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Making Contracts Work: Playing a Game for Enhanced Managerial-Legal Collaboration

In today's networked economy, businesses increasingly rely on others to provide products and services for them. As timelines get shorter and inventories are kept to the lowest possible level, companies become more and more dependent on each other — and on the effective management of contracts. Contracts have an impact on profits, rights, cash flow, costs, and risks. It is not enough that lawyers master contract law. Lawyers need to understand how contracts work in business. Business managers, in turn, need to know how contract law relates to the business. Despite the importance of contracts as a means to balance risk against profits many managers leave it to the lawyers to take care of contracts and many lawyers leave it to the managers to take care of profits. To assure success, managerial-legal collaboration is required. Yet it is not always easy to engage people in cross-professional communication and make sure they speak the same language. Over the years, we have come to appreciate the possibilities that simulation, visualization, and gamification hold to enhance the learning of contracts and law in action. These approaches offer a means to make lawyers and management understand how contracts impact business strategy. This paper introduces CREW, a web-based game which enables lawyers and business managers to engage in group learning about the business impact of contracts. It illustrates how playing a game can engage people, enhance managerial-legal collaboration and help the players prevent and resolve contract problems.

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Contents

- 1 The Challenge
- 2 Responding to the Challenge
 - 2.1 Merging Simulation and Visualization in Contract Education
 - 2.2 Example: Using Visualization to Bridge the Gaps in the Contracting Process
 - 2.3 Gamification in Contract Education
 - 2.4 Example: Playing CREW, a Game for Enhanced Contract Learning
- 3 Conclusions
- 4 References

1 The Challenge

[Rz 1] Contracts govern companies' deals and relationships with their suppliers and customers. They impact future profits, rights, cash flow, costs, and risks. No one can remain in business without making contracts. Whether involved in sales, procurement or projects, many managers and professionals find themselves preparing or reviewing contracts, requests for proposals and quotations. Very few have received training in the area or have the confidence that comes with mastering the topic.

[Rz 2] Most lawyers are not trained in *contracts* — they are trained in *contract law*. They are trained to look at contracts through the eyes of a judge who might eventually have to rule on a contract dispute. Apart from the difference between *academic law* and *law in action* there seems to be a major gap between *contract law* and *contract practice* (MITCHELL 2013). Traditional law teachers have equated contracts with *contract litigation*, and the discussion about *using contracts* has been mostly about applying them in court, reactively, *ex post*, after a dispute has arisen — much less about using contracts in business (HAAPIO 2013a and 2013b). Some academics in law do not consider contract terms as law and consequently do not include the understanding of contract terms in the curriculum.

[Rz 3] Although it is important for lawyers to know about dispute resolution, it has been known for a long time that legal skills can be useful in *preventing* disputes. In the context of practicing law, the idea of prevention was first introduced by LOUIS M. BROWN, a US attorney and law professor. One of his fundamental premises was a simple but profound truth: «It usually costs less to avoid getting into trouble than to pay for getting out of trouble» (BROWN 1950, 3). Based on the work of BROWN and his followers, the approaches specifically called Proactive Contracting and Proactive Law emerged in the Nordic countries in the late 1990s and early 2000s. In the context of contracting, the pioneers merged quality and risk management principles with Preventive Law, thereby adding a *promotive* dimension to the *preventive* dimension (e.g., SIEDEL & HAAPIO 2010 and 2011; WAHLGREN 2006). The goal of Proactive Contracting is that the contracting parties achieve the goals of their collaboration (e.g., POHJONEN 2006 and 2009). In order to increase the likelihood of successful business outcomes, the parties need clarity as to what is expected from them and what they can expect from others. This includes clarity as to their contractual rights and duties and how contract law might impact them.

[Rz 4] Despite the many opportunities offered by contracts' proactive use, most business managers tend to view contracts as a necessary evil, a last resort — something best delegated to legal experts. However, 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 (ARGYRES & MAYER 2007 and 2004). Still, many managers overlook the importance of

their involvement in the contracting process and are pleased when lawyers drive contract design, drafting and negotiation. In the process, key decisions may be left to the lawyers, even in areas where business managers and subject matter experts could (and should) make an important contribution (MALHOTRA 2012, 363—364; HAAPIO 2013a; HAAPIO & SIEDEL 2013). For companies to succeed, managers and lawyers need to engage in group learning (WILSON ET AL. 2007). A look at the terms of typical business-to-business contracts confirms this: surveys show that nearly 80 % of the terms of such contracts are areas of significant managerial (rather than legal) concern: they are business and financial terms, such as statements of work, specifications, and service levels (CUMMINS 2003; SIEDEL & HAAPIO 2011).

[Rz 5] The growing *contractualization* of business in itself is a challenge. It provides opportunities as well: these have caused practitioners and researchers to look into companies' contracting capabilities as a strategic resource and a potential source of competitive advantage (ARGYRES & MAYER 2004 and 2007; SIEDEL & HAAPIO 2010). Yet there seems to be a gap in educational methods to promote the proactive use of contracts and to facilitate the managerial-legal collaboration that is required. So we asked ourselves the question: despite the central role contracts play in business, why are business managers not more enthusiastic about working with contracts or lawyers — and what can we do about it?

2 Responding to the Challenge

[Rz 6] In our work as educators we have seen a growing need to change the way in which contracts and contract law are perceived and taught. In our publications, we have called for a new, user-friendly interface for law (e.g., RAMBERG 2012; HAAPIO 2013a and 2013b). Over the past years, after experimenting with different approaches to teaching, we have come to appreciate the possibilities that simulation holds to enhance the learning of contracts and law in action. In this paper, we use *simulation* to mean modeling reality: students are presented with real or realistic scenarios, which may be taken from real life or may be fictional. Simulation may but need not include an online or «e» element; it may be acted out in face-to-face sessions or be a combination of the real, paper and virtual worlds (GRIMES 2014, 1).

[Rz 7] In the last 40 years, there has been a slow but steady interest in the theory and implementation of simulation (and, more recently, e-simulation) within the field of legal education (GRIMES 2014, 5). In our work so far, we have relied on facilitated face-to-face sessions, enhanced with visualization, role play and games. We have had the opportunity to teach not only in our respective Universities and other educational institutions but also in law firms and corporate in-house training workshops in various parts of the world. In the following, we will draw on recent research and our experiences in teaching contracts and contract law in these contexts.

2.1 Merging Simulation and Visualization in Contract Education

[Rz 8] People are known to be reluctant to read contracts (e.g., BURNHAM 2003, 133). In many fields, the (assumed or real) reluctance on the part of the readers has led to a trend in combining «fun» formats with information, for instance in the format of *graphic novels* (AOKI ET AL. 2008), also known as *information comics* or *educational comics* (JÜNGST 2010; HAAPIO 2013a, 77). ARTHUR LEFF (1970, 157) made a strong argument for viewing a contract as a «thing», with the hope that

this exercise could «smash the semantic box in which our current thinking is locked». While his context was mass consumer contracts, his way of thinking offers food for thought for commercial contracts as well (HAAPIO 2013a, 35). Images and comics seem to offer a way to «smash the semantic box» limiting our current thinking (HAAPIO 2013a, 77).

[Rz 9] One of the authors began experimenting with interactive simulation merged with visualization in contract education in the 1990s. One of the early experiments is presented in her doctoral dissertation as a proof of the concept of educational comics (HAAPIO 2013a, APPENDIX TO HAAPIO 1998). The booklet¹ consists of graphic notes made at the session on Proactive Contracting of the Annual Quality Congress of the American Society for Quality (ASQ) in Philadelphia, PA, in 1998. The work of the collaborating visualizer, Annika Varjonen, illustrates the many ways in which images can move managers toward a deeper understanding of how they can use contracts and contracting processes for better business outcomes. On the pages of the booklet, the image of a friendly contract acts as a mentor to a sales person, who instead of working with contracts would rather be «out there selling». The contract shows why sales people should pay attention to contracts and how they can navigate safely in the jungle of cross-border sales laws, payment and delivery terms and «battles of forms» so as to avoid negative surprises. The feedback received after the event confirmed that the visual notes indeed helped the attendees to better understand the various ways in which contracts can affect business deals and relationships.

[Rz 10] This example illustrates how images can be used in contract education to engage the audience and make contracts more easily accessible. Images are capable of changing perceptions of contracts as a solely legal domain: they can draw attention, awaken interest, and cure the «contract phobia» from which some people tend to suffer. Recent research has started to build evidence that complex contracts can be made easier to use through visualization (PASSERA ET AL. 2013 and 2014; PASSERA & HAAPIO 2013), indicating that visualization *in* contracts and *about* contracts (a.k.a. visual contract guides) can be used to *make contracts work for clients* (HAAPIO 2012). Contract visualization can help find and maintain a sound balance between the respective needs and requirements of the different managerial and legal functions of contracts. To ensure informed decision making and successful implementation, research suggests that future contracts do not necessarily rely on text only when communicating contractual messages; they can rely on visualization as well. In the digital world, they might have a visual user interface (MAHLER 2010 and 2013; HAAPIO 2013b). Experience and research tell us that visualization and simulation can develop student interest and engagement (GRIMES 2014, 3; HAAPIO 2013a and 2013b).

[Rz 11] Visualization may deal with data, information or knowledge, and can be divided into three different fields: data visualization, information visualization and knowledge visualization. The first two are mainly about computer-assisted exploration and visualization of large volumes of data, while knowledge visualization is about supporting the creation, application and communication of knowledge and insights. Research related to knowledge visualization investigates how to create and transfer insights between individuals and within groups; how to manage and reduce complexity and to allow understanding; and how to support learning, communication and interaction through new approaches and techniques (EPPLER 2004; EPPLER & BURKHARD 2004). While

¹ Sample pages are presented at the web pages of the Program for Legal Technology & Design based out of Stanford University's Institute of Design (d.school), <http://www.legaltechdesign.com/reading-list>. Further examples are available through <http://www.lexpert.com/en/visualisation/> and <http://www.lexpert.com/en/visualisation/visual1.htm>.

data visualization and information visualization have a lot to offer to the field of contract education, for face-to-face sessions knowledge visualization is a natural choice, offering strategies, tools and methods to make contract-related knowledge accessible and visible and to improve processes through which knowledge can be identified, assessed, shared, discussed, applied and managed (HAAPIO 2013a, 13).

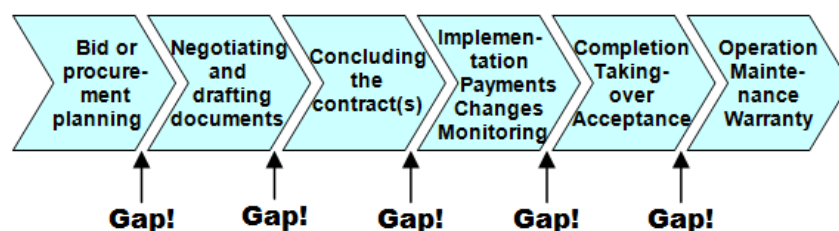
[Rz 12] In light of the growing number of examples, graphic representations may finally be on their way into the legal field — a development that has been promoted by COLETTE R. BRUNDSCHWIG and other pioneers for quite some time (e.g., BRUNDSCHWIG 2001, 2011 and 2014; HAAPIO 2013a). This development has already taken place in various other fields, such as technology, medicine and economics. Visualization offer a means to change perceptions and transform contracts from hard-to-understand legal instruments into user-centered managerial instruments that promote successful communication across the boundaries of professional communities (PASSERA & HAAPIO 2013; HAAPIO 2013a and 2013b).

2.2 Example: Using Visualization to Bridge the Gaps in the Contracting Process

[Rz 13] In complex projects, communication failures easily occur when people from different cultural and professional backgrounds work together. This is as true in construction contracts as it is in technology contracts. A recurring reason for such disputes is *communication failure*, «which easily occurs when you have techies, business people, bean counters, and lawyers in one room pretending to speak the same language» (GROSSMAN 2000). Indeed, even if the people negotiating a contract share the same native language, they often only «pretend to speak the same language». Communication failures easily lead to disputes and interpretation issues (HAAPIO & SIEDEL 2013).

[Rz 14] Once put together, contracts need to be implemented. People responsible for implementation need to understand their contracts and how to translate them into action. Figure 1 illustrates typical phases in a delivery project inside one organization and how there may be several gaps in the process. Even in a «simple» two-party contract, the buyer's solicitation team and the supplier's proposal team may consist of people different from those on the contract negotiation team, none of whom may be part of the operational or delivery team. The teams may not meet and may just «inherit» from their predecessors the contract documents that they are expected to master and work with. Without guidance, delivering on the promises made in such documents and knowing how to proceed is not easy, nor is passing on the applicable terms to subcontractors (HAAPIO & SIEDEL 2013).

Figure 1: Mind the Gaps in the Contracting Process!



[Rz 15] Figure 1 shows how visualization can be used to illustrate what goes on in the contract

lifecycle, highlighting the need for managerial-legal collaboration. Simulations can be designed so that the gaps in the contracting process become visible. Simulation merged with visualization helps to see the big picture and one's own role in the whole, enabling the participants to develop a shared mental model of the business process and project lifecycle. Visualization can support knowledge sharing and convert participants' tacit knowledge into explicit knowledge, making cross-professional communication and collaboration easier. The participants can then work together to bridge gaps and solve problems, both legal and non-legal. Identifying the issues and learning how different contractual choices and the law might impact them can make a «dry» subject highly interesting.

[Rz 16] Seeing is believing. When people see how their work and choices — contractual or otherwise — impact business, it becomes easier to start collaborating and learning to speak the same language. Equipped with new insights people with different professional backgrounds can gain a common understanding about what is involved. They can start to see contracts differently and consider contract law and its operation in a holistic sense. Their interest in learning about contracts and the law is likely to increase in the process. People who were reluctant to read contracts earlier will soon realize that even the small print may have a big impact. Visualization merged with simulation enables the learners to integrate their learnings with the real world experiences they will encounter in their professional lives.

2.3 Gamification in Contract Education

[Rz 17] Gamification and simulated games have become widely used techniques in the business environment. While the terms are relatively new, the concepts have been around for quite some time. In legal education, they represent a rather recent phenomenon. While the contractual and legal rules related to augmented reality and games have received some research attention (e.g., ERENLI 2015), there is little research related to law games. An annotated bibliography of 2008 (GOLDMAN 2008, 440—443) lists nine articles that describe game and simulation systems used in law teaching, only one of them relating to contract law. This describes the work carried out by MARLENE LE BRUN related to «gaming» contract law, resulting in a web-based CD-ROM game package developed for law students at City University in Hong Kong. While according to the author, «the product is Chinese in look and feel», the package — and the concept of developing online games to enhance student learning in contract law — is of interest for a wider audience (LE BRUN 2003).

[Rz 18] Since the publication of the annotated bibliography in 2008, the number of contract law related educational games seems to have grown somewhat (AGAPIOU ET AL. 2009; HAGAN 2012, 2013 and 2014; KIMBRO 2014). While no historical summary of literature on contract gamification seems to exist, experience and research tell us that there is a place — and a growing need — for gamification in contract education. In the following, we describe CREW, the game for enhanced contract learning.

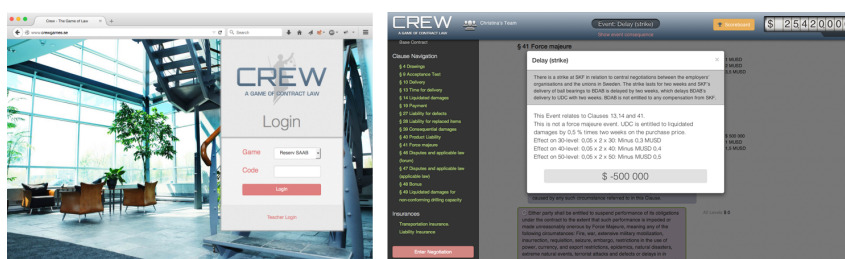
2.4 Example: Playing CREW, a Game for Enhanced Contract Learning

[Rz 19] One of the authors began experimenting with gamification in contract education in 2009. CREW, the contract game, was developed during 2011—2013 as a close collaboration between

IT specialists and lawyers with expertise in theoretic and pragmatic contract law. CREW was launched in 2013 and has been widely used with law students, solicitors, in-house corporate lawyers as well as corporate management in many different departments, including procurement and marketing.

[Rz 20] The participants work in teams and compete with other teams. Each team creates its own mix of contract terms by choosing from commonly used pre-set alternatives (buyer-friendly, seller-friendly or neutral). The less risk a team chooses, the more expensive it becomes and the less initial profit the team makes. This initial phase is interrupted by short mini-seminars where the game leader describes the law in relation to the alternatives. The mini-seminars are initiated by the participants' questions in order to ensure maximum attention. At the next phase, the teams are exposed to events (delays, payment or quality problems, etc.). Then they apply their individual contract terms and see how the profit is affected by the events. The screenshots in Figure 2 show what appears on the login page and on a page where events have different effects on the profit, depending on the contract.

Figure 2: Two Screenshots of CREW, the Game for Enhanced Contract Learning



[Rz 21] The winning team is the one having the highest profit in the end. Working in this way, the participants learn to assess what contract terms are really essential and how commonly phrased contract terms affect the potential risks. Such knowledge is much more useful than knowing the law in relation to legislation or case law.

[Rz 22] CREW consists of many different games in English and Swedish, covering sales, construction, distribution and M&A contracts. Currently, a contract for financing (credit contracts) is being developed. Some CREW games have been developed for particular organizations' needs, based on the organization's individual standard terms and with events tailored for the organization's particularly frequent problems. The contract terms used are often the same all over the world and CREW is suitable to be played in all jurisdictions.

[Rz 23] CREW has received extraordinary good reviews from participants. Large companies have decided to invest heavily in using CREW on a long term basis to enhance their employees' knowledge and competence.

3 Conclusions

[Rz 24] Entering a contract can be risky. It creates obligations and liabilities. Contract risks may threaten business deals and relationships, reduce margins, and prevent the parties from achieving their objectives. They may cause unexpected costs or unintended liabilities. Still the greatest risk in business is not taking any risks. Contracts should support sound risk-taking and help balance

risk with reward. Achieving the right balance requires successful collaboration and communication across functions and disciplines. Gaps in the contracting process, poor communication, or lack of proper contract management practices easily lead to unmanaged risks.

[Rz 25] Companies do not make contracts just for the legal department or future litigation; they make contracts to succeed in their collaborative ventures and to reach business objectives. Apart from contract law, success with managing contracts requires knowledge and skills in many other aspects: technical, financial, operational, and so on. Lawyers need to understand how contracts work in business. Business managers, in turn, need to know how contracts and contract law relate to the business and impact its profits and risks. Managerial-legal collaboration is key to successful contract management.

[Rz 26] This paper explores the opportunities that simulation, visualization, and gamification hold to enhance the learning of contracts and law. These approaches enable lawyers and business managers to engage in group learning about the business impact of contracts. Playing CREW, the contract game, can put managers and lawyers in a much stronger position to negotiate and maintain better business outcomes. After engaging in group learning, they are better equipped to work together; and working together, they are able to make better contractual choices. They learn to understand that a contract is not just a piece of paper but is essential for the business' profitability. Their insights stay on for life.

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