionid=C8727C3673324A8CBEEC095D18579530&docid=309085&docClass=NEWS&site=MMR&from=mmr.root.

[17] *E.g.*, George J. Siedel, *Interdisciplinary Approaches to Alternative Dispute Resolution*, 12 J. LEGAL STUD. EDUC. 141, 154–61 (1992).

[18] *E.g.*, Nigel J. Jamieson, *Codes, Contracts, and Commerce: The Contractual Mistakes Act Part II: Releasing More Light than Heat*, 31 STATUTE L. REV. 107, 115 (2010) ("Objectivity and certainty are among the avowed measures of contract law no less than consistency is required for commerce and continuity for business practice . . . ."); Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM. & MARY L. REV. 1055, 1133–34 (2004) ("Legal certainty . . . is a valuable asset that facilitates business and investing . . . .").

[19] Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928 (2010).

[20] Helena Haapio, *Introduction to Proactive Law: A Business Lawyer's View*, *in* A PROACTIVE APPROACH, *supra* note 3, at 21.

the better the chances of a fair and prompt solution. In the context of practicing law, the idea of prevention was first introduced by Louis M. Brown, himself an experienced practitioner as well as a law professor. In his ground-laying treatise *Preventive Law* published in 1950, he states a simple but profound truth that has not lost any of its value. Indeed, many attorneys and in-house-counsel actually act according to this motto: "It usually costs less to avoid getting into trouble than to pay for getting out of trouble."[21] To this *preventive* dimension (preventing what is not desirable, keeping problems and risks from materialising) proactive law adds a second aspect which is often neglected in traditional law—the *promotive* (or positive, constructive) dimension (promoting what is desirable; encouraging good behavior). Louis M. Brown's work on preventive law was targeted toward lawyers. While influenced by his work, the proactive law approach emphasizes the importance of collaboration between legal professionals and other disciplines. In the words of Soile Pohjonen,

> [Preventive Law] favors the lawyer's viewpoint, i.e., the prevention of legal risks and problems. In Proactive Law, the emphasis is on achieving the desired goal in particular circumstances where legal expertise works in collaboration with the other types of expertise involved. In Proactive Law, the need for dialogue between different understandings is emphasized.[22]

The approach specifically called *proactive law* emerged in Finland in the late 1990s. The first publication relating to the approach was a paper entitled "Quality Improvement through Proactive Contracting" that Helena Haapio presented at the Annual Quality Congress of the American Society for Quality in Philadelphia in 1998.[23] This paper was followed by a series of publications and the first proactive law conference, which was held in Helsinki in 2003.[24]

A central figure in the field is the Nordic School of Proactive Law, a network of researchers and practitioners from Denmark, Finland, Iceland, Norway, and Sweden, each of whom has an interest in proactive law. The Nordic School was instrumental in the creation of the ProActive ThinkTank, led by a core team from Denmark, Finland, France, the Netherlands, and the United Kingdom.[25] The

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[21] LOUIS M. BROWN, PREVENTIVE LAW 3 (1950).

[22] Soile Pohjonen, *Proactive Law in the Field of Law*, in A PROACTIVE APPROACH, *supra* note 3, at 53; *see also* Soile Pohjonen, *Law and Business – Successful Business Contracting, Corporate Social Responsibility and Legal Thinking*, TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND (JFT) 470, 477 (2009), *available at* http://www.helsinki.fi/oikeustiede/omasivu/pohjonen/Law%20and%20Business.pdf.

[23] Helena Haapio, *Quality Improvement through Proactive Contacting: Contracts are Too Important to be Left to Lawyers!*, 52 PROC. OF ANN. QUALITY CONGRESS 243 (1998), *abstract available at* http://www.asq.org/qic/display-item/index.html?item=10690&item=10690. This paper was also published as Helena Haapio, *Preventive Lawyering in International Sales – Using Contract Reviews to Integrate Preventive Law, Risk Management, and Quality*, PREVENTIVE L. REP., Winter 1997/1998, at 16. The two sessions where this paper was presented were graphically recorded by Annika Varjonen. The graphical notes ("visualizations") are on file with the authors.

[24] Selected conference papers were published in the Summer 2003 issue of the Preventive Law Reporter.

[25] Helena Haapio, *Introduction to Proactive Law: A Business Lawyer's View*, *in* A PROACTIVE APPROACH, *supra* note 3, at 26; *see also Welcome to the website of the Nordic School of Proactive Law*, NORDIC SCHOOL OF PROACTIVE LAW, http://www.proactivelaw.org (last visited Oct. 25, 2010); *Proactive ThinkTank*, NORDIC SCHOOL OF PROACTIVE LAW, http://www.proactivethinktank.com (last visited Oct. 25, 2010); *ProActive ThinkTank Home Page*, INTERNATIONAL ASSOCIATION FOR

mission of the ThinkTank is to provide a forum for business leaders, lawyers, academics, and other professionals to discuss, develop, and promote the proactive management of relationships, contracts, and risks and the prevention of legal uncertainties and disputes.[26] Among the publications following conferences organized by the Nordic School are three English language books, *A Proactive Approach*,[27] *Corporate Contracting Capabilities*,[28] and *A Proactive Approach to Contracting and Law*.[29] Some of the early work of the Nordic School is available in Finnish or Swedish only.[30]

After initial developments in the Nordic countries, the proactive approach started to awaken interest outside Scandinavia, first in Europe and later in other countries, leading to conferences[31] and publications[32] on a broader scale. Through these and the International Association for Contract and Commercial Management (IACCM), information about the approach reached pioneers of Law and Strategy and Law and Competitive Advantage, emerging fields in the United States. This expanded the already existing close collaboration between the promoters of preventive law and proactive law to new fields and led to first attempts to trace the history of these parallel developments and to merge their common themes.[33]

The importance of exploring the proactive law approach further was recently recognized in the European Union, in the Opinion of the European Economic and Social Committee (EESC) on "The proactive law approach: a further step towards better regulation at EU level", published on July 28, 2009 in the Official Journal of the European Union in all EU languages.[34]

A contract designed according to the idea of proactive law aims, first of all, at helping the parties reach their objectives so as to implement their strategy and

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CONTRACT AND COMMERCIAL MANAGEMENT, http://www.iaccm.com/proactive (last visited Oct. 25, 2010).

[26] *ProActive ThinkTank Mission Statement*, NORDIC SCHOOL OF PROACTIVE LAW, http://www.juridicum.su.se/proactivelaw/main/thinktank/missionstatement.pdf (last visited Oct. 25, 2010).

[27] A PROACTIVE APPROACH, *supra* note 3.

[28] CORPORATE CONTRACTING CAPABILITIES, CONFERENCE PROCEEDING AND OTHER WRITINGS (Soili Nystén-Haarala ed., 2008). This publication contains a collection of academic papers presented at the third Proactive Law Conference held on June 13-16, 2007, under the title "Commercial Contracting for Strategic Advantage: Potential and Prospects" in Turku, Finland.

[29] *See supra* note 12.

[30] *E.g.*, ENNAKOIVA SOPIMINEN – LIIKETOIMIEN SUUNNITTELU, TOTEUTTAMINEN JA RISKIEN HALLINTA [Proactive Contracting – Planning, Implementing and Managing Risk in Business Transactions] (Soile Pohjonen, ed., 2002); EX ANTE – ENNAKOIVA OIKEUS [Ex ante – Proactive Law] (Soile Pohjonen, ed., 2005).

[31] *See* Lexpert, Public Courses and Workshops, http://www.lexpert.com/en/encourses.htm (last visited Dec. 9, 2010) (listing various conferences and workshops that had material discussing the proactive approach).

[32] *E.g.*, THOMAS D. BARTON, PREVENTIVE LAW AND PROBLEM SOLVING: LAWYERING FOR THE FUTURE (2009).

[33] *See* Siedel & Haapio, *supra* note 8, at 644, 667–68 (applying concepts from these movements to the contracting process and illustrating opportunities to create new value and innovate in areas often neglected by managers); s*ee also* GEORGE SIEDEL & HELENA HAAPIO, PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE (2011).

[34] *See* Opinion of the European Economic and Social Committee on 'The proactive law approach: a further step towards better regulation at EU level', 2009 Official. J. Eur. Union, July 28, 2009, at C 175/26, § 4.2, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:175:0026:0033:EN:PDF.

business plan in the way they themselves want. In today's business world, the object and scope of the contract—what the contract is about and what is agreed upon—are becoming more complex. Contracts need to help manage this complexity and guide the parties towards their goals despite it. The proactive law approach changes the focus from *contract law* to *contract implementation* and the *contracting process*. This is typically part of a business process, such as a sale-and-delivery process or procurement process. Here, business managers, not lawyers, are the owners of the process, and the contract becomes more of a management tool than a legal tool.[35]

A proactive contract is crafted for the parties, especially for the people in charge of its implementation in the field, not for a judge who is supposed to decide about the parties' failures. Instead of providing the most advantageous solution for one of the parties, in case of the failure of the other party to comply with its contractual obligations, the proactive contracting process and documents seek to align and express the interests of both sides of the contract in order to create value for both. For example, in an international sales contract, instead of unilaterally insisting on the use of one party's domestic law as the applicable law to the contract, the parties may agree on the use of a neutral third country's law, including the United Nations Convention on Contracts for the International Sale of Goods (CISG), if this reveals to be more appropriate to govern their international dealings.[36]

If nevertheless problems arise, a proactive contract helps the parties work together to guide their collaboration back on track so problems do not develop into conflict or dispute. For example, instead of providing for penalties in case of non-performance or late delivery, a proactive contract may oblige the non-conforming party to give notice, in order to allow the other party to take appropriate measures and avoid negative consequences. If a dispute is inevitable, the contract provides the most appropriate means to control and resolve it. In the framework of proactive contracting, mediation will often provide an appropriate means of dispute resolution.

Because proactive contracting is collaborative, a proactive contract seeks clarity and to enable all involved parties to understand the meaning, expectations, and obligations of the terms. The goal of proactive contracting is friction-free collaboration with predictable outcomes, successful business relationships, and no negative surprises. Therefore, proactive law recognizes the need for the contracting team to be interdisciplinary and encourages early collaboration between all stakeholders in the contracting process. Early involvement in the process increases the likelihood of the contract being understood as intended and makes implementation easier. It is also likely to improve the effectiveness and integrity of the contracts a company creates.

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[35] *See* Helena Haapio, *Business Success and Problem Prevention Through Proactive Contracting*, *in* A PROACTIVE APPROACH, *supra* note 3, at 149, 152–53 (discussing proactive contracting and commenting that, "[f]irst and foremost, it is about the conscious use of contracts and contracting processes as management tools which guide and support the success of the client's business."); *see also* Siedel & Haapio, *supra* note 8, at 655–66; SIEDEL & HAAPIO, *supra* note 33.

[36] For detailed information on the CISG, see Pace Law School, Institute of International Commercial Law, http://www.cisg.law.pace.edu/ (last visited Dec. 9, 2010).

One typical challenge is the managerial–legal divide or disconnect between the sales or procurement process, of which making the contract is part, and then the post-award implementation and management of the contract. At the contract preparation stage, the business substance of the contract (technology, scope, deliverables, project plan, schedule, resourcing, pricing, and so on) is typically not a lawyer's main concern. What is significant in proactive contracting is the recognition of the fact that contracts are made for business reasons, in order for the parties to reach their goals. Contracts are made to help the parties implement business strategy and create value—not just to allocate risk or to avoid failure as some lawyers focus on. At a recent Corporate Counsel Exchange in The Hague, the roundtable participants felt that most agreements are "fit for purpose" from a purely legal perspective, but were much less confident that they meet the commercial needs and interests of the parties. The result of such an attitude is that buyers are frequently disappointed with outcomes and sellers are frequently disappointed with profitability.[37] The proactive approach and visualization can alleviate these unwanted outcomes.

As noted earlier, firms expect contracts to provide predictable outcomes, yet contract interpretation is the largest source of business-to-business contract litigation.[38] People are reluctant to read contracts—and for good reason.[39] We identify two reasons for this reluctance to read contracts, and the lack of understanding in the contracting process. The first is the lack of clarity often inherent in legal language, or complexity of the legal concepts, which non-lawyers—and sometimes even lawyers—are not able to understand. The second reason is "contractual illiteracy" of the non-lawyers participating in the contracting process. This means the lack of a basic legal knowledge, or the ability to recognize a contract and fully understand contractual terms. Part of this phenomenon may be busy business people's "contractual aliteracy", or an unwillingness to read contracts, despite the individual's capability to do so. A discussion of contractual literacy is the subject of the next section of this article.

II. THE IMPORTANCE OF CONTRACTUAL LITERACY

A. Contractual Literacy

Few managers—or people who are not lawyers in general—have formal training in how to read contracts or why they should do so. This is somewhat surprising, taking into account the important role contracts play in today's business. Managers sometimes fail to recognize a contract if there is no signed formal document bearing the title "contract" on it.

The proactive approach suggests that contracts are not only about risks and contingencies, a kind of legal risk insurance policy in case one party does not

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[37] Tim Cummins, *Contract Integrity on the Line*, COMMITMENT MATTERS (Oct. 26, 2010), *available at* http://tcummins.wordpress.com/2010/10/26/contract-integrity-on-the-line/.

[38] Schwartz & Scott, *supra* note 19, at 928.

[39] Burnham, *supra* note 13, at 133.

perform, but they are also the *visible script* for the parties to follow in their business relationship, a management tool helping the parties to reach their goals. It is not enough that lawyers read and understand contracts. Nor is it enough that lawyers plan or craft contracts alone. Contractual literacy is required of everybody involved, especially of managers and engineers.[40]

Crafting today's business contracts often requires subject matter (business, technical, and contextual) and legal expertise. Macneil and Gudel divide contract planning into two main dimensions, performance planning and risk planning.[41] The first dimension, as we see it, is about the core of the relationship and the parties' goals: translating goals and shared expectations into contracts which secure business success, ensure desired outcomes, and balance risk with reward. The second is about risk and contingencies: contract terms dealing with failure, risk allocation, Force Majeure, liabilities, remedies, and dispute resolution. For companies to succeed, managers and lawyers need to engage in group learning.[42] Otherwise, there is a real danger that, echoing Stewart Macaulay, there is a huge gap between the contract as written ("the paper deal") and the true agreement ("the real deal").[43]

In their case study, Argyres and Mayer show that much of the knowledge regarding, for instance, how to design roles and responsibilities provisions in contracts resides in managers and engineers, rather than legal professionals.[44] Once put together, contracts need to be easy to understand for delivery teams and business and project managers responsible for implementation. Companies need to learn to contract, and cross-professional collaboration is called for.[45]

The express terms of a contract—we call them *visible terms* here—can get quite complicated, especially in international business. Apart from the visible terms, lawyers and managers alike need to develop an understanding of what we call the *invisible terms*.[46] Those are hidden terms, such as default rules contained in statutory provisions, which apply in the case the contract remains silent. The lawyer knows these terms, the non-lawyer does not. Therefore, the fact that a contract remains silent may not necessarily mean that the parties to the contract want the statutory default rule to apply. Rather, it may simply mean the parties did not know about this "invisible term" because it was not mentioned to them by their lawyer, or they were acting without a lawyer, for example when using standard terms and conditions. To take another example, sometimes the CISG applies to a

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[40] *See also* Bagley, *supra* note 8, at 383.

[41] *See generally* IAN R. MACNEIL & PAUL J. GUDEL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS (3d ed. 2001).

[42] Jeanne M. Wilson, Paul S. Goodman & Matthew A. Cronin, *Group Learning*, 32 ACAD. MGMT. REV. 1041 (2007).

[43] Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, *in* IMPLICIT DIMENSION OF CONTRACTS: DISCRETE, RATIONAL AND NETWORK CONTRACTS 51, 51 (David Campbell et al. eds., 2003).

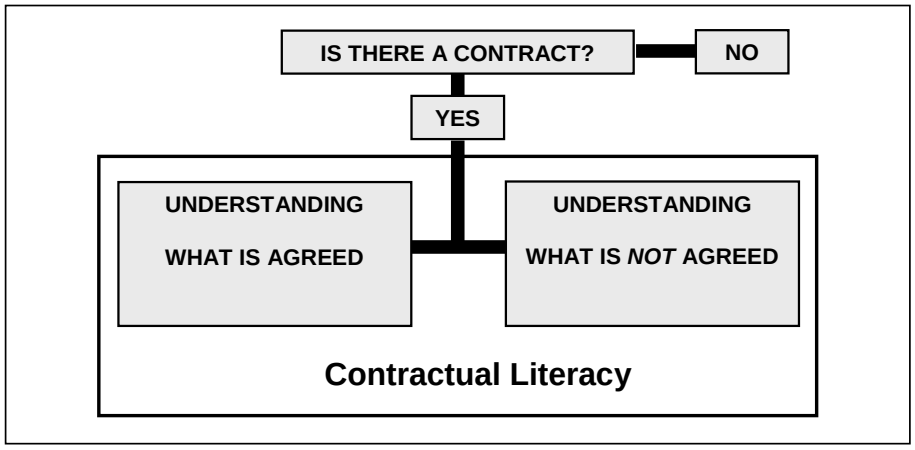
[44] Argyres & Mayer, *supra* note 8, at 1065–66.

[45] *See id*. at 1073–74; Nicholas Argyres & Kyle J. Mayer, *Learning to Contract: Evidence from the Personal Computer Industry*, 15 ORG. SCI. 394, 396 (2004).

[46] Helena Haapio, *Invisible Terms in International Contracts and What to Do About Them*, CONTRACT MGMT., July 2004, at 32, *available at* http://www.ncmahq.org/files/Articles/81EEB_cm_July04_32.pdf.

contract without the parties being aware of that fact.[47] As somebody trained in conflict of laws knows, a choice of law clause directing towards the law of a CISG member state includes the CISG as part of this member state's national law.[48] Legally untrained international business partners may be unaware of the CISG applying to their contract without them choosing it expressively, and even less do they probably know about the CISG's content and its provisions different from the UCC (or whatever their domestic sales law may be) they might be accustomed to. Trade usage and practice may become part of the contract as well, without any mention being made about it in the written agreement. These invisible terms may bring along requirements, liabilities, and remedies that the parties did not know existed, even if they had read the contract carefully. In the interest of legal certainty, contractual literacy requires understanding of both the visible and the invisible terms, as illustrated by Figure 1.[49]

Figure 1: Contractual Literacy



Contracts drafted by continental-European lawyers from the civil law tradition are usually shorter than their common law counterparts.[50] In civil law countries, such as Germany, France, Italy, Spain, Russia, South America, and many Asian jurisdictions, the predominant legal source is written law, such as statutes and

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[47] *See* Gilles Cuniberti, *Is the CISG Benefiting Anybody?*, 39 VAND. J. TRANSNAT'L L. 1511, 1541 (2006). The author states: "Because the parties are generally unsophisticated, they do not appreciate the importance of the legal rules governing their contracts to such an extent that they neglect to include a choice of law clause in their contract. The parties probably do not even know which law applies to their contract, making it hard to see how they could be aware of the applicability and content of the CISG. It may be that if the parties were told the content of a given provision in the CISG and told that they could opt out of it, they would actually do so, but that just does not happen."

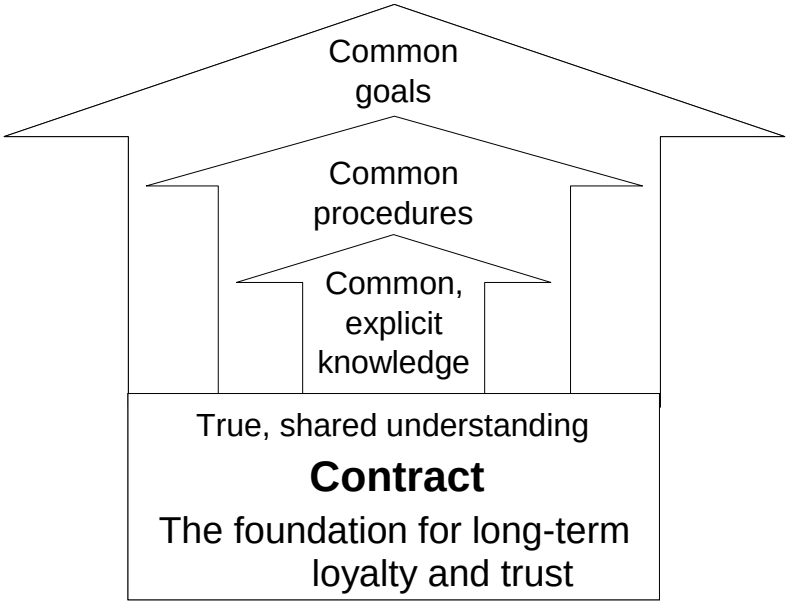
[48] *E.g.*, Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1149–50 (N.D. Cal. 2001) (explaining this principle).

[49] Haapio, *supra* note 35, at 170.

[50] Ethan S. Burger, *International Legal Malpractice: Not Only Will the Dog Eventually Bark, it Will Also Bite*, 38 ST. MARY'S L.J. 1025, 1039 (2007) ("As a general rule, contracts to be executed in civil law countries are significantly shorter than in common law jurisdictions."); *see also* Charles E. Meacham, *Foreign Law in Transactions Between the United States and Latin America*, 36 TEX. INT'L L.J. 507, 510 (2001).

codes, in contrast to case law in common law jurisdictions like the US.[51] For this reason, when drafting contracts, civil law lawyers tend to rely on statutory law and remain silent on issues that are implied by law. For example, when working for the buy-side in a sale of goods transaction, they may find no need to deviate from the buyer-friendly provisions of statutory law. Yet if the supplier is not aware of these provisions, negative surprises can follow. We believe that successful long-term relationships should be built on a sound contractual foundation, where both parties know the applicable requirements, rights, responsibilities, and remedies. In order to enhance a better understanding of contracts and to make contracts a visible script or a route map for the business relationship, even the "invisible terms" need to be made "visible" to the parties to the contract in a meaningful way. Only then can the contract work as a foundation for long-term loyalty and trust, as illustrated in Figure 2.[52]

Figure 2: Good-quality Contracts: Foundation for Long-term Loyalty and Trust



III. VALUE, LIMITATIONS, AND PRACTICAL EXAMPLES OF VISUALIZATION

The concept of proactive contracting as described in the first part of this article is collaborative and based on interdisciplinary communication and understanding. The goal is to prevent legal problems from arising and ultimately to create value for both parties of the contract, through the elaboration of common

[51] *See generally* J.H. MERRYMAN, THE CIVIL LAW TRADITION (2d ed.1985). For information about the status of a nation's legal system, see University of Ottawa, JuriGlobe – World Legal Systems Research Group, http://www.juriglobe.ca/eng/index.php (last visited Dec. 3, 2010).

[52] Haapio, *supra* note 35, at 163.

procedures, resulting in the realization of common goals. Potential problems need to be explicitly addressed in order to develop a shared knowledge that allows the development of collaborative business procedures. As illustrated in Figure 2 above, a prerequisite for achieving these common goals is a true, shared understanding between the business partners of both the technical and the legal implications of their contractual relationship. Proactive contracting therefore seeks to provide clarity and cross-professional understanding. In order to achieve this common understanding, it is necessary that all stakeholders in the contracting process actually read and comprehend the underlying contractual provisions. However, traditional contracts typically are written by lawyers for lawyers, and non-lawyers—the people who need to implement these contracts—find them hard to understand and ambiguous and, therefore, sometimes even refrain from reading them. In the following part we introduce the idea of legal visualization to foster this interdisciplinary understanding of contracts, which, to us, is a crucial element for a successful proactive business relationship.

A. The Value and Limitations of Visualization

As Ronald Gilson explains, business lawyers play the role of transaction cost engineer in the consummation of transactions.[53] The goal for lawyers is to bridge the gap between the hypothetical world of perfect markets and the imperfect reality of the real-world transactions.[54] Visualization can play the role of a transaction cost reducing device by clarifying the risks and returns of the transaction through an enhanced understanding of the contract terms. Moreover, lawyers equipped with visualization skills can act as opportunity engineers helping their companies, along with their contracting parties, co-create new value.[55] Visualization can also play a role as a persuasion tool, both internally and externally, for the company.[56]

As noted earlier, visualization techniques have been researched related to improving the comprehension of jury instructions through the use of flowcharts[57] or other illustrations.[58] In the domain of contract, visualization can be value enhancing for both parties. Skepticism certainly exists of the lawyer's trade. Whereas engineers increase the size and quality of the resource pie, many seem to think that the lawyer merely decides how to carve up the slices.[59] In the contract formation context, terms are commonly perceived as zero-sum arrangements. One modification of the negotiated terms, or even the environment surrounding the negotiation, benefits one party and injures the other. Instead of zero-sum negotiations, contract visualization has the potential to enhance the value of the

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[53] Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 253–56 (1984).

[54] *Id*. at 255.

[55] For an explanation of lawyers as opportunity engineers and legal departments as profit centers, see SIEDEL & HAAPIO, *supra* note 33.

[56] *E.g.*, Samuel H. Solomon, *Visuals and Visualization: Penetrating the Heart and Soul of Persuasion*, SM078 ALI-ABA 309 (2007).

[57] *See generally* Semmler & Brewer, *supra* note 14.

[58] *See generally* Dattu, *supra* note 15.

[59] *See* Gilson, *supra* note 53, at 307.

contract for both parties. A greater understanding of the business model-related contractual choices before commitments are designed and made increases the options for co-creating value and enhances clarity about the true meaning of what a contract's terms mean at the implementation stage, thereby reducing uncertainty and misinterpretation between the parties. Business managers and lawyers can plan the deal and relationship, design the related documents so these are aligned and compatible with one another, bargain with fuller information, and avoid reaching agreements that will create grounds for dispute during the contract's performance.

This is not to say, of course, that visualization is not without cost or limitation. Visualization tools cannot clarify every contractual option or term. Indeed, there may be some options or terms which visualization cannot helpfully illuminate. This may be due to their inherent complexity or because the written word conveys a certain logic that a contract term requires better than visual tools. There is also the risk that a transaction can be over-visualized. A simple flowchart can devolve into an impenetrable maze of arrows and conditions. The visualization of a small number of concepts or entities can clarify a document. The visualization of dozens of concepts or entities can confuse the reader and obfuscate the underlying purpose of the agreement.[60] Like all contract drafting tools, visualization has its bounded limits. Further, visualization can work and help the parties clarify their goals, business models, and terms only if the parties are willing to engage in the endeavor. After having made a contract where terms are inherently uncertain, there is no magic in visualization that can remove the ambiguity. Also, if the text of the contract contradicts with the visual representation of it, the visualization can create additional trouble, unless the parties agree which prevails.

While much of the focus of visual contracting and contract visualization examines the impact of visualization on the contracting process and the contract's terms, no less relevant is the impact of visualization on the individual interacting with the visualization. These tools can help viewers organize their ideas and comprehend the framework of a complex contract. They are most helpful, however, for right-hemisphere-dominant thinkers.[61] Such thinkers can more effectively visualize the spatial relationships between ideas.[62] As a result, the use of contract visualization tools must not only consider the process or document that is to be visualized, but the mental processes of those contributing to or working based on the visualization. One visualization size does not indeed fit all.

The problem with making the invisible visible in a contract is that it adds to the already problematic length of the contract. The concept of visualization we present next introduces an alternative way to present contract data, even legal information.

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[60] In the context of flowcharting as a classroom tool, see Greg Sergienko, *Using Instructional Design to Improve Student Learning*, 1 J. ASS'N LEGAL WRITING DIRECTORS 267, 276 (2002) ("[F]lowcharts become too visually cluttered to be useful in conveying a complex set of rules in one diagram.").

[61] Diane Murley, *Mind Mapping Complex Information*, 99 LAW. LIBR. J. 175, 179 (2007).

[62] *Id*.

B. Origins of Legal Visualization and Examples

The recent "contractualization" of business has caused practitioners and researchers to look into companies' contracting capabilities as a strategic resource and a potential source of competitive advantage.[63] When combined with a proactive approach and contractual literacy, contracts offer many opportunities to use proactive law for strategic advantage.[64] But in order to use contracts in this way, people's attitudes need to be changed.[65] Managers and engineers must overcome their reluctance to read contracts. In this respect, the visualization of legal information, an emerging research topic originating in Central European legal informatics,[66] combined with strategy visualization and non-textual communication in business more generally, seems to offer a promising new direction for contracting research and practice.

Visualization as a research topic itself is not new, but is still an emergent and highly fragmented research field. Research needs to be collected from such diverse fields as knowledge management, organization studies, human-computer interaction, diagram research, anthropology, small group research, cognitive psychology, information visualization, design studies, and architecture.[67] To date visualization is still lacking a comprehensive theory,[68] though the contributions of Hartmann and Fisher[69] and Eppler and Burkhard[70] clearly move into this direction, and business people commonly use visuals to communicate information and business goals.

While legal visualization is already largely used for educational purposes, and some practical examples in business related areas exist, the visualization of legal information as an academic research topic is relatively new and available research is sparse.[71] The idea of legal visualization is to use visual communication

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[63] Argyres & Mayer, *supra* note 8, at 1061; Argyres & Mayer, *supra* note 38; Siedel & Haapio, *supra* note 8, at 667–68.

[64] Proactive contracting and other areas of the law affecting managers are explored in greater depth in SIEDEL & HAAPIO, *supra* note 33.

[65] In order to change this attitude, a group of European universities, business schools, and other institutions are currently working on an ERASMUS curriculum development project on Proactive Management and Proactive Business Law (PAM PAL) funded by the Lifelong Learning Programme of the European Commission. *See ProActive Management and ProActive Business Law*, TURKU UNIVERSITY OF APPLIED SCIENCES, http://pampal.turkuamk.fi (last visited Oct. 28, 2010).

[66] *E.g.*, Colette Brunschwig, *Legal Design and e-Government: Visualisations of Cost & Efficiency Accounting in the* wif*! e-Learning Environment of the Canton of Zurich (Switzerland)*, 2456 LECTURE NOTES IN COMP. SCI. 430 (2002); Colette R. Brunschwig, *Visualising Legal Information: Mind Maps and e-Government*, 3 ELECTRONIC GOV'T, AN INTL' J. 386 (2006); *see also* RECHTSVISUALISIERUNG.NET, http://www.rechtsvisualisierung.net (last visited Oct. 25, 2010); *Welcome to Semiotics of Law*, SEMIOTICS OF LAW, http://www.semioticsoflaw.com (last visited Oct. 25, 2010).

[67] *E.g.*, Martin J. Eppler, *Toward a Visual Turn in Collaboration Analysis?*, 35 BUILDING RES. & INFO. 584, 585 (2007).

[68] *Id*.

[69] Timo Hartmann & Martin Fischer, *Supporting the Constructability Review with 3D/4D Models*, 35 BUILDING RES. & INFO. 70 (2007).

[70] Martin J. Eppler & Remo A. Burkhard, *Knowledge Visualization: Towards a New Discipline and its Fields of Application* (Universitá della Svizzera italiana, Paper No. 2/2004), *available at* http://doc.rero.ch/lm.php?url=1000,42,6,20051020100118-DI/1_wpca0402.pdf.

[71] One of the early exceptions is Matthew J. McCloskey, Comment, *Visualizing the Law: Methods for Mapping the Legal Landscape and Drawing Analogies*, 73 WASH. L. REV. 163 (1998).

tools to convey information in a way that makes the information easily accessible and understandable for the intended audience. While legal visualization is relatively new as a research field, in practice graphs and other visuals, even audio-visuals, are used more and more to explain legal concepts in legal education. They enhance the classroom experience for students who have grown up in a multi-media environment and seem to be less receptive to black and white text than former generations.[72] As far as these educational practices are being analyzed and new methods are being developed, an emerging research area in the field of visual legal education can be identified.[73]

The use of images and visual technologies has also been influential in court[74] and has been the subject of intriguing academic research.[75] Besides the use of visuals in legal education and the courtroom, academic research as well as practical use of legal visualization seems to primarily concern the visualization of laws and regulations. A useful example of visualization of legal information in this context is the Street Vendor Project carried out by Candy Chang, a designer, urban planner, and artist, in collaboration with the Center for Urban Pedagogy in New York. Having noted that the "rulebook [of legal code] is intimidating and hard to understand by anyone, let alone someone whose first language isn't English", they prepared a visual Street Vendor Guide called "Vendor Power!" that makes city regulations and rights accessible and understandable.[76] Figures 3A ("Before") and 3B ("After") illustrate the difference between text and visual guidance.

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[72] For an example of legal visualization in education, see Eric Hilgendorf, *DTV-Atlas Recht*, Band 2 (2008), *extract available at* http://www.bilandia.de/multimedia/dtv/Hilgendorf-Eric-9783423033251-leseprobe.html.

[73] A recent research project at the University of Edinburgh School of Law examined possibilities of "embodied legal learning." *Beyond Text in Legal Education*, THE UNIVERSITY OF EDINBURGH SCHOOL OF LAW, http://www.law.ed.ac.uk/beyondtext/ (last visited Oct. 25, 2010).

[74] For example, in one highly-publicized murder trial the Connecticut Supreme Court affirmed the use of a compelling multimedia montage in the closing arguments of the trial. State v. Skakel, 888 A.2d 985, 1067–70 (Conn.), *cert. denied*, 549 U.S. 1030, 1069 (2006) ("We therefore never have categorically barred counsel's use of such rhetorical devices, be they linguistic or in the form of visual aids, as long as there is no reasonable likelihood that the particular device employed will confuse the jury or otherwise prejudice the opposing party. Indeed, to our knowledge, no court has erected a per se bar to the use of visual aids by counsel during closing arguments."); *see also Case Illustrations: Criminal*, NEW YORK LAW SCHOOL, http://old.nyls.edu/pages/3981.asp (last visited May 24, 2010). *See generally* Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237 (2010). For additional examples of using visual and audiovisual material in court, see NEAL FEIGENSON & CHRISTINA SPIESEL: LAW ON DISPLAY, THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT (2009). The book is built around detailed studies of audio-visual displays used in actual cases.

[75] *See, e.g.*, FEIGENSON & SPIESEL, *supra* note 74, at xii, 196–211 (addressing the issue of whether digital pictures and multimedia are in general beneficial or harmful to the legal field and how the law can best accommodate them); s*ee also* Neal Feigenson & Meghan A. Dunn, *New Visual Technologies in Court: Directions for Research*, 27 LAW & HUM. BEHAV. 109 (2003); David Taiti, *Rethinking the Role of the Image in Justice: Visual Evidence and Science in the Trial Process*, 6 LAW, PROB. & RISK 311 (2007); *Visual Persuasion Project*, NEW YORK LAW SCHOOL (last visited Oct. 25, 2010).

[76] Candy Chang, *Street Vendor Guide*, C IS FOR CANDY, http://candychang.com/street-vendor-guide/ (last visited Oct. 28, 2010).

Figure 3A – Before Utilizing Visualization:

§20–465**Restrictions on the placement of vehicles, pushcarts and stands; vending in certain areas prohibited.** a. No general vendor shall engage in any vending business on any sidewalk unless such sidewalk has at least a twelve-foot wide clear pedestrian path to be measured from the boundary of any private property to any obstructions in or on the sidewalk, or if there are no obstructions, to the curb. In no event shall any pushcart or stand be placed on any part of a sidewalk other than that which abuts the curb.

b.No general vendor shall occupy more than eight linear feet of public space parallel to the curb in the operation of a vending business and, in addition, no general vendor operating any vending business on any sidewalk shall occupy more than three linear feet to be measured from the curb toward the property line.

c.No vending vehicle, pushcart, stand, goods or any other item related to the operation of a vending business shall touch, lean against or be affixed permanently or temporarily to any building or structure including, but not limited to lamp posts, parking meters, mail boxes, traffic signal stanchions, fire hydrants, tree boxes, benches, bus shelters, refuse baskets or traffic barriers.

d.No vending pushcart, stand or goods shall be located against display windows of fixed location businesses, nor shall they be within twenty feet from an entranceway to any building, store, theatre, movie house, sports arena or other place of public assembly.

e.No general vendor shall vend within any bus stop or taxi stand, or within ten feet of any driveway, any subway entrance or exit, or any corner. For purposes of this subdivision, ten feet from any corner shall be measured from a point where the property line on the nearest intersecting block face, when extended, meets the curb.

f.Each general vendor who vends from a pushcart or stand in the roadway shall obey all traffic and parking laws, rules and regulations as now exist or as may be promulgated, but in no case shall a general vendor vend so as to restrict the continued maintenance of a clear passageway for vehicles.

g. (1) No general vendor shall vend on any street which is in a C4, C5, or C6 zoning district, or in the area bounded on the east by Second Avenue, on the south by Thirtieth Street, on the west by Ninth Avenue and Columbus Avenue and on the north by Sixty-fifth Street, except that as chairperson of the street vendor review panel established pursuant to section 20–465.1 of this subchapter, the commissioner of the department of small business services or his or her designee may receive applications from any person, group, organization or other entity to permit general vendors on any street within said area or said zones, or to prohibit general vendors on any other street. Such applications shall be considered by the street vendor review panel in accordance with the procedures enumerated in section 20–465.1 of this subchapter.

(2) No general vendor shall vend on any street which is in the area including and bounded on the east by the easterly side of Broadway, on the south by the southerly side of Liberty Street, on the west by the westerly side of West Street and on the north by the northerly side of Vesey Street.

(3) Upon issuance of a new general vendor license or a renewal of an existing license, the commissioner shall provide a copy of subchapter twenty-seven of chapter two of this title and of the rules of the city of New York implementing such subchapter to such new or renewal licensee.[77]

[77] NEW YORK CITY, N.Y., ADMIN. CODE § 20–465, *available at* http://24.97.137.100/nyc/AdCode/Title20_20-465.asp.

Figure 3B – After Utilizing Visualization:[78]

Looking at the outcome of these and similar projects it is surprising that visualization is not more commonly used in business contracts, apart from exhibits containing technical product or service descriptions.[79] Business people usually are receptive to flowcharts, mind maps, and graphs and many use them on a daily basis. Why not use these tools to describe legal information in a way that helps provide a better understanding of visible and invisible terms in contracts so as to improve the contracting process and contract implementation? Academic and even professional literature in this field is scarce and, as far as we have identified, for now largely

[78] Excerpt from Street Vendor Guide, Accessible City Regulations. Courtesy of Candy Chang, *available at* http://candychang.com/street-vendor-guide/.

[79] In certain fields, such as construction and equipment supply, drawings and visuals are sometimes used in technical specifications and product and services descriptions attached as exhibits. For an example of the latter, see Advanced Energy Management Agreement, http://www.sec.gov/Archives/edgar/data/1372664/000119312507000742/dex101.htm (last visited Oct. 25, 2010).

descriptive[80] or pedagogical.[81] The aim of our future research would be to develop, test, and prototype visual ways to present contract information, beginning with core terms of certain frequently used contracts. We expect these visual representations to make contracts accessible and contractual choices easier. Most companies' current contracts are text-only, black and white, with no pictures, graphs, or examples. We see tremendous opportunities for improvement here. The parties could describe their areas of responsibility and interaction in infographs or images using existing design tools and methods. Contracts, work scope specifications, and so on, could be visualized for easier understanding and communication. In this way, we believe, a growing number of managers can become curious—even enthusiastic—about contracts and the law.

Contracts and contracting can be viewed through the analogy of a jigsaw puzzle. With a complex project in mind, Figure 4 shows contracting as a puzzle of technical, implementation, business, and legal parts, all of which must be consistent and coordinated.[82] With the help of a proactive approach and visualization, the pieces of the puzzle can be assembled so they form a complete picture, one where all the pieces are fit for purpose, aligned, and support successful implementation. The result: buyer's satisfaction with outcomes, seller's satisfaction with profitability, and no unnecessary disputes.

Figure 4: The Contracting Puzzle

IV. VISUALIZATION OF CONTRACTS AND THE EMPLOYMENT RELATIONSHIP

Another opportunity for readymade application contract visualization is in the employment context. Like most agreements, employment contracts are formed between two parties: the employer and the prospective employee. Unlike many business-to-business contracts, however, one side tends to hold the greater amount

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[80] Henry W. Jones and Michael Oswald, *Doing deals with flowcharts*, ACCA DOCKET (Oct. 2001); Henry W. (Hank) Jones III, *Envisioning Visual Contracting: Why Non-textual Tools Will Improve Your Contracting*, IACCM, *available at* http://www.iaccm.com/news/contractingexcellence/?storyid=949 (last visited Dec. 3, 2010); Katri Rekola & Helena Haapio, *Better Business Trough Proactive Productization and Visualization of Contracts*, IACCM, *available at* http://www.iaccm.com/news/contractingexcellence/?storyid=906 (last visited Dec. 3, 2010).

[81] FRANK JOHN DOTI, CONTRACT LAW FLOWCHARTS AND CASES: A STUDENT'S VISUAL GUIDE TO UNDERSTANDING CONTRACTS (2009).

[82] *See* SIEDEL & HAAPIO, *supra* note 33, at 122.

of knowledge about the relationship. Even small firm personnel commonly have experience with hiring and firing employees and may have greater knowledge about the legal regulation—including the invisible terms—of the employment relationship than the applicant. Many firms have human resource departments whose expertise is the administration and comprehension of employment regulation. The combination of human resource expertise plus the drafting skills of the lawyer produces an unexpected result: a standardized employment contract that is lengthy, convoluted, and thus inaccessible to the signing employee.

Contract visualization can help remedy this imbalance. Visualization tools can clarify important but complex topics such as pay periods, pensions, benefits, vacation time, sick time, commission rules and seniority systems. New employees will better understand the terms and conditions of employment from the outset. Unskilled employees, who may lack the education to comprehend the technical terms or the resources or time to contact a lawyer for guidance, would benefit most. Visualization would also assist employees whose comprehension of the language used in the contract is not particularly strong.

A contract visualization effort may also increase trust on behalf of the employee because she observes that the employer is taking steps to ensure that the agreement is clear and fully understood. The employer is declining to hide behind contract length or legalese. Visualization sends the message that the employment relationship is an equitable one with open and transparent channels of communication.

Clear communication at the outset can help reduce problems later. Employees who understand their rights will have less need to utilize human resources to answer questions or solve problems. Such employees may be less likely to demand time-consuming internal dispute resolution mechanisms because rights and obligations are more clearly understood. Visualization helps shift the contractual relationship at work away from a discrete money for wages transaction. In its place, employment shifts toward relational contract, one that is characterized by trust, shared commitment, and mutual goals, which can have numerous indirect benefits for the employer, such as greater productivity, increased loyalty, and higher organizational citizenship.[83]

The dispelling of all contractual uncertainty is not necessarily a complete benefit for every employer. Contract visualization can also trigger challenging questions. One example of such a dilemma is the constructed knowledge surrounding employment at will. Employment at will is the foundational rule of employment in the United States, permitting employees to fire employees for almost any reason, including a good reason, bad reason, or no reason at all.[84] This is a sharply different system than what is found in Europe, whereby employees can only be terminated for just cause.[85]

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[83] *See* Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 215 (2005).

[84] *Id*. at 196.

[85] *See* Frances Raday, *Individual and Collective Dismissal—A Job Security Dichotomy*, 10 COMP. LAB. L.J. 121, 132 (1989).

Although employment at will has been firmly in place for decades, many employees believe they have employment protections closer to the for cause employment found in Europe.[86] Thus, firms benefit from the loyalty that such employment certainty might bring without the associated costs of providing job security to workers.

Contract visualization could erase that benefit, however unearned it may be. One can imagine a visualized contract that highlights in picture the full discretion that employment at will provides to employers. Even though the employer may not condone unsupported firings, it might forcefully show the prospective employee how tenuous her hold on her livelihood really is. The employee might also see the concept as unfair and engender negative feelings before the employment relationship has even started. Ignorance might not be bliss, but contract visualization might produce some unsettling effects for an employer who would choose to use it in this situation. On the other hand, if the employer is willing to give its employees more than the law requires,[87] it may use contract visualization to highlight this when competing for access to key talent and a skillful workforce.

CONCLUSION

Recent research proves the growing importance of contracts for the value chain of today's interconnected enterprises. Given the economic importance of contracts for inter-firm relationships, we propose a new, proactive mindset that is directed away from risks, problems, losses, and failures, and towards improving business outcomes, creating value, and preventing problems. Contracts are expected to provide parties with predictable outcomes. While contracts should provide legal certainty, contract design is not just about the law. Its core is the *performance* the parties expect, not just risk and contingencies. In order to function as business and management tools, contracts must translate goals, expectations, and promises into a language that is understood in the way intended. Here, courts and opposing counsel are not the primary audience; people working in delivery teams implementing the contracts are. In order for contracts to translate into successful performance, the people in the field need to know what they are expected to do and refrain from doing. The business (performance) and legal (risk) related scripts, as presented in the contract, must be aligned to create a roadmap to be followed in the legal landscape of today's complex projects.

When an earlier version of this paper was presented at a conference, a session attendee inquired skeptically, "Does this mean that we now need a graphic designer every time we want to draft a contract?" The question was raised with the apparent implication that the very idea of visualization was unnecessary, but the query touches upon a fundamental issue of breath, depth, and utility that

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[86] *See generally* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

[87] The authors have used the story of Lincoln Electric Company as an example of a company that did something many companies have not been willing to do: it waived the at-will rights it had under US employment law and, instead, offered guaranteed employment for all full-time workers who had been there at least three years. *See* Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 35–36 (2008); SIEDEL & HAAPIO, *supra* note 33, at 652–53.

visualization scholars must answer for.

To reply to this skeptical conference attendee, we answer in the negative. A graphic designer will not become a veritable "visual legal counsel" that firms routinely require for every commercial transaction. Yet, this does not mean that contract visualization has no role to play. Far from it, the potential for contract visualization tools is intriguing. If a visualized agreement can reduce uncertainty, increase trust, and reduce disputes between the parties, then the practice of visualization is a beneficial contracting tool as important as arbitration clauses, choice of quality legal counsel, or the conventional risk allocation measures—which are all more concerned with preparing for future failure rather than ensuring success.

Before contracts and visualization can be used in this way, people's attitudes need to change. Managers and engineers must overcome their reluctance to read contracts, and lawyers must change their decades old text-only-communication habits. Only then can they engage in the true managerial-legal group learning and collaboration required for today's contracting success.

Translating goals and expectations into contracts which secure business success, ensure desired outcomes, and balance risk with reward is not an easy task. Relying on recent empirical research, this paper suggests that the planning and design of contract terms is a co-creative effort, best entrusted to business professionals working together with legal professionals. Contractual literacy and visualization of legal information can help cross-professional communication, so that contractual choices become easier to make and contracts are easier to design, understand, and use, for legal and business professionals alike.