

NEW CONTRACT GENRES

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Keywords: *Contract communication, contract design, genres, comic contracts, parametric smart contracts*

Abstract: *Contracts, once almost exclusively written by lawyers for lawyers, are undergoing a major transformation. Technology and design have enabled entirely new contract genres. When the focus shifts from legal issues to functionality and ease of use, automation and communication come to the fore. We envision a future where contracts are designed to contain code, text, sound, visuals, comics, and more. They work for both computers and humans, on and off screen: they can auto-execute desired terms as well as guide human behavior toward more collaborative and productive ends.*

1. Introduction

For a long time, contracts looked and felt like legal documents: dense text and lawyerly defined terms, with content and presentation based on precedents and conventional drafting approaches. The occasional table was as visual as it got.¹ This genre embodied contracts written «*by lawyers for lawyers*».² Conventional contracts in many countries and industries still follow this path. Not much has changed in terms of their formation, substance, design, or medium. Old habits, styles and templates prevail.

As long as contracts were seen only from a legal perspective, the challenges they caused to non-lawyers were largely ignored. The pioneers of *Proactive Law* were among the first to ask questions about the functionality, usability, and user experience of conventional contracts.³ When they joined forces with information designers, the dysfunction of complex contracts became obvious, both in research and in practice.⁴ With the development of digital content, new services, and machine-to-machine dealings, new professionals – designers, writers, and technologists – entered the field, helping to bring Proactive Law to practice and embed its goals and ethics to new solutions. In recent years, on several continents, researchers and practitioners have started to explore new ways of making and representing contracts.⁵ The focus of contract design is shifting from winning a legal argument to making it easy for the parties to achieve business goals, respect contracting partners, and prevent

¹ See, generally, MITCHELL 2017, PASSERA 2017, HAAPIO & BARTON 2017, and HAAPIO, PLEWE & DE ROOY 2016.

² BERGER-WALLISER, BIRD & HAAPIO 2011 (emphasis added).

³ See, e.g., SIEDEL & HAAPIO 2011 and BERGER-WALLISER 2012.

⁴ See, e.g., WALLER ET AL. 2016, WALLER, HAAPIO & PASSERA 2017, PASSERA 2017, and HAAPIO 2013.

⁵ Apart from the resources mentioned in the previous notes, see, generally, KEATING & BAASCH ANDERSEN 2016, PLEWE & DE ROOY 2016, CONBOY 2014, and BARTON, BERGER-WALLISER & HAAPIO 2016.

problems. Computable and smart contracts have emerged,⁶ along with proactive simplified and visualized contracts.⁷

Similar new genres and designs are being introduced in other contexts, such as privacy and disclosure documents, where there is a need to make complex legal information more accessible and actionable. Converging *contract/legal visualization* and *contract/legal design* streams of research and practice seek to integrate design thinking and visual expression with technology in various contexts of business and legal practice, research, and education.⁸ Legalese is being replaced by clear wording, structure, and design that make it easier for readers to find what they need, understand what they find, and use that information.⁹

In our previous work, we have introduced a proactive, user-centered approach and design thinking into the world of contracting and law, seeking to create new deal-making platforms and accessible, understandable, useful, and usable contracts.¹⁰ We have assessed the contract continuum from text to visuals and code, and considered next generation contracts and deal-making.¹¹ This paper introduces two examples of emerging contract genres – Comic Contracts and Parametric/Smart Contracts, both of which have the potential to reshape contracts and enable a transformation to contracts that are commercially and legally sound, and yet easier to work with and act upon.

2. Emerging Contract Genres: Comic Contracts and Parametric Smart Contracts

In contracting, tensions arise among legal-friendly, business-friendly, and user-friendly approaches. If developers focus too much on legal needs, contracts easily become over-lawyered: legal functionality is prioritized over business functionality and usability. The goals need not be mutually exclusive; different users have different needs, and innovative solutions can, and must, meet the demands of each. But to serve business needs as well as user expectations, even new genres of contracts must be legally sound. The following examples illustrate, however, that this three-sided tension can be minimized or even transcended.

2.1. Comic Contracts

A *comic contract* is a legally binding contract¹² where the parties are represented by characters and the contract content by the illustrated interactions between them.¹³ The parties sign the comic as their contract. The first comic contracts were signed between an agricultural business and their temporary workers in May 2016. More than 300 fruit pickers signed this first comic contract, and more than 2000 workers have since signed similar comic contracts in South Africa.¹⁴ The contract was a success for both the employer and the employees. The transparency of the contract terms motivated the employer to soften the actual terms for the employees,

⁶ For computable contracts, *see* SURDEN 2012. The idea of smart contracts was introduced by Nick Szabo in the 1990s (SZABO 1997). After languishing for several years, smart contracts have recently attracted much attention, especially in the financial industry. The idea of wise contracts: smart contracts that work for people and machines was introduced in HAZARD & HAAPIO 2017.

⁷ *See, e.g.*, BERGER-WALLISER, BIRD & HAAPIO 2011, PASSERA 2017, and HAAPIO & BARTON 2017.

⁸ *See, e.g.*, MITCHELL 2017 and BERGER-WALLISER, BARTON, & HAAPIO 2017, with references. – Margaret Hagan at Stanford has collected different models to present complex legal information, *see* Examples of Legal Communication Designs at <http://www.legaltechdesign.com/communication-design/> (all websites accessed on 2 January 2018) and, *generally*, HAGAN 2017. – For privacy communication, *see* HAAPIO ET AL. 2018, with references.

⁹ These objectives are also shared by plain language advocates. *See* What is plain language? Plain Language Association International, <http://plainlanguagenetwork.org>.

¹⁰ *See, e.g.*, HAAPIO & BARTON 2017, HAAPIO, PLEWE & DE ROOY 2016 and 2017, and HAAPIO 2013, with references.

¹¹ PLEWE & DE ROOY 2016 and HAAPIO, PLEWE & DE ROOY 2016 and 2017.

¹² *See* BAASCH ANDERSEN 2018.

¹³ The terms *graphic contracts* and *comic-book contracts* have also been used to describe this new genre – *see, e.g.*, KEATING & BAASCH ANDERSEN 2016 and the inaugural conference on the topic held at the University of Western Australia in Perth, Australia, in December 2017, <https://www.comicbookcontracts.com/>.

¹⁴ For further details and sample pages of the first ClemenGold contract, a Comic Contract by Jincom EHS (<http://www.jincom.com>), *see, e.g.*, HAAPIO, PLEWE & DE ROOY 2017 and VITASEK 2017.

thus making the agreement more equitable. The meaning of the visually engaging contract terms was easily understood by the employees (who are mostly illiterate) and reduced the time to onboard employees from four hours to 45 minutes. Some supervisors have taken to carrying the comic contract with them in the orchard as a mutual reference to help them resolve issues that may arise. Other employers soon followed and commissioned comic contracts for their workers. To date no issues have escalated to labor conflicts. Proactive Law in action!

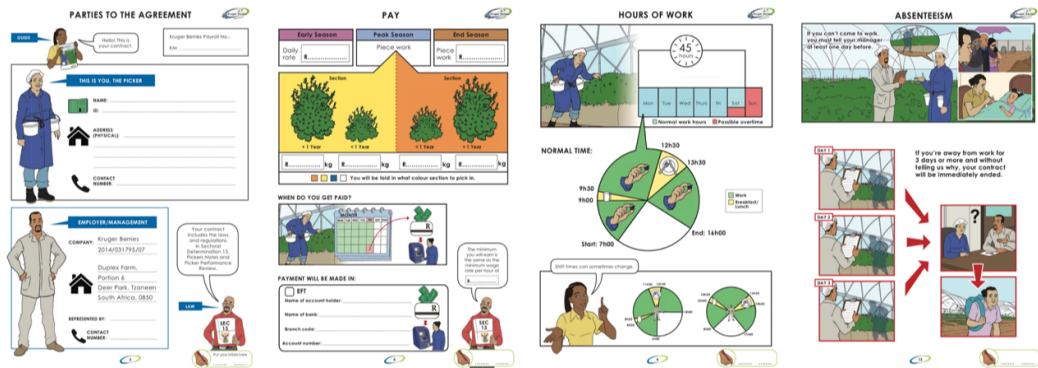


Figure 1: Sample Pages of a Comic Contract by Creative Contracts (Pty) Ltd¹⁵

While comic contracts were conceived for contracting with vulnerable and illiterate people, their potential is now being explored in the corporate world. Comic contracts offer a way for companies to express their personality when contracting with staff, suppliers and customers.¹⁶ Companies can signal who they are and what they expect from their partners, giving them a competitive edge in establishing better relationships. Together with innovative online solutions, it also facilitates the contracting process, allowing the expression of a consistent friendly and transparent tone from the initial meeting through negotiation, signing and towards the desired relationship.

2.2. AXA Fizzy Smart (Parametric) Contract

«Fizzy» is a pioneering smart contract from the AXA insurance company that consumers can buy online to insure against flight delays. The legal simplicity of the agreement enables its easy, web-based «wizard»-like contract formation. The company has radically simplified the provisions of their contract, as a way of facilitating the simplification of language and user interface. The Internet clip available at the AXA website¹⁷ shows this breakthrough in comprehensibility, authenticity of user consent, certainty, and administrative efficiency. Advances in information availability and processing have permitted AXA to offer Fizzy insurance without having to hedge their liability or exposure with legal caveats. They have virtually eliminated disclaimers, indemnification, liquidated damages, and a host of other possible legal defenses in favor of a simple, virtually absolute liability. The promise as well as premise is clear: AXA will pay pre-defined compensation to airline

¹⁵ These sample pages are of Kruger Berries (Pty) Ltd's Harvesting Picker's Contract, © 2017 Creative Contracts (Pty) Ltd. A Comic Contract by Jincom EHS (www.jincom.com). Used with permission.

¹⁶ See, for example, CALLAGHAN 2017. For an interview of one of the authors in the news on South African television, see <http://www.cnbc.com/video/?bctid=5060857923001>; on Finnish television, see <http://yle.fi/uutiset/3-9276177>; on Australian radio, see <http://www.abc.net.au/radionational/programs/lawreport/comic-contracts/7898330>. For an interview in Forbes, see VITASEK 2017. For further press coverage, a Google search with «comic contracts» brings more than 600 results. In October 2016 Robert de Rooy won the IACCM Innovation Award (Program of Visionary Change), see <http://www.iaccm.com/iaccm-innovation-awards>.

¹⁷ See Fizzy Smart insurance. Automatic compensation at <https://fizzy.axa/>.

travelers based on one, and only one, independently verifiable contingency or «parameter»: if a flight is delayed in arrival. The result is a radically simpler agreement that they can make self-executing in smart contract form, through computers communicating directly with one another.

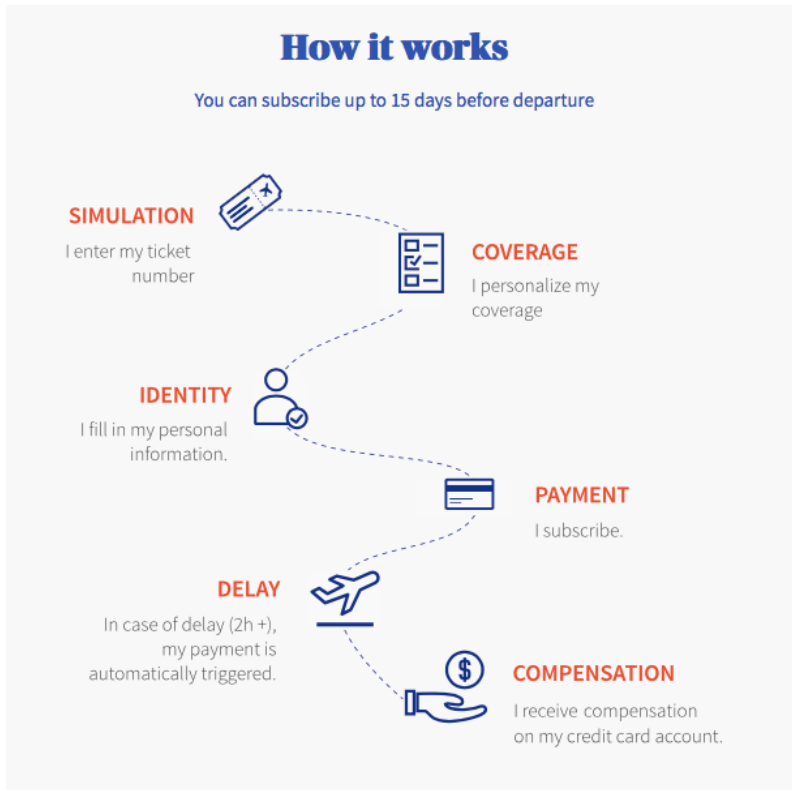


Figure 2. Schematic of Fizzy Flight Delay Insurance. <https://fizzy.axa/>. Used with permission.

Contract simplification – easier language and accompanying images – is made far more feasible where legal complexity is first eliminated. Employing parametric, self-executing provisions within a contract will technically enable that reduction in legal complexity. Still, the *willingness* to relinquish complex legal clauses that escape from agreements may come slowly. As data analytics proceed, however, more companies will be able to calculate prices for their products that assure a profit from simpler, more legally absolute transactions.

3. Concluding Remarks

New contract genres are starting to make inroads into the monopoly of contracts by lawyers, and we believe that this trend will persist. This paper has introduced two examples: an employment contract in a comic contract format and a parametric self-executing insurance contract, both already in commercial use. Other contract genres have similar potential to transform contracts from legal rules to business and collaborative tools. New apps and tools also promise to automate the generation of both conventional and non-conventional contract genres.¹⁸ Our examples should suffice to see contracts differently. They illustrate that we can make contracts

¹⁸ See, for example, Thomson Reuters Contract Express, a self-service contract solution promising contract creation that is «trusted by Legal and loved by the Business», <http://www.contractexpress.com/document-automation-solutions/corporations/contract->

smart and machine-readable, and at the same time prepare and communicate them in forms that are genuinely human-readable, even for people that are illiterate.

These developments are exciting, but we see their greatest potential in how these genres can leverage off each other towards more functional, useful, and usable contracts and better relationships. We believe that this trend is strong, and where appropriate, will free agreements from much unnecessary legal complexity. We can use code, words, images, audio, animations, or a combination of formats, to create, represent, or execute contracts. The new genres of contracts will no longer be left unread in filing cabinets; they will work for humans and machines, receiving and verifying information from and triggering effects in the real world. Contracting systems can become simple at the front, and smart at the back.

As the new contract genres cross boundaries between written and oral, verbal and visual, coded and conventional, old questions become new again: How does contract law cope with developments in human communication? How do the rules of interpretation apply to contracts using comics, graphics, audio, video, or coded content? How would evidentiary principles apply? How would the traditional contract remedies apply? How can contract technologists and solution providers balance the needs of both business and legal? Should our laws adapt to accommodate these trends? Due to space limitations, addressing these questions is beyond the scope of this paper.

We trust that these questions will be answered. New questions will inevitably arise for researchers and practitioners alike, and they also will likely be answered. Once clients start asking for new contract genres, momentum will build toward rapid change. In the words of Tim Cummins, the CEO of the International Association for Contract and Commercial Management: «[the] key to simplification is the ability to understand and implement. In just a few years, we will look back and wonder why it took so long to make our contracts intelligible to the mass of people they affect.»¹⁹

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creation-software/; Clause, promising «Connected Contracting: Simply connect your contracts to the Internet of Things and APIs to self-manage commercial relationships and business processes», <https://www.clause.io/>; and Shake by LegalShield, promising to help users «create, sign and send legally binding agreements in seconds», <http://www.shakelaw.com/>. ContractStandards, <https://www.contractstandards.com/>, offers a library of standard contracts, checklists, and clauses, along with analytics and a platform that promises to allow organizations to consolidate contracts, standardize language, and create and manage templates intelligently. Juro, <https://juro.com/>, promises to make contracts smarter and seamless: «Create contract magic with Juro’s scalable API: Generate contracts in Salesforce, capture signatures in onboarding flows, hear about new comments in Slack and store contracts in Box.» Open-source solutions are developing, too, for example, CommonAccord, an initiative to create global codes of legal transacting by codifying and automating legal documents, including contracts, <http://www.commonaccord.org/> and Accord Project, promising techno-legal standards and open-source software tools for the future of legal contracting, <https://www.accordproject.org/>.

¹⁹ CUMMINS 2016.

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