# TRANSFORMING CONTRACT CREATION: GOODBYE TO LEGAL WRITING – REVISITED

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***Abstract:*** *For a long time, the focus of contract writers was mainly on the needs of lawyers: litigants, judges, and arbitrators. Practitioners and scholars prioritized legal objectives over anything else – until technology enabled new contract genres and self-help contracting platforms. A fundamental change is on its way in how contracts are prepared and presented. This paper takes stock of some recent developments and posits that the view of contracts as legal writing may soon be a thing of the past. To serve clients well, contracts must be designed, not just drafted, and self-help is here to stay.*

## 1. Introduction: Contract Style, Content, and Creation Are Changing

*«There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground.»* Fred Rodell, Yale University.

These comments were made by Yale Law Professor Fred Rodell in «Goodbye to Law Reviews», an article published in Virginia Law Review in 1936.[1] Although his criticism was expressed more than 80 years ago, it still applies to much of today's legal writing. But it may not necessarily apply to contracts, at least not for very long: contract style and content are changing, and so is the process to generate contracts.

Fred Rodell's above comments formed part of the Introduction to my IRIS conference paper back in 2013, «Designing Readable Contracts: Goodbye to Legal Writing – Welcome to Information Design and Visualization».[2] In the paper I looked into the shortcomings of legal writing in conventional contracts and proposed what clients need and deserve: contracts that are not only legally sound and functional, but also easy to work with and act upon. It was – and remains – my hope and belief that lawyers do not purposely ignore the needs and wishes of clients, or try to hinder communication and comprehension.

Since my 2013 IRIS paper was published, contracts and contract creation have changed. Looking back, this has happened quite fast, in any case compared to law reviews, the writing of which was the main target of Fred Rodell's criticism. Contracts are no longer seen solely as «documents written *by* lawyers *for* lawyers».[3] The view of contracts as «documents» changed already when online contracts and electronic paperless contracting came around, and smart and computable contracts have only accelerated the change.[4] Parallel to the move from static, disconnected documents to more interactive and integrated contracts, researchers and prac-

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1 Rodell 1936, p. 38. Fred Rodell revisited his critique on legal writing and law reviews in Rodell 1962, noting that the problems he critiqued had not been corrected.

2 Haapio 2013a. The paper was nominated to the Top 10 short list of the IRIS2013 LexisNexis Best Paper Award.

3 *See, e.g.*, Berger-Walliser/Bird/Haapio 2011, Barton et al. 2019 and Haapio/Passera forthcoming.

4 *See, e.g.*, Clack 2018, with references; *see also* University College London Smart and Computable Contracts research project, https://www.researchgate.net/project/Smart-and-Computable-Contracts, with sub-projects studying use cases in financial services and construction. The authors use the term «computable contracts» for «legal contracts that are understandable by both humans and computers». In our 2017 IRIS paper, we called such contracts «wise contracts, smart contracts that work for people and machines» (Hazard/Haapio 2017).

titioners have found ways to redesign conventional paper contracts, too.[5] With the hard work and dedication of likeminded people and some good fortune, examples and success stories have become available to share. Working with clients, fellow researchers, and the International Association for Contract and Commercial Management (IACCM), we have explored real-world contract simplification and visualization and built a Contract Design Pattern Library.[6] New design patterns have been identified, collected, and shared, not only related to contracts, but also to privacy communication[7] and other contexts, where complex legal information needs to be more accessible and actionable.[8] Even the business world is awakening: the Financial Times recently published an article asking «Can contracts use pictures instead of words?»[9]

These developments, together with the growing contract automation industry,[10] have the potential to reshape contracts and how they are generated. The rate of change is accelerated further by self-service contracting wizards and solutions being developed at record speed.[11] Where users are expected to insert contract data guided by a bot or Q&A with no lawyers around, it is obvious that some questions and challenges arise. Does the user understand the meaning of the choices made – or the meaning of contracts generally? If the user interface will not be just text, what will it be like, and who should provide it?

Is the ongoing move away from text-only lawyer-prepared contracts a good thing, something to welcome – or is it frightening, something to fight against? This paper posits that it can be either. Chapter 2 illustrates that while the context may be new, many of the questions have actually been asked and answered before. In light of the arguments presented against the development of self-help contracting tools, most recently in Germany in the Smartlaw.de case[12], Chapter 3 argues that treating contracts as legal writing and something that lawyers are best suited to do can lead to undesirable results. Taking into account the true purpose of contracts as seen by clients it becomes obvious that current contracts are not fit for purpose, and the way they are produced is not optimal. Chapter 4 argues that to serve clients well, contracts must be *designed*, not just *drafted*, and proposes an interdisciplinary approach to Contract Design. Chapter 5 concludes, envisioning a way forward where legal and other professionals, enabled by technology, collaborate to create better self-help tools and better contracts.

## 2. Are Templates and Self-Help Contracting Tools a Dangerous Thing?

In recent years, clients – consumers and businesses alike – have shown a growing interest in contractual and legal self-help. New technology developers have responded to and accelerated the demand. Despite the obvious benefits, not everyone is enthusiastic about the idea. Some people, especially lawyers, have expressed serious doubts about giving non-lawyers access to forms and contract preparation tools. Many have done so out of a real worry about who wrote the forms and who built the tools, and whether the contracts these tools help produce are legally sound, valid, and appropriate to the situation at hand – or outdated, inappropriate,

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5 *See, generally*, Berger-Walliser/Bird/Haapio 2011, Plewe/de Rooy 2016, Keating/Baasch Andersen 2016, Haapio 2013b, Conboy 2014, Haapio/Barton 2017, Passera 2017, Barton/Berger-Walliser/Haapio 2016, and Haapio/De Rooy/Barton 2018.

6 The first prototype of a Contract Design Pattern Library, http://www.legaltechdesign.com/communication-design/legal-design-pattern-libraries/contracts/ was launched in connection with our 2016 IRIS paper Haapio/Hagan 2016. Together with Stefania Passera, we built the IACCM Contract Design Pattern Library in 2019, *see* https://contract-design.iaccm.com. *See also* Passera/Haapio 2019.

7 *See, generally*, Rossi et al. 2019 and Haapio/Hagan/Palmirani/Rossi 2018.

8 Margaret Hagan, the Director of the Legal Design Lab at Stanford Law School, has collected different models to present complex legal information, *see* Examples of Legal Communication Designs at http://www.legaltechdesign.com/communication-design and, *generally*, Hagan (n.d.). *See also* Legal Design Pattern Libraries at http://www.legaltechdesign.com/communication-design/legal-design-pattern-libraries.

9 Love 2019. – Everyday contracts are still made verbally or partly orally and partly in writing, leaving many terms to be provided by the applicable default rules. The trend to shift from words to images (or word/image combinations) is growing, but visual contracts are by no means mainstream yet.

10 For the wide variety of existing tools, *see* IACCM/Capgemini 2019.

11 Examples include Smartlaw, https://www.smartlaw.de, RocketLawyer, https://www.rocketlawyer.com/#business-documents, and LegalZoom, https://www.legalzoom.com/forms. *See also* Nadauf 2018 and Limberakis 2017.

12 Hanseatic Bar Association v Smartlaw.de. District Court of Cologne, Landgericht Köln, 33 O 35/19, 8 October 2019, currently under appeal. Smartlaw.de is owned by Wolters Kluwer.

even dangerous. Some lawyers may doubt out of fear: If clients have access to the same information and tools as their advisors, what about future lawyering (or billing) opportunities.[13]

Here, the legal profession is not that different from the medical profession: those responsible for patients' health care have traditionally benefited financially from their illness. However, self-care has been one of the pillars of health-care reform, and there has been an increasing emphasis on the role of the patient. Health-care professionals and eHealth solutions have helped patients to increase control over their own health.

In both medicine and in law self-care carries with it issues and risks. These issues and risks are not new. The analogy to medicine is as provoking today as it was in 1955, when Louis M. Brown published his book «How to Negotiate a Successful Contract». He wrote:

> ... There are strict limitations on the extent to which a person can prescribe medicine for himself. Newer medicines, poisons, dangerous drugs, and drugs with questionable side-effects cannot be obtained without professional order. However, all legal forms are freely available – even the dangerous ones, the «poisonous» ones, the newer ones, and those with unhealthy side-effects.
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> In our society, there must be always a tremendous number of contracts that the parties themselves prepare. Every purchase order, every sales order, and many receipts are contracts. It would be as inconceivably absurd to require that a party engage counsel for every contract he signs as to require a doctor's prescription to walk into an apothecary's shop.[14]

Yes, users may misunderstand and misuse self-help contract generators and the contracts they produce. Yes, some tools and templates may become outdated, and some contracts produced on their basis may even be governed under the laws of a foreign jurisdiction. There are real risks and dangers – yet the outcome might still be better than a first-timer layperson's attempt to craft the contract from scratch. If the dangers materialize, are the users to blame themselves – or can they blame their tool providers? When assessing the quality of the tools or their output, which – or whose – criteria should be used?

In light of the growing demand for more modern, interactive, and actionable contracts, these are not easy questions to answer. If the traditionalists among the members of the legal profession would be the only assessors of contract quality, then the current static, text-only contracts with their conventional content and structure might continue to be the yardstick. But such contracts and the way they are generated might be soon outdated by popular demand, especially if self-help solution providers succeed in offering what clients increasingly ask for: new and better content, presentation, and functionality that can accelerate deals by simplifying the process to prepare, negotiate, make, and implement contracts. Is banning such new solutions the answer? Should services related to contract preparation remain within the sole domain of lawyers?

## 3. Contracts as Legal Writing – Soon a Thing of the Past?

Viewing contracts as legal documents and treating their preparation as legal writing readily leads to the assumption that contracts have to be prepared by lawyers. One thing leads to another: a prohibition on unauthorized practice of law, where such a prohibition exists,[15] can then be interpreted to prevent firms that are not law firms from drafting contracts; and the more tailored the contract is to the needs of an individual user, the greater the risk of whoever is offering it without being a lawyer being liable for unauthorized practice of law.[16] A recent German

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13 The questions have been asked and answered before. *See, e.g.*, Brown 1955 and Haapio 2006, with references.

14 *See* Brown 1955, p. 19, noting that there is no legal prohibition against a party's writing his own contract, «whether it be long or short, simple or complex, good or bad». While contracts have legal effects and in many jurisdictions offers and purchase orders are legally binding, not all everyday situations warrant obtaining legal advice.

15 What constitutes legal advice or legal services and whether these include preparing contracts or providing self-help tools to do so, is beyond the scope of this short paper. The fact that this has not been an issue in Finland, where I am based, has enabled lawyers and designers to experiment with real-world contract redesign, simplification and visualization, without a fear of being accused of unauthorized practice of law.

16 *See, e.g.*, Davis 2013, p. 124–125.

court case shows that the issue is still open and extends to contract tecnology providers as well. In October 2019, the Hanseatic Bar Association in Hamburg won a case that appears to prevent contract platforms from offering their services to clients without direct lawyer involvement.[17] Whichever way this case will turn out to be decided, clarity will be a good thing for all stakeholders: lawyers, clients, and technology providers.

While current contracts may work well from a conventional lawyer's point of view, they are in fact quite poor for business: out of synch with their business purpose, the new tech-enabled world of commerce, and the new paradigms of discourse enabled and promoted by digitization.[18] IACCM's research reveals that legal functionality is just one of the many purposes of a contract. Eleven distinct purposes emerged from that research: Record of rights, responsibilities and obligations; Protection and remedies in the event of a dispute; Framework for a mutually successful business outcome; Tool for risk apportionment; Support for a business relationship; Governance and performance management; Tool for risk management; Effective communication tool for those with a need to know; Providing operational guidance; Instrument for generating financial benefit; and Demonstrating brand and corporate values.[19]

Some of the purposes are familiar to conventional contract drafters, but many are not. The survey results further show a major gap in what the purpose is and how good current contracts are in fulfilling that purpose. For example, the survey shows that just 26 % of the research respondents claimed that their contracts are good at fulfilling their purpose as tools for communication and operational guidance. The remaining 74 % describe them in terms of increased contract risk, increased costs or delays, operational inefficiencies and errors, and ultimately claims or disputes – issues that well-meaning contract drafters have sought to avoid.

While the terms dealing with consequences of failure, claims, and disputes remain important, contract drafters should not overlook the fact that a large part of contracts – and the information needs of everyday contract users – are about business and financial terms, such as statements of work, specifications, and service levels. What matters for clients is that the original point of entering the agreement is achieved: business people do not look for liabilities and remedies, nor do they want to prepare for failure – they expect things to run smoothly so they reach their business objectives and both sides know what to do to perform as expected. Knowing that this does not always happen has guided lawyers' contract drafting choices. Lawyer-crafted contracts and templates, in turn, have forced negotiators to spend much of their time preparing for failure, rather than securing success: year after year, limitation of liability and indemnification clauses have retained their top positions in the most negotiated contract terms.[20]

Let's face it: current contracts are not fit for purpose, their content and focus are in need of serious reconsideration, and the way they are produced is not optimal. Contracts are managerial and business documents, and they should be recognized as such. They can and should be rationalized, re-appropriated, and put at the disposal of the business they are intended to benefit.[21] Yes, contracts do have a legal dimension, but this does mean that contracts should remain within the boundaries of legal competence only.

The argument for limiting legal services to licensed attorneys may be strong in some areas, but it is less convincing in services related to contract generation. Arguing about the rules related to who can and cannot provide which services misses the point. The time has come to debunk the myth of contracts as legal writing. Contracts are no longer – if they ever were – merely legal documents requiring legal writing. The real issue here is not about the law, lawyers, legal writing, or legal services. It is about a fundamental change in the market, the enabling technology, and the needs and expectations of clients.

Bringing predictability, creating value, and managing risk continue to be valuable contract goals. But how can they be reached, if contracts remain unread? How can lawyers claim to provide good service, if clients do

17 Hanseatic Bar Association v Smartlaw.de. District Court of Cologne, Landgericht Köln, 33 O 35/19, 8 October 2019, currently under appeal. For details and comments, *see, e.g.*, Artificial Lawyer 2019a and 2019b.

18 *See also* Unsworth/Haapio 2020.

19 *See* IACCM 2017.

20 *See* IACCM 2018. Negotiations over these issues slow down the process. *See also* Haapio/Barton 2017.

21 *See* Unsworth/Haapio 2020.

not find the information they need, or do not understand what they find in their contracts? All good writing, legal or otherwise, must begin with an understanding of what the audience needs and expects, and adapting one's message accordingly. Even the best legal writing is misplaced if it does not serve the needs of clients. Well-meaning lawyers may in fact be doing their clients a disservice by drafting contracts that their clients find non-readable or only lawyer-readable.[22]

## 4. Contracts Must be Designed, with Their Principal Users, the Clients, in Mind

Contract Design seems to be an umbrella term that can mean different things for different people. Some view Contract Design as a means to further clear content, ease of use, and human comprehensibility, others again frame its goal in terms of code-based efficiency. With the growing interest in Legal Design,[23] some have categorized Contract Design as its sub-domain. In order for contracts to work effectively as both business tools and as legal tools, they need to communicate information effectively to both business and legal audiences. So it is natural to view Contract Design also as a sub-domain of Information Design, Communication Design, or Document Design.

Traditionally, those preparing contracts and contract templates have talked about drafting, not designing. The rare legal scholars who have used the term «Contract Design» have used it as a synonym for planning or drafting contracts or clauses, typically with a focus on preparing for litigation or drafting around default rules and varying draftsmanship practices.[24] Organizational scholars, in turn, have conceptualized Contract Design in relation to transaction costs, governance, safeguards, and contracts' psychological effects.[25]

Clients do not make contracts just for the legal department or future litigation; they make contracts to reach business objectives. Apart from being legal tools, contracts are management tools. Their principal users or addressees are seldom judges or arbitrators, and the vast majority of their readers do not have law degrees. Some contracts may be used as evidence in court, reactively*, ex post*, after a dispute has arisen,[26] but most contracts do not end up in court. Instead, they exist in a number of business and personal contexts.

The importance of the role of the client and domain experts is illustrated by an empirical study carried out by two organizational scholars who studied Contract Cesign as a firm capability.[27] They looked at employee skills, those of a firm's managers, engineers and lawyers, and divided contract terms into five categories: roles and responsibilities; decision and control rights; communication; contingency planning; and dispute resolution, arguing that all five draw on knowledge held by more than one group of employees. They showed 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.[28] The design of decision and control rights may rely most on the legal knowledge of lawyers, but reflect input from managers and engineers, who are often in a better position to identify the most critical decisions from more peripheral ones around which concessions can be made. And while the design of roles and responsibilities terms relies most on the knowledge of managers and engineers, such terms often require interaction with lawyers.[29] In the study, the knowledge of lawyers was found of greatest importance in the fields of contract terms related to dispute resolution and contingency planning, especially in the context of contract templates.[30]

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22 Haapio 2013a.

23 Legal Design has been defined as «an interdisciplinary approach to apply human-centered design to prevent or solve legal problems», *see* Legal Design Alliance (LeDa) n.d.

24 *See, e.g.*, Scott/Triantis 2006, Choi/Triantis 2010, Goldberg 2012.

25 For a summary, *see* Passera 2017, p. 53–62; *see also* Weber/Mayer 2011, Schepker et al. 2014, p. 197.

26 For making contracts work for clients, *see* Haapio 2012, Haapio 2013b and Passera 2017. For what makes a good document more generally, *see* Waller 2011. For differing approaches and criteria used to evaluate the clarity of documents, *see also* Evans 2011.

27 Argyres/Mayer 2007.

28 Argyres/Mayer 2007, p. 1065–1066.

29 Argyres/Mayer 2007, p. 1074.

30 Argyres/Mayer 2007, p. 1068–1070.

For successful contracting, coordination between the managerial and legal perspectives is needed. Lawyers need to engage domain experts and management in the process and collaborate with them to translate goals, expectations and promises into contracts that are understood in the way intended. When translating the deal into a contract and then again translating the contract into action, managerial-legal communication must succeed. Legal writing must give way to user-centered design. To be useful and usable for clients, contracts must be designed, not just drafted. And they must be designed with their principal users, the clients, in mind.

## 5. Conclusion

If contract preparation is viewed as a subset of legal writing, it is natural to think that it is something that only lawyers are able or even entitled to do. In some instances, there has been a (real or perceived) risk of whoever is offering a drafting service or solution without being a lawyer becoming liable for unauthorized practice of law. But should contract creation and related services remain within the exclusive domain of lawyers? This paper posits that the answer is «no». This is not to say that contract crafting can ignore legal skills and knowledge. Those skills and knowledge continue to be important. As regards contract content, lawyers have a lot to contribute. But not all lawyers are willing to turn from *legal writers* to contract *designers*, expanding beyond legal concerns and focusing also on other matters.

While protecting clients in a dispute is important, it should not be seen as the only or even the primary goal of contract crafting. The primary goal should be to accelerate deals by simplifying the process to generate, negotiate, make, and implement contracts. This includes articulating the terms of the deal and presenting information so that it can be used by clients – the humans or machines working for them – to deliver on the promises made, foster good business relationships, and reduce the risk of future litigation. To serve clients well, future contracts must be designed, and not just drafted. If we prioritize the needs of clients, it is indeed time to say goodbye to legal writing and welcome to self-help contract generators and new contract genres.

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