

COMMERCIAL AND CONSUMER CONTRACT SIMPLIFICATION – FOCUS ON THE USERS

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Abstract: *Recent legislative initiatives in EU, the USA and Australia regarding consumer protection focused on the necessity of creating clear and fair contracts for consumers. At the same time, commercial contracts seem to be excluded from this discussion. The following paper aims to compare business-to-business and business-to-consumer contracts through the audience analysis and observe whether commercial contracts also require simplification and how differences in a number of users, nature of the relationship and ways of using a contract can influence approaches to contract simplification.*

1. Introduction

Increasing demand for clear and understandable documents for consumers has rather long history going back to the start of the consumer movement in the beginning of the 20th century, following by the Plain Language campaigns in the US, UK, Canada and Australia up to the modern regulations supporting clear communication to consumers in European Union and the United States.¹ Good documents for consumers, including consumer contracts, are still rather an exception than a rule; however, at least the necessity for their improvement has been widely discussed in academic, governmental and business circles.² At the same time, the body of research around designing better documents somehow excludes commercial (or in other words business-to-business) contracts. It seems that they are either perceived as being similar to other types of documents³, and do not need a separate methodological framework or, on the contrary, are absolutely different as they have to do with professional users rather than average citizens, and, therefore, do not need to be simplified⁴.

The following paper aims to compare two types of contracts based on the nature of parties: consumer (business-to-consumer, B2C) contracts and commercial (business-to-business, B2B) contracts by having a closer look at users of both types of documents.⁵ The core idea of contract simplification is designing a contract having a user in mind.⁶ Therefore, audience analysis is the main step in understanding whether commercial contracts need to be simplified and if so, what are the differences in approach between commercial and consumer contract simplification.

2. Preliminary assumptions

This paper is based on the assumption that identifying readers' needs and meeting those needs is integral for designing a good contract. Learning as much as possible about the user and getting a clear picture of the

¹ See, e.g., SCHRIVER 1997, pp. 16–33; FELSENFELD/SIEGEL 1981, pp. 31–43.

² For the overview of the main developments in the field, see KIMBLE 2012, Part Four and Five.

³ See, e.g., OSTER 2011, p. xiv.

⁴ See, e.g., FELSENFELD/SIEGEL 1981, p. 81.

⁵ RUBIN 1999, p. 1903.

⁶ PASSERA/HAAPIO 2011, p. 83.

target audience are main pillars in most fields that provide information – from document design to marketing. However, this knowledge is not transferred to the contract drafting. Contracts are typically created without having a user in mind. There is a long-lasting tradition of seeing contracts as purely legal work. The contract is usually seen as a document that imposes legal rights and obligations on the parties and is made to be used in court.⁷ Rarely contract is perceived as road-map for the deal, a document that depicts description of the product or service, the scope of business, responsibilities of parties, allocates risks and communicated other important information about the arrangement, including legal requirements, but not limited to them.⁸ Contracts seem to be created «by lawyers for lawyers»⁹ and don't take into account the fact that contract is made not only and not mainly for using it in court. This creates obstacles to business relations and successful performance. One of the ways to create contracts, which are business-friendly, is contract simplification.¹⁰

In the following paper, though, the author aimed to see whether there are important dissimilarities between two types of contracts that can influence the approach in contract design. Obviously, consumer and commercial contracts have a lot in common. First of all, both B2B and B2C contracts are documents that are read and used by people. There are some readers' mental processes that all people share and that should be taken into account when drafting a contract. Person's ability to perceive information is limited; therefore, taking care about readability and legibility of the document is important when dealing with any type of contract. A number of disciplines including, but not limited to cognitive psychology, linguistics, sociology, information and document design, can provide a valuable research on the way people use documents and techniques that improve contract quality. Moreover, contracts are traditionally seen as part of legal writing, and most principles of good legal drafting can be applied to contracts.

3. Consumer and commercial contracts: differences

At the same time, the nature of parties of B2C and B2B deals creates some differences, which should be carefully observed and taken into account when designing a contract of one or another type. Consumers and companies have different goals and expectations when entering a contract and tend to use them in different ways. In the next subsections, these dissimilarities will be discussed in more detail.

3.1. Number of contract users

Consumer contracts tend to be characterized by a large number of users of the same contract. The primary audience of B2C contracts are individuals or families who make the decision to buy a product or service from a trader.¹¹ Consumers can vary significantly from each other in levels of education and literacy, age and profession. It can be challenging to take into account different reading abilities and knowledge levels when drafting a contract. However, despite the great diversity of contract users, they tend to have similar expectations with respect to the contract. Secondary readers of consumer contracts are retail managers who connect the ultimate customer with the seller, and, in some cases, lawyers who assist consumers in complex agreements.¹²

Parties of the commercial contracts are not individual customers, but companies. The number of firms that use the same or similar contract is on average significantly lower than in consumer contracts. At the same time, users of B2B contracts in one company usually include several groups of stakeholders that execute different roles within the enterprise and have different needs. It is often observed that commercial contracts are negotiated by one team of commercial and product managers, drafted by another team of lawyers and

⁷ HAAPIO 2013, pp. 2, 6.

⁸ For analysis of legal and managerial functions of a contract, *see, generally*, HAAPIO 2013.

⁹ HAAPIO/BERGER-WALLISER/WALLISER/REKOLA 2012, p. 50.

¹⁰ HAAPIO/BARTON 2017, p. 371.

¹¹ UK OFFICE OF FAIR TRADING OFT 2011b, p. 12.

¹² FELSENFELD/SIEGEL 1981, p. 87.

afterwards used by several more procurement and execution teams. The bigger is the company involved and the more complex is the deal, the higher number of readers with different requirements uses the contract.

3.2. Length of a contract lifecycle

Consumer contracts tend to have short contract lifecycle. B2C contracts are often drafted as standard forms – contracts that are created once and used for all sales of a particular kind. They are not negotiated with every consumer separately and work on «take it or leave it» basis.¹³ The content and design of such consumer contracts always stay the same. A customer just has to sign it if he/she agrees to make the deal. Moreover, consumer contracts are often created within the immediate transaction without a written contract.

The lifecycle of a commercial contract is traditionally longer than one of a consumer contract. B2B contract lifecycle usually includes all stages, including pre-award, execution, and post-award and all of them can be rather long-lasting, especially in complex projects with the participation of big companies. Contract negotiation process itself can include many rounds. Standard forms are used in commercial contracting as well, especially in particular industries, like insurance, real estate, and cargo.¹⁴ However, the lifecycle of commercial standard forms is usually also longer as even a standard contract has to be approved by multiple stakeholders within a company. More often, though, contracts are created on the basis of existing templates but customized according to specifications of a given deal. Unlike consumer contracts, where terms are usually the same for all customers, in commercial contracts, price and conditions can vary depending on the particular project.

3.3. Nature of relationship

The relationship between companies in B2B contracts is lengthier and more involved than in B2C contracts. In consumer trading, customers can easily change a seller for the next transaction. Vendors usually don't know consumers personally, there are just too many of them. The decision to get into consumer contract is usually emotional, whereas commercial contracting is logically-driven.

Companies in B2B relationships seek for reliable suppliers and service providers whom they can trust, as it is costly and challenging to change a partner for every transaction. Due to a smaller amount of contractors, long sales cycle and significant value of each deal, the relationship between parties in business-to-business trading has a more personal touch.

4. Role and usage of a contract

Users of consumer contracts rarely read contracts in full, especially when they are standard form contracts. According to the study of the Office of Fair Trading in the UK, only 23% of survey respondents make a good read of contracts before purchase.¹⁵ Usually, customers just skim through a contract to check main provisions like what they are getting and its price.¹⁶ Such behavior is explained by the fact that consumers see little benefit in spending time and effort on reading the contract, taking into account the fact that they usually can't influence the contract terms. The main arguments for not reading a consumer contract are the facts that readers feel protected by the law, trust the company, or think they cannot do anything about the contract.¹⁷ Other reasons mentioned were the excessive length of the contract and an overwhelming amount of legal jargon (24% and 22% respectively).¹⁸ Notably, among those consumers who later on experienced problems with the contract, these two reasons for avoiding reading the contract were significantly more popular (40% and 30%

¹³ HATZIS 2008, p. 44.

¹⁴ GOODCHILD/HERRING/MILOSEVIC 2000, p. 64.

¹⁵ UK OFFICE OF FAIR TRADING OFT 2011b, p. 27.

¹⁶ FELSENFELD/SIEGEL 1981, p. 45.

¹⁷ UK OFFICE OF FAIR TRADING OFT 2011b, p. 28.

¹⁸ *Ibid.*

respectively).¹⁹ The following statistics leads to a conclusion that it should not be expected that consumers read their contracts in full; however, improving the quality of contract design can minimize the number of problems customers encounter while using a contract.

Readers of commercial contracts have much more appetite for detail. They know the product and the field well and want to ensure that the contract incorporates all their needs and expectations. Even though bargaining power can also be unequal in business-to-business contracts, usually both parties can influence the terms of the deal to some extent. Moreover, consumer protection laws usually don't cover B2B contracts²⁰ and, therefore, there is more freedom of contracting in commercial relations. As a result, contract terms are read and negotiated, often in greater detail. However, it is true not for all the end-users of the commercial contract.

As discussed earlier, B2B contracts transfer information valuable for different groups of users within the company – lawyers and managers. Goals and expectations of different contract users can vary significantly and even be contradictory.²¹ Therefore, a contract designer should deal with a challenge of creating a document that incorporates all those needs. Traditionally, though, contracts are very one-sided: they are drafted by lawyers and read by lawyers. In spite of the fact that business people usually negotiate and execute the deals, they are often reluctant to read the contracts that actually define the terms of the given relations.²² Managers find contracts «unreadable or only lawyer-readable».²³ Unlike consumer contracts, where the necessity of reading the contract in full is questionable, in commercial contracts engaging all the users to refer to the contract is vital for commercial excellence. When business teams are early and properly involved in the contracting process, the cycle time to a signed contract decreases by 20% and 25% fewer claims arise.²⁴ Commercial contracts lie in the heart of doing business and improving their usability is a core target of contract drafters.

5. Differences in contract simplification approaches

Contract simplification of B2C contracts should focus on communicating the main terms directly and straightforwardly to the reader, without any hidden surprises in the small print.²⁵ Consumers use contracts more like the reference documents and rarely read them in full. Therefore, it is important to work on the substance of the contract and include only provisions and terms that really matter to consumers, are determined by law or are justified by business considerations.²⁶ Highlighting techniques like informative headings, capitalization, bold face, colour, use of border and white space can be important tools for making main terms more visible.²⁷ Consumer contract language should be targeted for an average user; it is better to write in somewhat lower readers' level in order to cover the bigger part of the marketplace.²⁸ The simplification approach can include using common words and simple grammar structures, avoiding legal and technical jargon and explaining complex terms where it is not possible to omit them.²⁹ Especially helpful can be defining terms in context with the help of examples or scenarios.³⁰

Commercial contracts regulate more complex business relations and have to include way more detail than consumer contracts. Dealing with this complexity is substantial for improving business outcomes. Unlike con-

¹⁹ *Ibid.*, p. 29.

²⁰ In some countries (e.g. Australia, UK) consumer protection legislation lately started covering small businesses and sole traders, who have little or no bargaining power in trading relations with big businesses.

²¹ HAAPIO 2013, p. 53.

²² *Ibid.*, p. 49.

²³ *Ibid.*, p. 50.

²⁴ IACCM 2015, p. 5.

²⁵ UK OFFICE OF FAIR TRADING OFT 2011a, p. 1.

²⁶ FELSENFELD/SIEGEL 1981, p. 48.

²⁷ TSYGANKOVA 2016, p. 411.

²⁸ KLARE 1979, p. 105.

²⁹ For the overview of language simplification techniques, *see, e.g.* GARNER 1991.

³⁰ *See, e.g.*, FLOWER/HAYES/SWARTS 1980.

sumer contracts, a lot of information cannot be and shouldn't be reduced; therefore, significant attention should be given to the structure of the contract and logical organization of its content. Moreover, the current design of most B2B contracts neglects the variety of contract users, ignoring the fact that not only lawyers but also managers, engineers, and other professionals deal with them. Commercial contracts, while outlining and managing the deals on paper, exist separately from people who actually negotiate, close, and execute them. Thus, poor business document design creates obstacles for successful business relations. One of the main tasks of business contract simplification would be discovering the needs of different groups of users and designing the contract in such a way that all these needs are met. Here information layering techniques and visualization tools can facilitate the task.³¹ Contract language should also be adapted in B2B contracts, as it is overloaded with legalese and archaisms. However, it should be noted that reasonably used technical and legal terms are appropriate, while commercial contracts are used in professional settings where users are skilled in this kind of information.³²

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³¹ For some ideas about information structuring and layering, see, e.g. WALLER 2011. For contract visualization research, see, e.g. PASSERA/HAAPIO 2012, pp. 376–382.

³² WALLER/WALLER/HAAPIO/CRAG/MORRISSEAU 2016, p. 2.

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