

Business Success and Problem Prevention through Proactive Contracting

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1 Introduction

In business transactions, everything – task allocation, price, payments, milestones, rights, responsibilities, and remedies – revolves around the underlying contract. Contractual terms, express and implied, have a tremendous impact on the outcome of transactions and relationships. They affect profitability, increase or decrease costs and liabilities, and play a major role in customer and supplier satisfaction. If contracts fail, business performance will suffer. A lot is at stake, including good-will and reputation.

Businesses today want to streamline their processes, manage their supply chains and relationships, control their costs, and reduce their risks. So they need to take good care of their contracts. Many have invested in resources, tools and technologies that enable them to manage their contracts and contracting processes effectively. Many still need help in these areas. In a number of organizations, contracts could be used more effectively than they are used today, and contract failures could be prevented more often than is done today. Expensive contractual disputes endanger relationships and consume time and resources which could otherwise be used for productive work.

Traditionally, the steps in providing legal care have resembled those of medical care: diagnosis, treatment, and referral – all steps that happen after a client or a patient has a problem. Care has been *reactive*. You get sick, you seek treatment. You encounter a dispute, you turn to a lawyer. We need to move away from that model. Both the legal profession and its clients benefit from a *proactive* approach focusing on how to secure success and build a protective system that makes clients strong and resistant; “immune” to the potential problems and risks, and helps them stay out of legal trouble.

Proactive Contracting, as that term is used here, refers to applying proactive law in the context of corporate contracting. The focus here is on large companies which deal internationally, the author’s primary field of practice.¹ Needless to say, this is a field where companies inevitably face legal issues of financial significance and where it is particularly easy, even for experienced people, to get into business and legal trouble. Relationships suffer, friends become enemies, and the damage caused to reputation can be permanent.

This Article sees the practice of proactive law – proactive lawyering – as a way of fusing legal foresight and proactive (or preventive)² legal skills with

¹ The ideas presented in this Article are based on the author’s experience and on discussions with corporate colleagues and clients in various parts of the world. The author works as International Contract Counsel with Lexpert Ltd (“www.lexpert.com”) based in Helsinki, Finland. Her clients are mainly large companies that market industrial goods, services and solutions worldwide, business-to-business. As part of her work, the author has designed and conducted training workshops on topics such as Contract Excellence, Contractual Risk Management, Proactive International Contracting, and Safe Sales, in Europe, Americas, the Persian Gulf Region and Southeast Asia. She also acts as arbitrator. – The author wishes to express her thanks to Thomas Barton, Nancy Kim, Cecilia Magnusson Sjöberg, and Anette Kavaleff for their valuable comments and to Leila Hamhoum for her effective assistance in editing this article.

² For an introduction to proactive law and preventive law, see author’s Introductory Article to this Volume of Scandinavian Studies in Law, with References.

business management, especially with enterprise-wide quality and risk management. In this context, the traditional view of contracts as legal documents or enforcement mechanisms is too narrow. Here, contracts present themselves as tools that combine proactive law and business management: tools that help clients run their business more efficiently, with improved outcomes, balanced risk exposure, and fewer problems. Well thought-out contracting processes and documents – both online and offline – can prevent misaligned expectations and disappointments so that unnecessary disputes can be avoided. Along with other crucial elements, contracts can provide safeguards and resolution mechanisms if changes, delays or disturbances occur or a conflict situation arises.

Many of the examples and ideas in this Article are very straightforward, even basic. At first sight, they might suggest that the need for help in the areas discussed would apply only to small or medium-sized companies and that large companies would not have problems in such areas. This is not true. Proactive law can be practiced in organizations of all sizes. People working in complex global organizations do not necessarily need skills or services different from those needed by people working in small local organizations. Experience shows that the larger the organization, the more it can benefit from systematically applying proactive law. While the individuals in large organizations may be more experienced in contracting than their colleagues in small ones, the tracking and managing of contractual risks and opportunities is never an easy task.³

The ideas presented in this Article are universal in that they apply all over the world, both in cross-border and in domestic dealings, online and offline – just as well on the sell-side as on the buy-side. While the focus here is on the corporate arena, the proactive approach is not limited to private organizations. In recent years, the number of contracts has exploded in public organizations as well, and an increasing number of public managers find new challenges in forming contract-based relationships and setting the rules by which those relationships will operate in a high-tech, market-driven world.⁴ When an organization – whether private or public – moves from purchasing goods to acquiring services or from one-time purchases to partnerships and alliances, its

³ The larger the organization the more difficult and complex are the challenges. *See* Krappé & Kallayil 2003. In this article, the authors describe the results of a survey which highlights how and why companies are often unaware of their risks, unable to mitigate risk, and may therefore also be unable to make accurate disclosures to investors and regulators. Despite the fact that the recent focus on corporate governance has heightened awareness of contractual risk, the survey found that, while 75 % of companies list this as a 'major area of concern', companies were unable to track their contractual risk adequately; 61 % of the companies had no idea of the interdependencies among their contracts, 66 % either did not or rarely tracked side letters, and 60 % did not track any contingent liabilities. Should a risk event occur, most companies surveyed were not prepared to respond quickly. More than 50 % of the companies involved in the survey did not have a reliable process to notify the right people in response to a contractual risk event. – The survey, which covered more than 100 companies headquartered in the United States and Europe, revealed that a surprisingly high number of the companies surveyed, 81 %, reported that simply finding all their contracts when they needed them was an area of concern.

⁴ *See* Cooper 2003. Rather than focusing on the continuing debate over privatization, the author emphasizes the tools managers need to form, operate, terminate, or transform contracts amidst a complex web of intergovernmental relations.

contracts become more complex. As our examples in Section 4 demonstrate, the proactive approach works well in public organizations also, particularly in the context of procurement and public private partnerships. In all these areas, proactive lawyers working together with other professionals can merge business and legal foresight in organizational strategy, systems and processes. When brought in early, they can act as strategic partners who add real value to management decisions and their successful implementation.

The shift of focus from reactive to proactive legal care has several implications, not only for law practice, but also for education and research. Much can be gained if Law Schools which have traditionally focused on disputes and litigation make the proactive law approach part of legal education. The benefits will be even greater, if the approach is introduced to and adopted by Business Schools and other institutions which train future managers.⁵

To create good quality contracts that serve well both as business tools and as proactive law tools, organizations need the skills and strengths of both managers and proactive lawyers. As new business models and technologies emerge, the need for cross-professional collaboration and education will grow. Contractual and legal aspects must be taken into account when architecting sales, procurement and partnering processes and offerings, online or offline. To secure a sound legal foundation, management needs to see the legal dimensions of its plans *early*. On the other hand, to make a meaningful contribution, lawyers need an understanding of business and the risks related to and opportunities offered by technology.⁶ When language and other barriers are overcome, the benefits will be great for both lawyers and clients. The proactive approach can then be used to promote business success, produce predictable results, manage costs and risks, avoid misunderstandings, and prevent problems.⁷

2 Proactive Contracting: Planning and Using Contracts for Business Success

2.1 Proactive Contracting: Goals, Means and Levels of Legal Care

Proactive Contracting (as that term is used here) is built on the use of contracts as proactive law tools. However, it is not predominantly about the law or lawyering. First and foremost, it is about the conscious use of contracts and contracting processes as management tools which guide and support the success

⁵ This topic is discussed more closely in Section 3.4, where the author proposes that proactive law be made part of their curricula and makes a plea for cross-professional research and education that would benefit both businesses and the academia.

⁶ *Similarly* Magnusson Sjöberg 2005a. In the Foreword, the author states: “Legally initiated IT professionals working together with representatives for the legal domain will definitely support the much-needed proactive approach to IT law.” For incorporating law in e-solutions, *see* Magnusson Sjöberg 2005b.

⁷ One needs to remember that proactivity has various applications in the practice of law, both in the corporate setting and in the public sector. Proactive lawyering is by no means limited to the areas discussed in this Article.

of the client's business. It is about bringing businesses the certainty they require to prosper.⁸

In the author's Introduction to Proactive Law in this volume, proactive legal care was divided into primary, secondary, and tertiary care, with clients' self-care as the foundation. A pyramid figure adapted from preventive medicine was used to illustrate the different levels. A similar illustration can be used in the context of corporate contracting, where the primary goals are: first, to promote successful performance and relationships and to eliminate causes of potential problems; second, to minimize the risk, problems and harmful effects when problems do arise; and third, to manage conflict, avoid litigation and minimize costs and losses where they are unavoidable.

Using contracts to reach these goals requires proper planning, negotiation, documentation, implementation and operation. For the purposes of Proactive Contracting, contracts and contracting processes can be used to prepare for, guide and manage: first, performance (implementation toward successful relationships and trouble-free transactions); second, risk and contingencies; and third, dispute resolution. To benefit fully from the opportunities offered by contracts, clients' self-care is crucial on all three levels. It is so fundamental that, without it, proactive legal care fails.

Figure 1 shows the pyramid figure adapted from preventive medicine with the above goals, means, and levels of proactive legal care. One interpretation of the Figure is that Proactive Contracting is not an isolated function: it needs to be fused with the client's strategy and business processes. It needs to become embedded in the client's corporate governance, customer and supplier relationship management as well as its project, quality, risk and other management practices. Then and only then, proactive legal care and contracts work at their best: helping clients manage their transactions and relationships more efficiently, with improved outcomes, balanced risk exposure, and fewer problems.⁹

⁸ For a business lawyer, proactive law is about providing legal certainty. *See* author's Introductory Article to this Volume of Scandinavian Studies in Law. – Similarly, from a business point of view, Tim Cummins, the Executive Director of the International Association for Contract and Commercial Management (IACCM), who states that the role that contracts and the contracting process should perform is bringing certainty where it was lacking. "The dilemma for buyers and sellers is to know when they have acted with 'due diligence' in protecting against risks in key areas of performance and the liabilities that might flow from non-performance." *See* Cummins 2006.

⁹ As shown in this Volume of Scandinavian Studies in Law, proactive legal care has many more applications and is not limited to the areas discussed in this Article. Also, contracts and contracting processes can be used for various purposes not reflected here, including the protection of confidential information, allocation of intellectual property, decision and control rights, and exclusion or minimization of tort liability. – For a more detailed discussion of the many elements and functions of contracts, *see* Section 2.2.

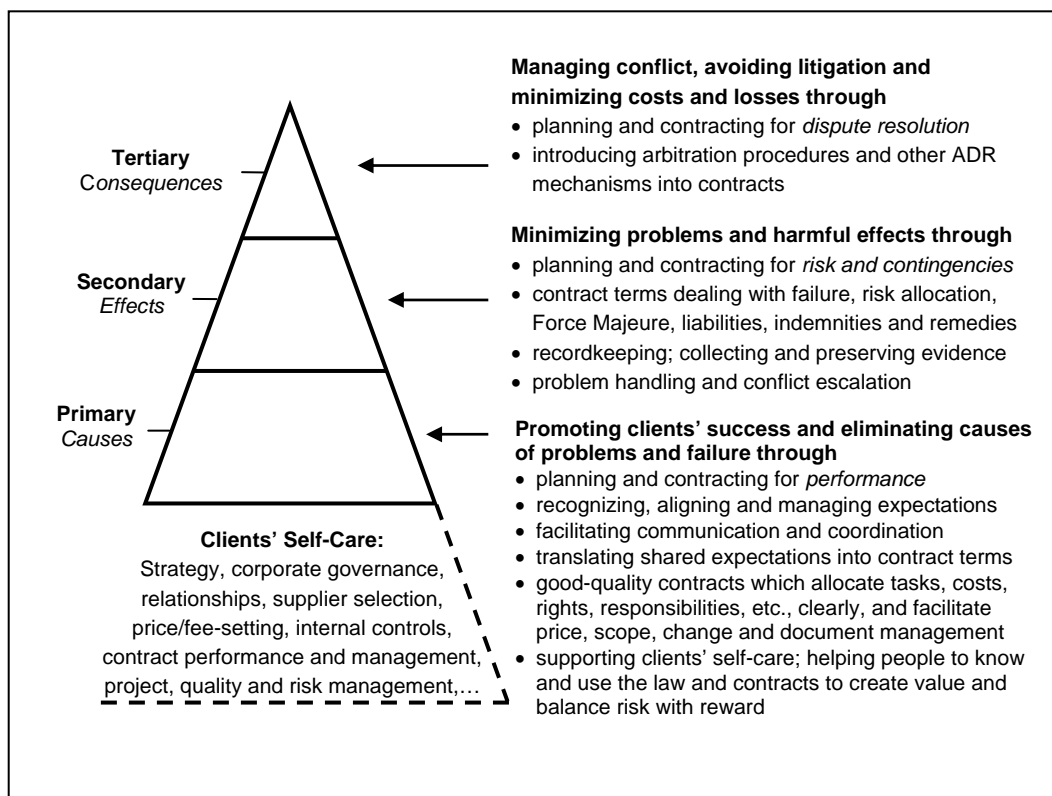


Figure 1. Proactive Contracting – Goals, Means and Levels of Legal Care

Another interpretation of Figure 1 is that for corporate contracting success, it is not enough for lawyers to deal with typical “legal” issues, such as resolution of disputes, remedies, and exit or termination provisions alone. Tertiary and secondary level legal care, such as dispute resolution mechanisms and contractual risk management, can only minimize harmful effects and losses. While dealing with all of these is important, they by themselves can never secure success, if the primary level and the client’s self-care efforts fail. Clients do not profit from damages, remedies, or dispute resolution: that is not what they want. What they want and what they profit from are successful relationships, trouble-free transactions, and the performance they expected to receive.

Each day, hundreds of lawyers still spend hours on drafting and negotiating clauses dealing with the settlement of disputes, (limitations of) liabilities and (limitations of) remedies – many more hours than they spend on drafting and negotiating clauses that enhance communication, clarify tasks and help secure successful performance. Reading contract law books, law students (as well as some practicing lawyers) easily get the impression that legal remedies are the only means to protect the parties’ expectations and other interests and that legal remedies are successful in doing so. For Proactive Contracting, a shift of focus is required. Law students’ and lawyers’ impressions, priorities and practices deserve a critical look.

When things proceed as planned, when success is secured on the primary level, fewer efforts are needed on the secondary and tertiary levels. This is not to

say that dispute resolution and contractual risk management efforts do not matter, they do. The intent here is to say that the primary level, along with clients' self-care, deserve much more of our attention than they have received before, and that we, lawyers and clients, must work closely together to secure business success.¹⁰ This, in a nutshell, is the core message of the following Sections.

We will begin our journey into Proactive Contracting by looking at the many elements and functions of contracts and their key building blocks. In Section 3, we will focus on what is required of lawyers and clients to make Proactive Contracting and clients' self-care work. Suggested solutions as well as examples of proactivity in action and client (self-)care applications will be presented in Section 4.

2.2 *The Many Elements and Functions of Contracts*

*“The salesman finds contract the work of the devil;
it is just one more thing to get in the way of closing a sale.”*
(Stewart Macaulay in Macaulay 1963b)

The making and contents of a contract always have a legal dimension, but that dimension is not the core of contracts from their business users' point of view. For them, the main goal is to create and maintain successful transactions and relationships. Aligning expectations, defining desired outcomes and allocating tasks are key steps to making this happen.

If clients get and give what they expected, which is the case in more than 99.9 per cent of the course of events in routine transactions, no attention needs to be given to the contract or laws involved. However, as we lawyers know (almost too) well, business people's expectations are sometimes not fulfilled. They may not get what they wanted. The delivery may be late, or the goods may be damaged or defective, or customers may be asked to pay more than they expected to pay. Disappointed and angry, people start to think of methods to

¹⁰ During the last five years, the International Association for Contract and Commercial Management (IACCM) has conducted a yearly survey where participants are asked to highlight the terms they negotiate with the greatest frequency. In 2004, input was received from nearly 500 corporations in various parts of the world. Limitation of liability has retained its Number 1 status each year, and the list is dominated by risk containment clauses. In the words of IACCM President Tim Cummins, “The survey shows relatively little evidence of time being spent on creative ‘expanding the pie’ negotiation – that is, growing the deal or solution, or defining parameters that increase the likelihood of success. The list is dominated by risk containment clauses – essentially those that deal with the apportionment of risk (such as Liabilities, Indemnities, Termination), those that protect assets (Intellectual Property, Confidentiality) or those that define principles or parameters (Payment, Delivery, Choice of Law, Enterprise Definition). ... Avoiding foolhardy exposure to claims or litigation, ensuring corporate assets are protected and providing a framework for contract and relationship management are key requirements. But where on the list are those terms that might add to our reputation; where is the evidence that we are viewing governance not just in terms of pre-award risk allocation, but also in terms of post-award management? ... These questions apply equally to both sides; it is in the interests of both buyers and sellers to ask questions about where time is being spent. The agenda is mutual.” – See Cummins 2004.

receive the performance they expected at the price they were willing to pay.¹¹ They look for their contract and ask their lawyer for help. For Proactive Contracting, that is obviously too late.

Despite the obvious benefits, not all clients are enthusiastic about proactive law. When it comes to contracts, some might be indifferent or outright hostile, particularly if they feel that others (especially lawyers) get involved with something that used to be their exclusive territory. In order to recognize potential causes of conflict or misunderstanding, it is necessary to look at how and why our perceptions may differ from those of others.

We lawyers tend to evaluate the elements of contracts in our own unique way. We are used to emphasizing careful wording of contractual terms and determining which obligations and liabilities are included and which are excluded in the contractual arrangement. We pay attention to regulatory requirements and mandatory laws such as tax and competition laws, we consider pre-contractual promises: whether some were made and whether they are enforceable, we take into account both express (“visible”) and implied (“invisible”) terms,¹² as well as clauses excluding or limiting particular types of liabilities and remedies, etc. A lawyer’s view of the various elements that go into (or out of) a contract can be illustrated as follows (Figure 2):

¹¹ The basics have not changed in 50 years; *similarly* Brown 1955, p. 3, and Brown: *Understanding and Preventing Risks in Offers to Form a Contract* excerpted in Gruner 1998.

¹² The author has coined the distinction between “visible” and “invisible” terms of contracts to make the topic more interesting to engineers and business managers who attend her training workshops. According to attendees’ feedback, this distinction has made the world of law and default rules accessible, interesting, even intriguing and fun. *See also* Haapio 2004.

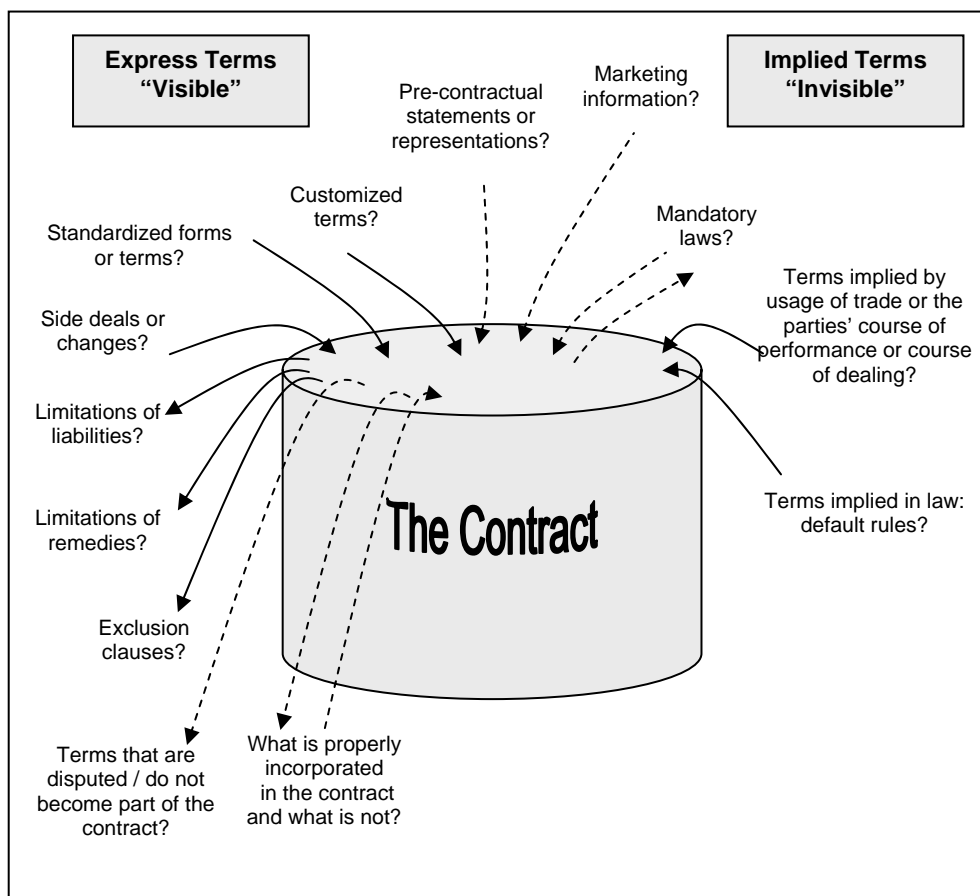


Figure 2. Elements of a Contract – a Lawyer's View¹³

For a business person wanting to secure a successful business deal and relationship, most of what we lawyers worry about may not matter much – particularly if it is discussed in typical lawyers' language. A lawyer new to corporate contracting must keep in mind that in business reality, contracts are not just legal enforcement mechanisms, something used as evidence in court, or risk management tools. Clients do not enter into a contract just to have a contract. For clients, a contract is always a tool, a vehicle to achieve revenues and profit. For them, the elements of a contract represent a different picture than that shown in Figure 2. In that picture, business, technical and financial concerns are crucial, and relationships and reputation matter more than what is or is not part of the contract or documents.

After the deal is done, corporate contracts must translate into required actions. Contracts or laws do not take action or perform work – people do. Contracts or laws do not decide whether and when to take legal action – people do. Law students and lawyers sometimes tend to overestimate the importance of the law and underestimate the importance of people. Even the largest of global

¹³ Adopted from Mulcahy & Tillotson 2004, p. 178. The notion of "visible" and "invisible" terms and other elements are added by the author. For a discussion of "invisible" terms in international contracts, see Haapio 2004.

organizations are made of people. Irrespective of the size or location of their companies, people have all kinds of personal and professional needs, wants, strengths and limitations. They are concerned about achieving their objectives and creating revenue, profit, and good-will. When something goes wrong, people in the organization decide what to do. When their expectations are not fulfilled, when people feel disappointed or taken advantage of, they may think of legal remedies or of filing a lawsuit – not otherwise. When doing deals, only secondarily if at all do they worry about issues such as potential legal problems or litigation. Lawyers, again, according to many people’s understanding, focus entirely on disputes and litigation – no wonder it is hard to see what a lawyer’s role could be at its best: a business partner who understands both the big picture and the law and can work strategically with the client, using the law to assist the client in securing business success.¹⁴

Looking at contracts through the eyes of a business person, contracts are made to reach business goals, to support corporate objectives, and to facilitate transactions and relationships. They are made to manage business activities, operations and resources; to create, protect and share valuable assets, whether tangible or intangible; to communicate crucial information inside and between organizations; and to allocate decision and control rights. Risk management, problem prevention, and dispute resolution are important, but not the *primary* goals of business contracts. The functions of corporate contracts can be summarized as illustrated in Figure 3.

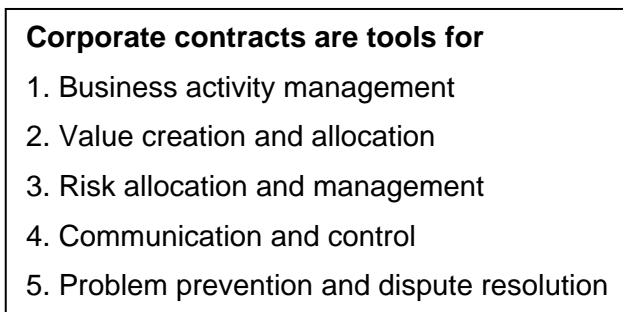


Figure 3. Functions of Corporate Contracts – a Business View¹⁵

For business people, the primary purpose of a contract is to make the sale and secure the monies; to get the goods, services, rights, or profits; or to establish the relationship they expect. For them, contracts are not about legally relevant information (or the lack of it). They are about business information that is needed to manage projects and people, and to coordinate different inhouse and outsourced functions, sub-suppliers, etc.¹⁶ To be useful for clients, contracts

¹⁴ See, e.g. Chanen 2005 and other references mentioned in Section 3.4 in the context of proactive legal skills.

¹⁵ Adapted from Haapio & Haavisto 2005. See also Argyres & Mayer 2005.

¹⁶ Roxenhall 1999 explores three Swedish case studies in order to determine how written contracts are used as a means of communication: (i) to control the company’s own staff as well as the staff of the opposite party, and (ii) to co-ordinate the supply and production

must work as business tools. They must translate into desired actions and help make things happen. According to the International Association for Contract and Commercial Management (IACCM), on average nearly 80 % of the terms in business-to-business contracts are *not* areas of significant legal concern, but rather business and financial terms, such as Statements of Work, Specifications, and Service Level Agreements.¹⁷

To address the choices that business and project managers must make and the challenges that they face in connection with contract crafting, it is useful to view the contract through the analogy of a jigsaw puzzle. With a complex high-technology or engineering-procurement-construction (EPC) project as an example, Figure 4 shows the contract as a puzzle of technical, implementation, business/financial and legal parts, all of which must be consistent and coordinated.

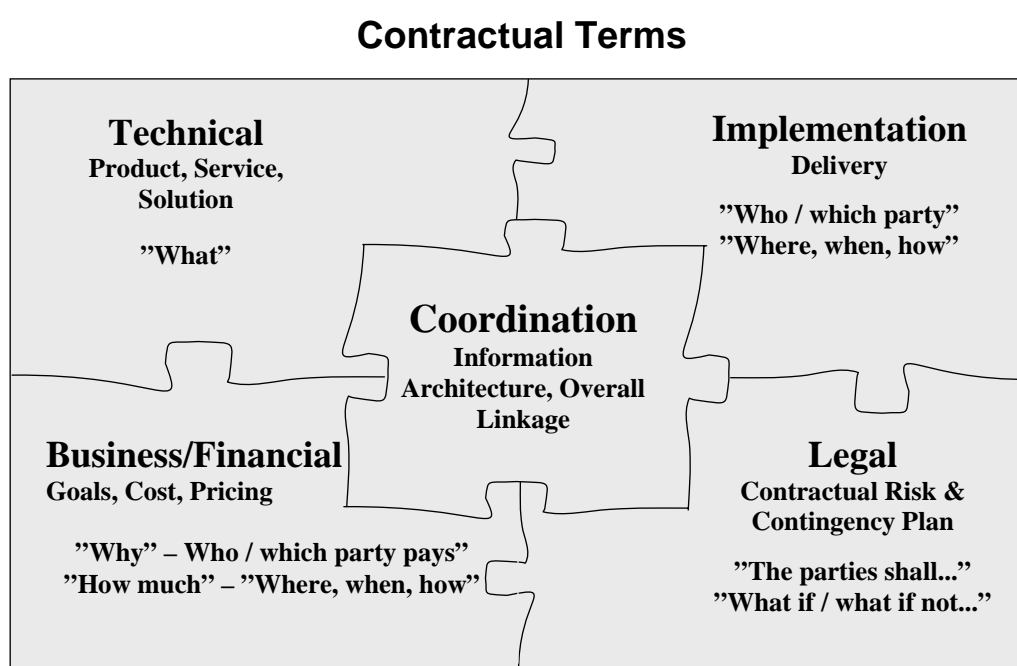


Figure 4. Contractual Terms – Puzzle Analogy. The parts of the puzzle must match and be capably coordinated and managed

If correctly assembled, the pieces of the puzzle form a complete picture. The parts must fit together to create a successful, synchronized business deal. They must be linked with each other and with the parties' expectations to form a picture that reflects the true goals of the parties. The agreed solution must be

activities of both parties. *See also* Roxenhall & Ghauri 2004 and Argyres & Mayer 2005. – For the contractual allocation of intellectual property rights and control rights to customized products based on an empirical analysis of Finnish small and medium-sized firms, *see* Paija 2003 and Paija 2004.

¹⁷ *See* Cummins 2003. *See also* Argyres & Mayer 2005, where the authors discuss contract design capabilities for detailed commercial contracts from a managerial perspective in terms of roles and responsibilities, communication procedures, decision and control rights, dispute resolution, and contingency planning.

capable of being implemented within the allotted time, with the resources that have been allocated, and within budget. The supplied solution must meet the described solution which must meet the customer's requirements. Simultaneously, the project must satisfy the supplier's requirements for profitability and risk management. The "real deal" must match the "paper deal". Where many different functions and teams are involved, it is crucial that the solution designed matches the solution described, which in turn must match the solution priced.¹⁸ Otherwise, cost overruns, disappointments, claims – even litigation – may follow.

For a lawyer new to business contracting it is noteworthy that the legal part is only a piece of the puzzle, and not the puzzle itself. The elements and functions of contracts as illustrated above point out that in contract crafting and implementation, coordination and management skills are key. A balance needs to be struck between many different (and often conflicting) requirements. Contracts must be commercially acceptable – even attractive, so that they generate new business and revenue and help maintain good customer and supplier relationships. At the same time, they must be legally sound, provide adequate protection, and balance risks against benefits. Both task descriptions and contingency planning provisions are needed, and they should complement each other.¹⁹ Contracts must help eliminate causes of problems and prevent misunderstandings – and provide safeguards, procedures and resolution mechanisms if changes, delays or disturbances occur or if a conflict situation arises.

The list of requirements on contracts could be continued. However, it is already clear that putting the contract puzzle together is not an easy task. Before we look more closely at the skills and capabilities required, we will look for good-quality contracts: something that is not always easy to define.

2.3 *Toward Good-quality Contracts: Minding the Gaps and Other Things that Matter*

"Business consists of transactions and relationships. Quality management's purpose is to cause all transactions to be complete and correct, while all relationships are to be successful. If we understand those two sentences we know all we need to know about quality management."

(Philip B. Crosby in Crosby 1996)

It has been said that "the best test of a good contract is its ability to withstand challenge in litigation". Proactive preventive lawyers and their clients do not agree with this view.²⁰ The quality of contracts *may* be tested in litigation, but

¹⁸ See Garrett & Kipke 2003, p. 106–108 and Section 2.4.

¹⁹ See Argyres et al. 2005.

²⁰ See Dauer 1998: "I have heard it said more often than my gastric constitution can stand that "the best test of a good contract is its ability to withstand challenge in litigation." Nonsense. A good contract is one that helps the parties achieve their goals—and success in litigation is

for a client making hundreds of contracts a day, that is a remote possibility, and litigation involving contracts very rarely happens in everyday business life. If it happens, from a business point of view, the contract in question has already failed.

Contract quality can be viewed from many different angles, including content, presentation, process, and outcomes. For a lawyer, it is typically important that the contract includes enforceable terms and conditions, complies with applicable laws, and is well written, clear, complete, and consistent. Clients, on the other hand, want their contracts to achieve their business purpose: translate into successful performance and on-going mutually rewarding relationships. Defining desired outcomes, allocating and communicating the parties' roles and responsibilities clearly, and providing incentives for the parties to fulfil their responsibilities then become key characteristics of good-quality contracts. Additional aspects of good-quality contracts are that they contain unambiguous requirements, divide costs, tasks, and risks clearly and fairly, provide for predictable outcomes and effective contract administration, and allow flexibility where needed.

Proactive Contracting seeks to merge the different good-quality criteria of contracts. Some of them seem to be in direct conflict with one another, and trade-offs are required. For example, most business people prefer short contracts: the shorter, the better. For them, lengthy lawyer-crafted contracts are a nightmare: such contracts may be taken as signs of distrust and may hurt the other party and the relationship. Lawyers, on the other hand, tend to advise against overly short contracts.

Having seen occasions when things went wrong, lawyers typically consider silence in contracts as risky and dangerous; gaps in contracts can cause unexpected costs and liability exposure. If something goes wrong and the contract is silent, gap-filling laws and implied terms come into play. So hazardous gaps should be detected *before* they develop into business and legal problems. Lawyers are trained to spot issues and gaps – and due to training and experience, tend to spot them even where business people see a contract that covers everything that is necessary. Gaps may relate to the core of the deal, for example scope, time or terms of delivery or payment, or to issues such as liabilities and remedies. A business manager's and a lawyer's different ways to see contracts are illustrated by Figure 5.

almost never among any rational person's goals. Likewise, a good risk management program is not one that reduces the costs of errors. It is one that reduces errors.”

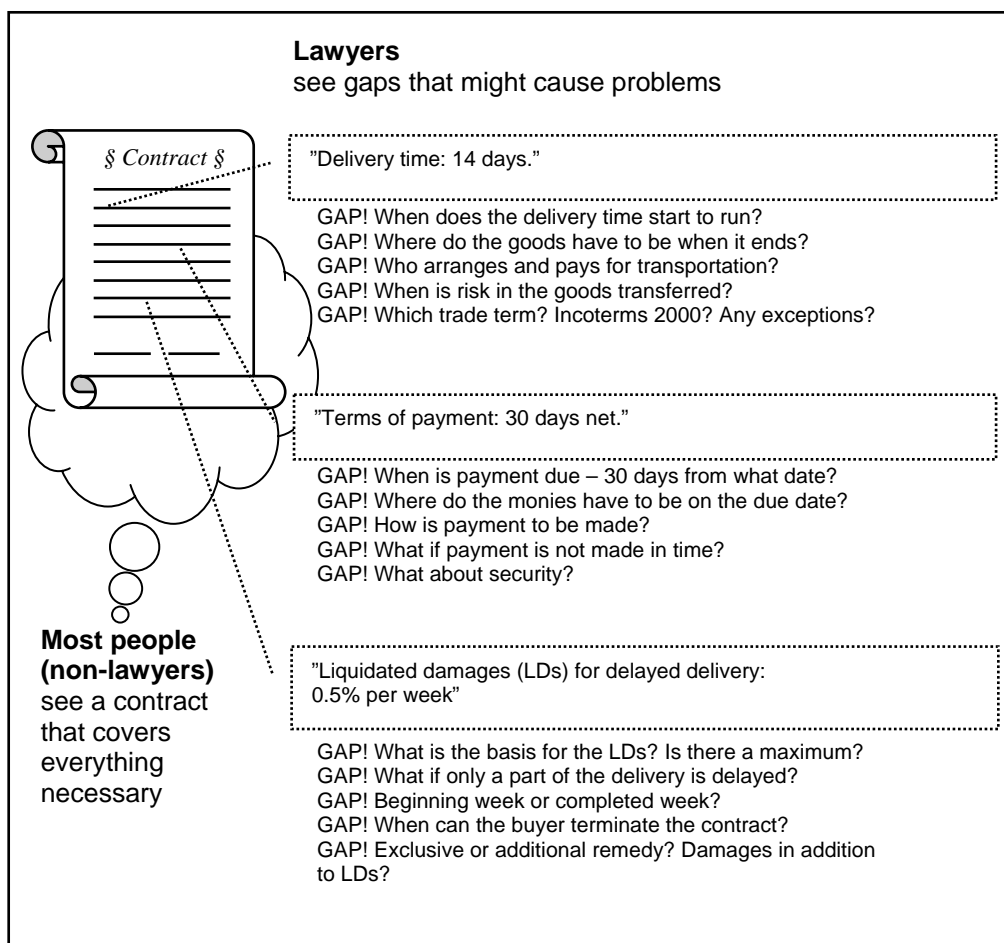


Figure 5. Contract – Mind the Gaps!²¹

One aspect of good-quality contracts is their user-friendliness. Most lawyers and business managers tend to agree that contract clarity is important and that contracts should be written in plain English so that they are understandable. From the client's point of view, courts, arbitrators, regulatory bodies, and lawyers are not the primary readership for contracts – the people applying the contracts in one's own and in the other party's organization are. They are the ones who should be able to understand and be comfortable with the language and vocabulary used. What the writers of contracts are comfortable with should not be the decisive factor.

Good-quality contracts build on proper planning and careful communication, ensuring a true and shared understanding of the business arrangement and the parties' goals. As illustrated in Figure 6, good-quality contracts create coordination: they provide common, explicit knowledge that can be shared within and between organizations and leads to common procedures towards common goals. Good-quality contracts are easy to understand, balanced, and fair. Such contracts can be implemented successfully, and lay the foundation for

²¹ Adapted from Haapio 2002, p. 26.

long-term loyalty and trust. And a good contract is good to have if problems are encountered or a dispute arises.

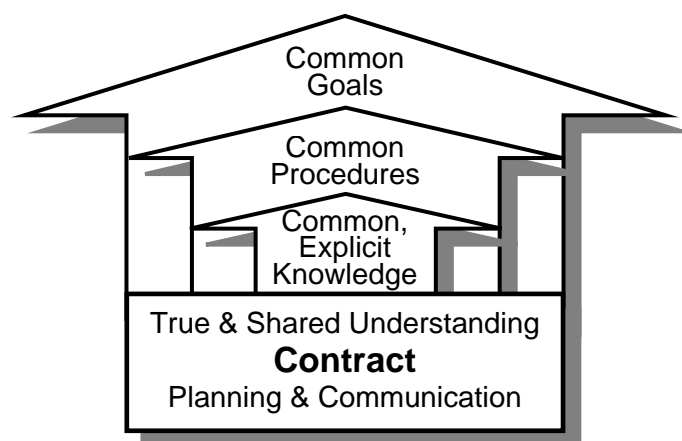


Figure 6. Good-Quality Contracts: the Foundation for Long-term Loyalty and Trust²²

For Proactive Contracting, good-quality contracts are the goal. While perfect contracts may be impossible to reach,²³ businesses should aim at having a shared view of what good quality means for them. This cannot be judged by lawyers alone. Good-quality contracts produce what they are expected to produce. They provide people in the contracting organizations with crucial information for performing their work. They ensure that plans and actions are based on express knowledge (rather than vague or implied, “invisible” terms). Good-quality contracts provide a readable roadmap of how to proceed.²⁴

2.4 Contract Planning: the Practical and Theoretical Foundation for Proactive Contracting

Contract crafting and negotiation are important aspects but not the *only* important aspects of contracting, which is used here to refer not only to *making* but also to *using* and *implementing* contracts. For our purposes, it is useful to break down the contracting process into three phases: 1) planning, solicitation and bidding (preaward); 2) negotiation and signing (award); and 3)

²² The figure has been adopted from the materials presented by Hille Korhonen, Director of Operations, Iittala Group, in a corporate in-house seminar on Supply Chain Management. The emphasis on contracts has been added by the author.

²³ See, e.g. Macneil & Gudel 2001, p. 29 and 33 – cf. Case Study under Section 4.2, where the Better Agreement Team defined what they considered a “perfect” contract for the company.

²⁴ See also Smith 1996, p. 42, discussing construction contracts: “A good contract should be in essence a handbook for performance. As such, it will set out with clear, consistent and hopefully concise language the procedures to be followed for such things as inspections, payments, and interpretation of the contract documents.”

implementation (postaward). In this Article, we focus on the first phase – with an eye toward successful implementation

The foundations for good-quality contracts are laid in the planning phase, long before negotiation and signing – the earlier, the better. For buyers and suppliers alike, the planning, solicitation and bidding (preaward) phase is vital in creating the basis for successful projects, contracts and relationships. Most contract information is (or should be) captured in that phase, in the pre-contract process.

Buyers' may request bids (or quotes, tenders, proposals, or offers) verbally, in writing, or electronically. The procurement documents (generally called solicitations) can take different forms, such as requests for proposals or invitations to bid. They may include the buyer's contract form and terms and conditions. Solicitations communicate (or should communicate) the buyer's needs and requirements clearly to the potential suppliers. Better solicitations from the buyer generally result in better bids, while poorly communicated solicitations often result in delays, confusion, fewer bids and lower-quality responses. Supplier selection is one of the most important decisions a buyer will make, as contract and project success and failure will depend on the competence and reliability of the key suppliers and their subcontractors.

For the supplier, making the bid/no bid decision includes evaluating the buyer's solicitation, the proposed specifications, scope of work, requirements, and contract (including terms and conditions, where provided), and assessing the risks against the opportunities. This step is crucial for the supplier's contracting process. Bid preparation can range from one person writing an email or one page proposal to a team of people developing proposal of hundreds of pages that take weeks or months to prepare.²⁵

Before one can articulate a request or a bid, one must understand what it is that is required or being offered: the specifics of the product, service or solution. The supplier must know what the customer's requirements are, and meet them. While the actual format will vary, major components of a bid for a complex project often include a Technical Response; a Delivery or Implementation Response; a Financial or Pricing Response, and a Contractual Response. In addition, an Executive Summary providing an overview of the bid and key details from the above Responses is frequently submitted.²⁶

The puzzle analogy used in Section 2.2 (see Figure 4) about the contract is useful at the planning, solicitation and bidding phase. Here, the picture shown on the puzzle as well as the individual pieces are beginning to take shape. What was stated about the contract applies to the buyer's solicitation and the supplier's bid: already at these early stages, the technical, implementation (delivery), business/financial (particularly pricing), and legal aspects must be consistent and linked with each other to solve the customer's problem – and to satisfy the bidding company's requirements for profitability and risk. Where many team members are involved, linkage of the offered solution's design, description and pricing must be ensured – as well as matching them with the contractual terms

²⁵ See, e.g. Garrett 2003, p. 25 and 89–97 and Garrett & Kipke 2003, p. 20–27.

²⁶ See, e.g. Garrett & Kipke 2003, p. 20–22 and 106–109.

governing scope, task allocation, performance and other requirements, schedule, milestones, changes and extras, extension of time, etc. Coordination, information architecture, and overall linkage – the center piece of the puzzle – are crucial from early on.

In the actual drafting of the bid (or quote, tender, proposal, or offer), the supplier has to satisfy two conflicting objectives. On the one hand the primary function of the bid is to act as an aid to selling: the supplier is seeking to persuade the buyer that he, rather than any other, should be selected for the award of the contract. Its preparation should therefore be attractive and positive. At the same time, the bid is the supplier's opportunity, often his only opportunity, of seeking to protect himself against provisions in the request for proposals which he considers unreasonable. At the least, if there are any such provisions, he must make certain his bid is so worded that it cannot be accepted without his having the right of discussing these with the buyer.²⁷

Traditionally, legal education and research have not been particularly interested in the processes or documents used at the planning, solicitation and bidding stage – unless they have been litigated as, e.g., battle of forms, contract formation, or enforceability issues. If planning is addressed at all, it is mainly for dispute resolution purposes, preparing for litigation. However, there are some remarkable exceptions in legal literature: Louis M. Brown²⁸, Edward Dauer²⁹, Stewart Macaulay³⁰, and Ian Macneil³¹ were among the first to break the lawyers' traditional way of looking at the past. Their work on the use and non-use of contracts as well as on planning (by lawyers) in general and contract planning in particular, even though partly several decades old now, is still valid.

In their more recent broad-base introduction to contracts, Ian Macneil and Paul Gudel excel at a non-traditional law book approach.³² When they look at contract planning (and nonplanning), they state that all contractual relations involve 1) performance planning and 2) risk planning, whether lawyers are

²⁷ See Marsh 2000, p. 60.

²⁸ See, e.g. Brown 1955 and Brown 1972.

²⁹ See, e.g. Brown & Dauer 1978.

³⁰ See, e.g. Macaulay 1963a and Macaulay 1963b.

³¹ The first two Editions of Ian Macneil's *Contracts: Exchange Transactions and Relations* (now Macneil & Gudel 2001) were published in 1971 and 1978. Many of Macneil's renowned articles were also published in the 1970s, including *The Many Futures of Contracts* 47 S. Cal. L. Rev. 691 (1974) and *A Primer of Contract Planning*, 48 S. Cal. L. Rev. 627 (1975) – Excerpts of both articles are reprinted in Hardaway 1997, p. 281 and 463.

³² Macneil & Gudel 2001. The fact that the book is entitled "Contracts", not "Contract Law", the authors state, is no accident. After noting how generations of law teachers have equated Contracts with Contract Litigation, the subject of their courses, they state that here, the title reflects a different notion: "contract law, and particularly contract litigation, is but a small part of contracts. You cannot begin to understand the law of contracts unless you also come to an understanding of contracts – what they are, how they work, why people enter into them and what people use them for." See Macneil & Gudel 2001, p. 2. It is worth noting that for this book, a Teachers' Manual is available for Professors; see Macneil & Gudel 2003. – For a Nordic attempt to merge the two different worlds of *contract law* and *contracting* and to make designing good contracts and their effective management part of legal thinking, see Nystén-Haarala 1998.

involved or not. After the profound truth, "countless contracts are entered and carried to conclusion without ever having passed before the eyes of any lawyer", they go on exploring the actual functions of anyone, lawyer or otherwise, in contract planning, in administering the agreement process, and in administering contract performance.

In the words of Macneil and Gudel, a lawyer (or anyone performing the lawyer-like role) engaged in performance and risk planning will engage in the four planning processes set out in the following Figure (Figure 7): ascertaining the facts, negotiating, drafting, and applying legal knowledge. Each of these processes is intertwined with each of the others, and it is virtually impossible to carry out one without carrying out aspects of the others.

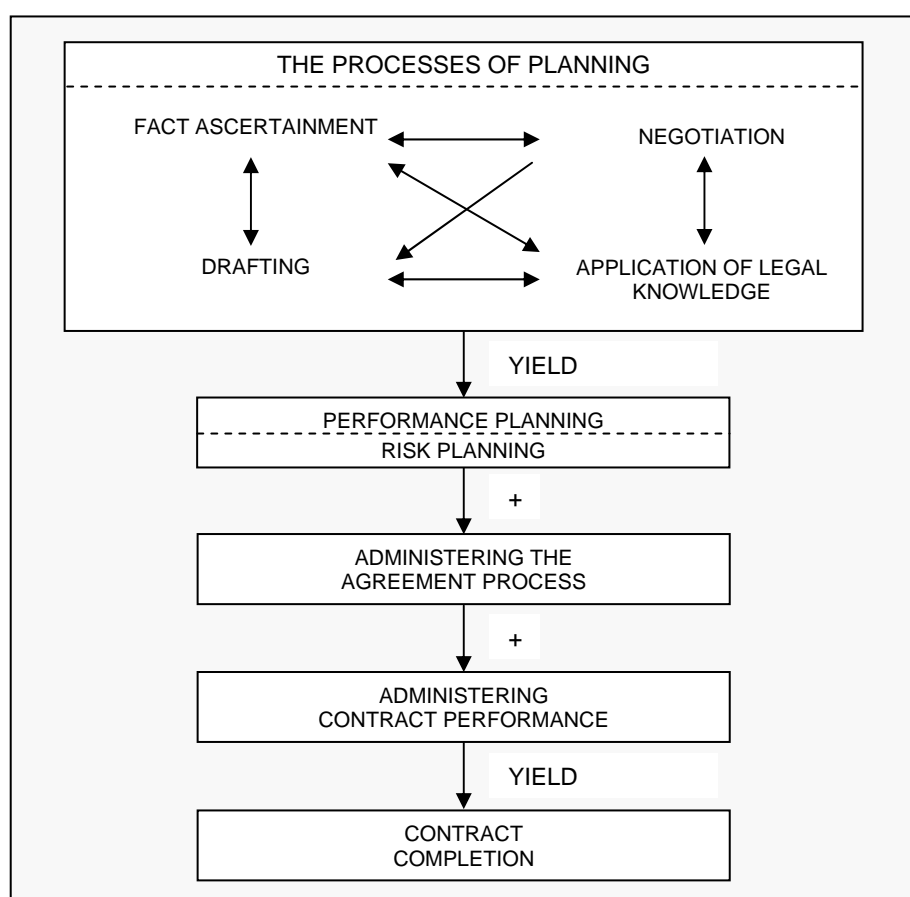


Figure 7. Planning through Contract – Functions in Contract Planning³³

Throughout their book, Macneil and Gudel focus on the role of contract as a planning mechanism. They do not believe that policy, justice and practice can be separated. Among many issues of both practical and theoretical interest, they discuss performance planning in the shadow of legal regulation and taxation, optimal use of standardized forms, providing for flexible operating conditions, and planning self-help remedies. They also discuss factors complicating

³³ See Macneil & Gudel 2001, p. 39 and Campbell 2001, p. 201.

planning such as inadequate or inaccurate communication, tacit assumptions, vague expectations, and what can be done about them.³⁴ Their work offers a practice-oriented theoretical foundation for contract planning, one of the key building blocks of Proactive Contracting, as well as for future research.³⁵

3 Making Proactive Contracting Work: Lawyers' and Clients' Shared Responsibility

Some people believe that lawyers are, or can be, in charge of the contracts a corporation makes. That is not so. Matters of contracting are not the exclusive domain of lawyers or legal scholars. Lawyers don't attend to the preparation of all deals and contracts – business managers and front-line personnel do. Lawyers don't manage or implement projects or changes based on those contracts – business and project managers do. Business managers make commitments, request bids and submit quotations and purchase orders over the phone and in email correspondence, send and receive related confirmation and other messages, handle project change and failure situations, and so on. Even though they might not think in terms of contracts, they make, change and handle contracts on a daily basis. They are experienced and business-savvy people, but their concerns are not primarily legal.

Good-quality contracts and successful performance are achievable through a well-thought out and well-managed contracting process. At its best, a Proactive Contracting process produces good-quality contracts, trouble-free transactions and successful relationships on an ongoing basis, even when people in the process change. This requires a systematic approach to managing the contracting process and documents from the planning, solicitation and bidding stage onwards, through implementation.

In the following, we will look at what is required to make Proactive Contracting work, and why clients' self-care is important. Suggested solutions and examples will be presented in Section 4.

3.1 Tacit Ignorance and Tacit Assumptions Can Be Hazardous to Clients' Legal Health

Much has been written recently about *tacit knowledge*. Less attention has been devoted to its counterpart, *tacit ignorance*: prevailing myths, beliefs, and assumptions that are considered to be true but which are not. The author has coined the term *tacit ignorance* to describe "knowledge" that is based on tacit

³⁴ Planning may also take the form of establishing frameworks for handling otherwise unplanned aspects of the relation. See Macneil & Gudel 2001, p. 29. – See also the introduction to the Louis M. Brown Program in Preventive Law at the web page of the National Center for Preventive Law at "www.preventivelawyer.org": "the fact that one ends up in an adversarial proceeding may be evidence of lack of planning or communication. By applying foresight, lawyers may limit the frequency and scope of future legal problems."

³⁵ See also Section 3.4, where contract design capabilities and the skills required for contract planning and drafting are discussed, and a plea is made to those in charge of training future lawyers and business leaders for cross-professional research and education in this field.

assumptions or preconceptions, unreliable or inadequate information, an unconscious lack of attention or interest, or misjudgment.³⁶

It is not always easy to tell whether people are making informed choices as to the contracts they suggest and accept, or whether they are *tacitly ignorant*. For a proactive lawyer, it is important to find out. In the words of Albert Kritzer, there are two categories of contract clauses that reduce profits or increase risks of loss: 1) those that are accepted, with eyes wide open, as legitimate trade-offs to obtaining an order, and 2) other unfavourable clauses. The latter are signs of *tacit ignorance* (or "skulls", as Albert Kritzer calls them), to the extent that they could have been avoided or mitigated through preparation and skilful negotiation.³⁷

Lack of interest, tacit assumptions and *tacit ignorance* can lead to poor planning (or, as is quite often the case, non-planning³⁸), careless communication, poor-quality contracts, and an underperforming organization. In day-to-day business, what is believed to be self-evident and appears as *tacit knowledge* may in fact turn out to be guesswork or *tacit ignorance*. Based on their assumptions, people making or implementing contracts may believe they know how things are – even without finding out about what the contract actually says. Quite often, those assumptions prove to be outright wrong or not applicable in all situations. If for example, people in sales believe, incorrectly, that when agreeing to liquidated damages of *any kind*, they are following company policy and agreeing to exclusive remedies and limited liabilities, when they are actually creating additional remedies and unlimited liabilities, they are unknowingly exposing their company to unidentified risks and liability exposure. This can be hazardous to the company's legal health.³⁹

Most people do not *intentionally* make poor-quality contracts or breach contracts, or do other things that add to their company's liability exposure – they just "do their job" and what they think is expected of them, and are *tacitly*

³⁶ See Haapio 2003a and Haapio 2003b.

³⁷ See Kritzer 1990/2000, Front Matter, p. 2. – Albert Kritzer is the former International Sales Counsel for the General Electric Company and the Executive Secretary of the Pace Institute of International Commercial Law. He is also the editor of the award-winning database on the CISG (the UN Convention on Contracts for the International Sale of Goods) and International Commercial Law at "www.cisg.law.pace.edu".

³⁸ For non-planning and the effect of tacit assumptions on contract planning, see Macneil & Gudel 2001, p. 29–33.

³⁹ Other examples of *tacit ignorance* that the author has come across include the following: "Small transactions only expose a company to small risks."; "If you agree to something in a written contract, you don't have to do anything not spelled out in that contract."; "If a signed contract document and attached specifications are in conflict, the specifications always prevail."; "If the contract is silent on remedies, the supplier is not liable for delays or non-conformities"; "If the contract is silent, the supplier's liability for damages is limited to the fee (or purchase price)."; "The supplier's liability for defects and non-conformities ends at the end of the warranty period."; "In cross-border contracts, the law of the buyer's country is always applied."; and "All laws are domestic and local, no international sales law exists." This list of examples is by no means exhaustive and continues to grow. If you know examples where *tacit ignorance* has played a role and you are ready to contribute them (all references are general, names and details of individual cases are never used), the author would be happy to hear from you.

ignorant. People don't know what they don't know. Project managers may not read their contracts, they just do what they usually do, for example when a change order or notice is required. Only if a dispute arises do they dig out the contract to find out that this one was quite different from the previous ones, or that the standard form had been revised. People who make offers, quotations, purchase orders and contracts may assume that certain things go without saying, particularly when they work closely or interact frequently with the same counterparts. "After all this time, they *must* know the scope of our work and how we do things." People on one side may assume that they know what the other side needs, expects or means – with the result that personnel in both organisations may end up spending hours trying to figure out what the deal actually was, and what is included in the fee and what is not.

Even if business managers do know how contracts and laws may impact business dealings, they often trust they can "work things out without bringing lawyers into it". When problems arise, there is a hesitancy to use legal sanctions or even to refer to the contract.⁴⁰ In many cases, this is understandable. Still, it is no excuse for failing to improve contracts and contracting processes so that *tacit ignorance* is replaced by explicit knowledge that good-quality contracts can provide.

3.2 Contractual Literacy Is Required – of Lawyers and Clients Alike

"When you "sign on the dotted line," you obligate yourself;
before you sign, you have a freedom of choice not available later."
(Louis M. Brown in Brown 1955)

An element of risk exists in any transaction, but when taking risks, prudent businesses want to know the level of risk so that they can balance the perils against the expected outcome. However, purchase price or fee, not risk, is often the yardstick used for policies related to individuals' authority to sign on behalf of a company. And yet the level of risk is not usually written on the documents themselves. Everyday traders do not always recognize that they are involved in contract making or risk taking; they just "do their jobs". In such cases, transactions can evolve unmanaged and result in people letting chances for profit or savings slip by or risks go unmanaged.

If we define a *contractually literate*⁴¹ person as one who can read and write contracts, we should be able, in principle, to include every literate person in that category. Most people are able to read and write contracts; whether they are

⁴⁰ See Macneil & Gudel 2001, p. 37. For business people's indifferent, sometimes even hostile attitude toward contracts, see, e.g. Macaulay 1963. For reasons why business can and does ignore contracts, see Macneil & Gudel 2001, p. 37–38.

⁴¹ According to a variety of dictionaries, the word *literate* has two basic meanings: someone who can read and write; and a well-informed, educated person. Correspondingly, *literacy* means the condition or quality of being literate or knowledgeable in a particular subject or field (e.g. *computer literacy*; *cultural literacy*; *emotional literacy*; *geographic literacy*). – See, e.g. The American Heritage® Dictionary of the English Language 2000.

willing to do so is another matter. Experienced corporate counsel know that the latter is often a problem in practice: Many business people are reluctant to read contracts, especially lengthy lawyer-crafted ones. Here, we are not dealing with *illiteracy* in the traditional meaning of the word. We are dealing with *aliterate*⁴² people – people who have the ability to read and write, but who may choose not to do so (when it comes to contracts).

For the purposes of future discussion, we leave out the writing part and concentrate on the reading part. For *Contractual Literacy*, mere reading is obviously not enough – one must understand as well. When reading a contract, there are two principal aspects to *Contractual Literacy*: first, being willing and able to read and understand what is specifically agreed, even the small print – and, often the more demanding task especially for non-lawyers, secondly, being willing and able to recognize and understand what is *not* specifically agreed, but still becomes part of or affects the deal – and to act accordingly. These aspects are presented in Figure 8 below.

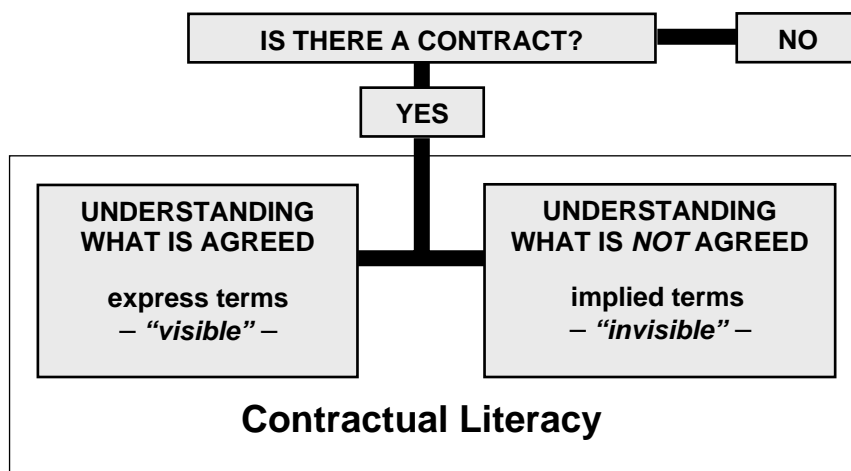


Figure 8. Contractual Literacy

Each of the two principal aspects of *Contractual Literacy* includes additional factors, particularly in international commerce. For example, understanding what is agreed – the express, “visible” terms – requires a good grasp of the language of the contract in question. Even if a person is literate enough to deal with daily business correspondence and routines, he or she may not be literate enough to understand the language and contents of contracts – or laws – that are encountered in international business. They demand different literacy skills, and many people have trouble with legal terminology and concepts. In cross-border transactions, in addition to mastering the relevant language and vocabulary, one

⁴² The dictionary definition of an *aliterate* person is someone who is capable of reading and writing but who has little interest in doing so, either because he or she is indifferent to the subject, or for other reasons. – See The American Heritage® Dictionary of the English Language 2000, Usage Note under *literate*.

often needs to master a number of abbreviations, such as the Incoterms trade terms, and their correct meaning and use.

Understanding what is *not* expressly agreed but may still become part of or affect the contract – the implied, “invisible” terms – requires a basic understanding of the mandatory and non-mandatory laws that apply. Sometimes the CISG⁴³ becomes part of the contract, without the parties being aware of that fact. Trade usage and practice may become part of the contract as well. These may bring along requirements, liabilities and remedies that the parties did not know existed.

Figure 8 shows another important requirement for *Contractual Literacy*, namely that of being able to recognize a contract. This may sound trivial, but in everyday corporate life it may not be anywhere near as easy as it sounds. If a contract is (falsely) understood solely as a signed piece of paper that has the word “contract” written on it, it is not easy to recognize the contractual aspects of the pre-contract process, or a bid, purchase order, or confirmation – or of project plans, schedules, workscope definitions, technical specifications, drawings, memoranda, minutes of meetings, etc.⁴⁴

In the era of electronic contracting, we don't "sign on the dotted line" anymore, and contracts have become harder to recognize. It is easy to believe that email messages and mouse clicks are “non-contractual”. Still for Proactive Contracting to succeed, all contracts must be recognized and properly dealt with, and appropriate attention must be paid to requests for proposals, bids, etc., irrespective of their form and media, as well as to changes made to existing contracts and their attachments.⁴⁵

People dealing with everyday business correspondence and documents have to act when it is time to act. Correcting possible mistakes and obtaining lacking information is most advantageous up front – when planning a solicitation or bid. If transactions are prepared in a proactive and systematic way, opportunities are maximized and risks are minimized. When management and staff take responsibility, the organization can identify and handle issues that, if left untreated, could develop into costly and time consuming disputes.

43 The abbreviation CISG is commonly used for the UN Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention and “the international sales law”. Despite the fact that the CISG has been part of the Nordic countries’ legislation for more than 15 years now, there is still a great deal of *tacit ignorance* around about the CISG – and lots of opportunities for proactive lawyering. Today, the CISG is the international sales law of more than 60 countries that account for more than two thirds of all world trade. Still its existence (not to mention its effects on the parties’ rights, obligations, notice requirements, liabilities and remedies) are not very well known or understood. – For the author, the CISG has become a career and learning opportunity which makes it easier for business people and lawyers from various parts of the world to get together, look closely into the ways bids, purchase orders and contracts are made, and make sure that the people who do the deals know enough about the law and have the tools and skills to manage its impact.

44 For the use (and non-use) of contracts as well as planning (and non-planning), see Macaulay 1963a, Macaulay 1963b, and Macneil & Gudel 2001, p. 29–38.

45 A matter making things more complicated is finding and keeping track of all relevant records and changes. See Krappé & Kallayil 2003 and under footnote 3.

Contractual literacy is a valuable corporate capability, and it is required of *everyone* who is involved, not just the experts. A *contractually literate* workforce can take better care of the deals it makes, and avoid unnecessary problems. It knows how to merge the goals and needs of business and risk management. Being *contractually literate* leads people to make educated decisions and helps them to offset risks with benefits. It allows them to avoid negative surprises, trouble – and the courtroom. Whether one acts for the seller or the buyer, being *contractually literate* means that one is able to take full advantage of the opportunities contracts provide.

Business managers and staff, everyday contract makers and users, when properly instructed and guided, can recognize contractual opportunities, avoid and bridge contractual gaps, and tackle possible problems at their roots by using clear and concise language. Agreeing on a well thought out, balanced, and realistic allocation of costs, risks, and tasks, as well as on appropriate conflict resolution mechanisms, is possible and does not require a lawyer. The same applies to addressing these matters in the documentation in an explicit and unambiguous manner. The people concerned – non-lawyers as well as lawyers – will be able to do all of this, provided they are *contractually literate* and are given the necessary tools, training and support.

Standard forms, together with standard terms, “the fine print”, can facilitate transactions and offer a way to make contracts look and feel shorter and easier to use. Many supplier and buyer organizations as well as trade associations representing them⁴⁶ have drawn up their own standard documents and clause libraries. The benefits are obvious: for routine contracting, making standard forms and optional templates easily available to sales and purchasing personnel can expedite workflow and drive revenue.

Standard terms have their downside as well. Exchanges of business information, both online and offline, often involve *both parties’* “fine print” and easily lead to battles of forms. In the international marketplace, surprises may be caused by approaches different from those applied domestically. In some jurisdictions, *both parties’* standard terms might be set aside and the applicable default rules, such as the CISG, could enter the picture. Electronic commerce solutions can help eliminate such problems. An e-commerce website can be set up in a way that provides clarity as to terms. Unlike a human sales force, an “electronic sales force” does not overlook steps in the contracting process or forget to address important issues – provided that the required steps, safeguards and terms are integrated early in system design and development.⁴⁷

⁴⁶ In many fields and jurisdictions, such as information and communication technology; mechanical, electrical and electronic products; and civil engineering, model contracts and standard terms are negotiated by or on behalf of companies representing both sides of the deal.

⁴⁷ For designing a legal interface for contracting on the Internet, *see* Ramberg 2005. The author divides “the rules of the game” in relation to e-commerce transactions in two major parts: first, how a contract is concluded and, secondly, the terms of the concluded contract. She also touches upon the related issue of how to incorporate the rules of the game into the contractual relationship. – For the myriad of legal and security-related aspects involved in architecting e-solutions, *see* Magnusson Sjöberg 2005b. *See also* Haapio & Smith 2000,

As the examples presented in Section 4 show, legal Intranets can speed up the process and help extend the geographical reach of proactive lawyers' support and assistance. Contract authoring and contract management systems are now available to help improve contract practices and the entire contracting process. Using existing technology and working together with business, IT and other professionals, proactive lawyers can provide their clients with skills, tools and training that support the company in its efforts to reach its business goals and to avoid project failures.

3.3 *Toward Clients' Self-care and Shared Care: Barriers and Opportunities*

As we move from reactive to proactive legal care, the role of the client becomes crucial. Traditional legal services do not suffice: lawyers cannot make or keep companies legally healthy. A company's contractual or transactional legal health is a matter of the work that people in the company do. It comes through the actions company managers and employees take and the choices and decision they make on a daily basis. What lawyers can do is identify, mobilize and support the strengths and capabilities of those people.⁴⁸

A truly proactive lawyer not only helps and "protects" clients but also helps the clients to help and "protect" themselves, stimulating and supporting their self-care. As medical self-care, legal self-care is a collaborative process. Clients need knowledge, skills, tools, and support to take care of their legal well-being. Success turns on the clients' willingness and ability to take responsibility, and on the lawyers' willingness and ability to encourage and support it. When potential problems are recognized and, where possible, prevented before they become legal ones – and when legal problems do occur, they are solved in good time, before they result in a dispute – everyone's resources are saved.

Despite the obvious benefits, not all lawyers are enthusiastic about the idea of clients' self-care. Some lawyers express serious doubts about giving non-lawyers access to forms and contract drafting tools. Many do so out of a real worry about who wrote the forms and who invented the tools, about whether they are good, valid, and appropriate to the situation at hand – or outdated, inappropriate, even bad. Some lawyers doubt out of fear: If clients have access to the same information and tools as their advisors, what about future lawyering (or billing) opportunities.

Again, the legal profession is not 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, where there has been an increasing emphasis in recent years on the role of the patient. Stimulating examples illustrate how health-care professionals have helped their patients and clients to increase control over their own health.

where the concept of "Safe Sales in Cyberspace" is introduced: a systematic approach to managing electronic presales and sales processes and documents.

⁴⁸ For a more general discussion of the changing roles of lawyers and clients as we move from reactive to proactive law, *see* Section 3 of the author's "Introduction to Proactive Law – A Business Lawyer's View", in this Volume of Scandinavian Studies in Law.

One of the main barriers to self-care support by physicians and nurses has proven to be their attitudes and values: "Self-care is inhibited by attitudes which discount the value of the client's experience and beliefs. Furthermore, an excessive focus on having the health problem solved by the professional can induce a passive attitude in the patient."⁴⁹

In medicine, research shows that supporting self-care can improve health outcomes and increase patient satisfaction. In the legal field, research is not available. Experience indicates that in many areas, including corporate contracting, a successful mixture of self-care and professional care (known in medicine as shared care⁵⁰) is the ideal way to go. As any care, self-care carries with it risks. 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.

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.⁵¹

Yes, users may misunderstand and misuse the tools proactive lawyers and others provide them with. Yes, those tools do become outdated and, yes, they may be governed under the laws of a foreign jurisdiction. There are real risks and dangers – these risks and dangers, however, can be minimized through education and support. While the outcome may not be a perfect contract, it is still likely to be better than a first-timer layperson's desperate attempt to craft the contract from scratch without any guidance. Once the person understands what is involved, he or she can make better decisions and know to seek appropriate help, when help is needed.

As will be shown in the examples presented in Section 4, existing technology allows a redistribution of work between clients and lawyers, and a number of tasks can be entrusted to business personnel, without sacrificing contract quality

⁴⁹ See Supporting Self-Care 1997 and Supporting Self-Care 1998.

⁵⁰ For self-care support and shared care, *see, e.g.* Self Care – A Real Choice 2005.

⁵¹ See Brown 1955, p. 19. – Louis M. Brown's first book that was published in 1950 included a chapter on "Understanding and Preventing Risks in Offers to Form a Contract". See excerpt reprinted in Gruner 1998: "Of course, an offeror need not consult counsel every time he makes an offer. Most offers do not involve sufficient risk to warrant consultations. An offeror must exercise his own judgment as to whether his offer is sufficiently unusual, important, or risky, to warrant the services of counsel. The amount of money involved is a good test to apply. The length of time the contract will last is another test. An offer resulting in a contract that will take a long time to perform might be sufficiently important to warrant obtaining preparatory legal advice."

or increasing risk. Skills and support are required so that everyday traders can identify opportunities in time to take advantage of them and spot potential problems while proactive preventive action is still possible. One of the great benefits (and threats to some!) of clients' self-care is the fact that they lessen clients' dependence on legal resources, particularly for routine matters. Legal resources can then be brought in when more complex negotiation is required or when a particular situation requires the drafting of nonstandard language.

3.4 Corporate Contracting Capabilities: A Plea for Cross-professional Research and Education

Legal education and research in the field of contracts have concentrated on legal rules and case law: what *courts* have done, for example to protect the weaker or less sophisticated party to a transaction – in hindsight, *ex post*. Businesses, again, would be interested in the makings of successful transactions, and what *people* and *businesses* can and should do – foresight, *ex ante*.

The typical law school education reinforces the notion that litigation is the very core of lawyering. Students spend a lot of their time reading about case law. Most contract law books are full of examples of failures and problem situations; contracts that have become involved in a dispute or litigation. Very few success stories are published in legal literature. As traditional law is mostly reactive, not many lawyers have questioned the habit of looking at precedents and the past or of focusing on failures rather than successes.

It is certainly necessary for law students to study cases and doctrine in order to create sensitivity as to how legal problems might arise and how they can be solved. However, not all lawyers are going to be litigators, judges or arbitrators. Planning and doing deals is fundamentally different from litigating, and the roles of the deal lawyer and corporate lawyer should no longer be neglected. To train lawyers that can help people and businesses succeed, the focus of legal education should be changed from a reactive to a more proactive approach.

In the corporate context, contracts cannot and should not be evaluated by their legal qualities alone. As discussed earlier, contracts have many functions. They must capture, merge and articulate different stakeholders' interests and requirements: strategic, financial, legal, regulatory, product and service owner, etc. This is true for both the buy-side and for the sell-side. Expectations need to be recognized, aligned, and managed. Shared expectations must be translated into responsibilities, which must be appropriately reflected in contracts. The supplier must understand and solve the customer's problem while satisfying its own requirements for profitability and risk management. In order to function as business and management tools, contracts must translate goals, expectations and promises into language that is understood in the way intended and translates into successful performance.

To ensure successful, profitable business, the contracting team must have a good grasp of the different dimensions and functions of contracts and how to manage them. In large organizations, where a range of participants are involved in the contracting process, the challenge is to achieve a balance between the different requirements and preferences and to facilitate communication and coordination – as well as a seamless transition between the different stages of the

life-cycle of the contract. Returning to the jigsaw puzzle analogy of Section 2.2, using a complex high-technology or engineering-procurement-construction (EPC) project as an example, Figure 9 illustrates that corporate contracting capabilities consist of technical, implementation (delivery), business (financial) and legal parts, all of which must be consistent and balanced.

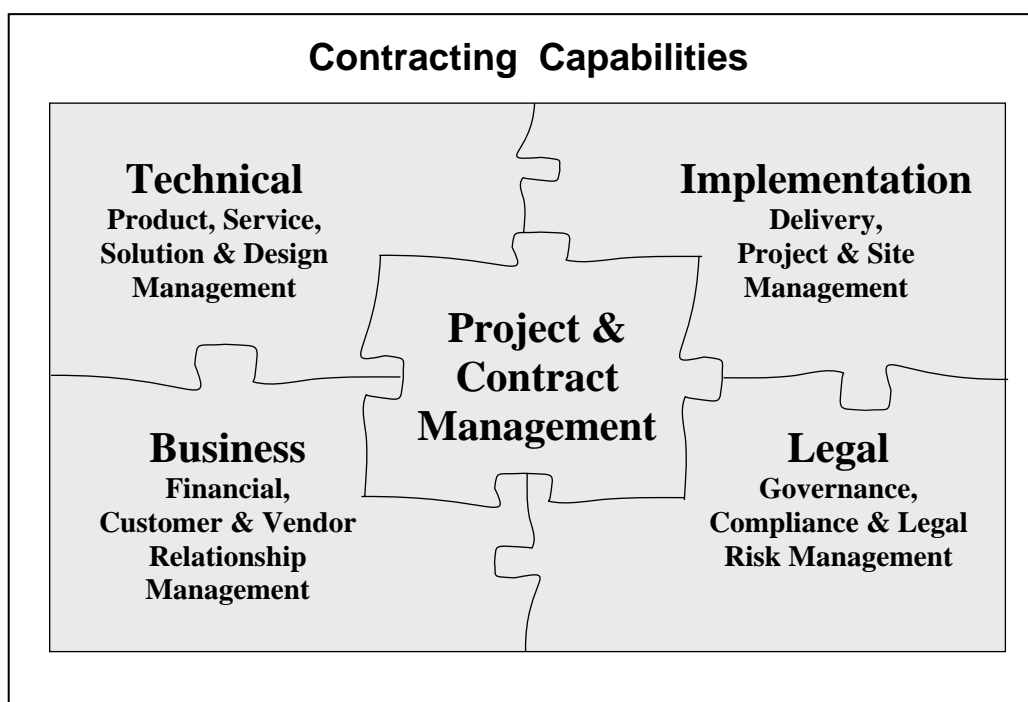


Figure 9. Contracting Capabilities – Puzzle Analogy. Orchestrating activities and merging skill sets across multiple functions and enterprises are crucial

The legal component is just one piece of the puzzle, albeit a quite important one. Contracting success requires much more than legal knowledge and skills alone. Managerial and technical skills come to the fore, not only at the implementation stage but also when contracts are planned and put together. The input of managers and engineers with intimate knowledge of the relevant businesses and technologies as well as of the management challenges involved in such exchanges is needed in key areas in order to lay the foundation for the deal and construct operationally efficient contract terms.⁵²

⁵² See Argyres & Mayer 2005. In this empirical research paper, the authors discuss contract design capabilities in high technology firms and the roles of lawyers, managers and engineers, respectively. The authors note that business managers play important roles in designing complex contracts such as alliance, outsourcing, engineering and licensing contracts and propose that managers and engineers, not lawyers, are the primary repositories of a firm's contract design capabilities with regard to the allocation and description of roles and responsibilities; providing for communication between the parties; and project-specific contingency planning. Lawyers, again, play important roles in designing contract terms related to decision and control rights allocation, dispute resolution, and generic (non project-specific) contingency planning. See also Weber & Mayer 2005, where the authors discuss the different skill sets possessed by three parties who may negotiate contracts on behalf of a firm: (i) external legal counsel, (ii) internal legal counsel, and (iii) managers and engineers,

In order for the different skill sets to complement rather than conflict each other, teamwork, communication, and clearly stated roles and responsibilities are called for. All participants must understand each other's responsibilities and how their roles interact during contract preparation, crafting and implementation. Strong project and contract management capabilities are required to ensure coordination, overall linkage and success. A well thought-out contract and the early involvement of the project manager in the contracting process set the stage for successful project completion. All team members – from the very early stages onwards – must commit to making it happen.⁵³

Both on the sell-side and on the buy-side, the roles of the different functions and professions often overlap. Coordination is needed between procurement, information technology, sales and commercial managers, financial managers, project managers, legal professionals, and others. Some managers may have authority to sign, modify, or cancel contracts, while others may not. It is often useful to map out what the organization's current contracting processes, roles and responsibilities are. It may become apparent that no one really has ownership and is accountable for the process, end-to-end. While new technology and a contract management system may help, each organization must make its own determination as to who is in charge and who needs to be kept informed. It needs to be clear to everybody involved.

Some lawyers tend to see contracts primarily as a source of trouble and dispute, and with few exceptions, legal writers and educators have presented contracts mostly in that context.⁵⁴ This has led to lawyers, when discussing contracts, using the language of law, risks and failure rather than the language of business, opportunities and success, without even noticing it. A language and culture barrier has developed, keeping lawyers out of many teams where they could have made a valuable contribution.

Yet knowing what lawyers know is of value, when used *before* something goes wrong, and communicated in a language that is meaningful to business people. Experienced proactive lawyers know how to use contracts to clarify obligations and requirements and to avoid negative surprises. Using the good old rules of legal risk management and dispute avoidance, they can begin the risk management process by identifying the risks: what, why, and how problems may

and the key issues in determining who should lead the negotiations when different types of knowledge are required. – Complex contracts are not the only example of an area where business managers rather than lawyers play a key role. As discussed earlier, contracts for routine deals are another. Corporate lawyers do not normally attend to such deals: sales, service, purchasing, and project managers do.

⁵³ Similarly, Garrett 2003, p. 29.

⁵⁴ This comes as no surprise: a lawyer's view of contracts (as illustrated in Figures 2 and 5) has developed through generations of projects and contracts that have failed; through disputes, litigation and case law. See Macneil & Gudel 2001, p. vii–viii: “Only lawyers and other trouble-oriented folk look on contracts primarily as a source of trouble and disputation, rather than as a way of getting things done.” Even in other disciplines than law, it seems that researchers and educators have been more interested in opportunistic behavior, ill will, misrepresentations, fraud, etc., than in success, good will, trust-building and win-win for the parties. – For a departure from the traditional litigation-centered approach to contract law, see Nystén-Haarala 1998 and other resources mentioned in Section 2.4.

arise. They know that implied (“invisible”) obligations and requirements are not easy to fulfill: to be able to perform, people need to know what is expected. People do not perform obligations they do not know of. By asking the right questions, proactive lawyers can help clients clarify goals, strategy, and task allocation, and be better prepared – not only for contingencies or legal problems, but also for successful performance.⁵⁵

Proactive law skills are needed in many areas of law practice. Where do we teach them? The author is not alone in suggesting that young lawyers coming out of Law School do not possess the skills needed in order to make a meaningful contribution toward proactive lawyering. One would assume that all lawyers would have at least some basic training in the legal skills related to commercial contracting. Still at many Law Schools that does not seem to be the case. Rather than skills, law students learn “the law”, and rather than contracts or contracting, they learn “contract law”, typically norm- and court-centered contract law (along with other areas of law, isolated from one another).⁵⁶ It is not unusual for law students to complete their studies without ever drafting or even seeing an actual contract.

Many Law Schools, while priding themselves on teaching students to think like lawyers, still teach students to think like litigators. Planning and doing successful business deals and eliminating causes of legal problems are fundamentally different from litigating, and they require different knowledge

55 For empirical research supporting this view, *see* Argyres et al. 2005. The authors find evidence from their sample that contingency planning and task description act as complements. According to their findings, as parties make more efforts at contingency planning, they learn more about how to carefully describe the task so as to avoid disturbances to the relationship. Conversely, as the parties increase their efforts to describe the task in more detail, they improve their understanding of important contingencies that could threaten the relationship. – As discussed earlier, experienced lawyers see and care about contingencies and elements that are often invisible to clients. Implied terms, for example. A client may believe that a supplier’s liability for design faults of a piece of equipment ends at the end of the contractual warranty period. Experienced lawyers know that despite the expiration of a contractual warranty, there may be other grounds for liability; the goods may not be reasonably fit for their purpose, and the question of implied warranties or statutory liability for non-conformity remains, unless that liability is expressly excluded. One single sentence in the contract can make the difference. For a proactive lawyer, however, the matter is not just a question of adding or deleting that sentence in the warranty clause; it is making sure that the client and its contracting partner(s) truly understand and agree what the performance and other requirements for the equipment are, and what obligations and liabilities each party has in respect of reaching those requirements. For other examples of tacit assumptions and *tacit ignorance*, *see* under footnote 39. For a discussion of “visible” and “invisible” terms in contracts and what to do about them, *see* Haapio 2004.

56 It may be different now, but years ago, when the author went to law school, there were courses in contract law, commercial law, intellectual property law, private international law, and other areas. There was no course putting the courses together or using legal knowledge in real-life situations. We learned of rules and principles of court procedure, of concepts, institutions, and statutes. No one taught us about business reality, contract planning or practices, or how to use the freedom of contract to the advantage of our clients in their business dealings. There was no course in international trade (or even in domestic trade) at that time, nor was there much on contract design, language, or forms. Nothing was said about how to put the pieces together, to overcome obstacles, or how to find legally sound solutions for future business dealings.

and skills.⁵⁷ Businesses value deal making, problem solving and problem prevention skills. Students who want to become proactive lawyers must learn to think proactively. Mere thinking is not enough. They must also learn how to do things: how to make proactive law work in real life. Businesses need practical legal skills that actively support their success.⁵⁸

The truth is that business managers, not lawyers, are the ultimate decision makers in corporate contracting. Today's business managers must be able to orchestrate and balance the (often conflicting) interests and requirements and understand their impacts when building business strategies and implementing them. Knowing how important the capability to make, manage and perform contracts effectively is for businesses, it is surprising how few Business Schools and Universities teach those skills and how few tools are available to develop and teach courses in these areas. So far, the experience-based knowledge about project and contracting successes and failures, as well as about contractual risks and opportunities, has remained inside businesses, within a small group of people. It is in the interest of companies, business managers, and lawyers, to share these lessons learned.

Up until recently, there has been little empirical analysis of how contracts are actually planned, designed, made, and used.⁵⁹ This may be due in part to unfortunate misconceptions based on Macaulay's classic work on the use and non-use of contracts⁶⁰ and the skepticism that followed about the importance of business contracts. What is required now is the development of frameworks and theories around the needs and concerns of the business community: contracting-related drivers of business success, incentives for good performance, as well as

⁵⁷ For deal lawyers, *see* Stark 2004, p. 223. In this essay, the author describes what it means to think like a deal lawyer. She discusses the analytic skill of translating the business deal into contract concepts, proposes a framework that students can use to learn how to add value to a deal, and argues that knowing about business is an imperative for deal lawyers, just as knowing civil procedure and evidence is an imperative for litigators. She also describes a course that Fordham University School of Law offers that is designed to teach students essential business concepts. *See also* Stark 2005. For strategic lawyers, *see* Chanen 2005, and for business lawyers as Transaction Cost Engineers, *see* Fleischer 2002, with references.

⁵⁸ For examples of proactivity in action and client (self-)care applications, *see* Section 4.

⁵⁹ Exceptions in the legal field include resources on contract planning discussed in Section 2.4. For empirical scholarship (or the lack of it) in contract law and legal science more generally, *see, e.g.* Schuck 1989, Korobkin 2002, Ulen 2002, and George 2005. According to George 2005, "empirical legal scholarship is arguably the next big thing in legal intellectual thought." It is worth noting that empirical scholarship is the theme of the 2006 Annual Meeting of the Association of American Law Schools. – The beginning of the 21st Century has seen encouraging new research initiatives outside the legal field looking at real-life business contracts and contracting, including those by strategy and organizational scholars and business economics researchers, *see, e.g.* Poppo & Zenger 2002, Argyres & Mayer 2004, Argyres & Mayer 2005, Argyres et al. 2005, Paija 2003, Paija 2004, Haavisto 2006, and their references. *See also* Roxenhall 1999, Roxenhall & Ghauri 2004, and Warsta 2001. The latter, an academic dissertation in the field of information processing science, studies contracting processes and how they evolve in software businesses. The empirical part covered twelve software producing companies, eight established by Finnish firms in Silicon Valley, USA, and four Finland-based firms operating internationally.

⁶⁰ *See* Macaulay 1963a and Macaulay 1963b.

sources of value, opportunity, and competitive advantage. Educational programs and multi-professional research – both theoretical and empirical – on commercial contracting and its success factors are called for.⁶¹

To create good quality contracts that serve well both as business tools and as legal tools, corporations need the skills and strengths of business managers and proactive lawyers. These skills and strengths must be integrated through collaboration and communication.⁶² Lawyers know how problems may arise – this helps going to the root causes of problems and removing them through pre-contract communication and clarifications. Business managers benefit much more from their legal advisors' insights and experience if they bring them in *early* in the contracting process rather than waiting until the last minute to fight a fire. When brought in early, proactive lawyers can act as business partners who add real value to business decisions. Working together, lawyers and business managers can determine a sound way to manage the contracting puzzle and its key trade-offs, such as including more or less detail in contracts and whether and when to use standard terms and conditions and contract templates vs. customized contracts.⁶³

As illustrated by the above discussion, there is much to be gained by making the proactive law approach part of legal education. Experience and research show that corporate contracting capabilities reside not only in lawyers, but also in managers and engineers – and, in particular, in companies' ability to merge

⁶¹ In 2005, recognizing that the ability to make and manage effective business commitments has moved to center-stage for today's corporations, the International Association for Contract and Commercial Management (IACCM) sent a request to selected academic institutions calling for the development of programs at both under-graduate and post-graduate levels; co-operation between leading institutions to ensure consistency of programs and outputs on an international basis; and agreed fields and structure for academic research into the role and contribution of commercial contracting in 21st Century business.

⁶² *See also* Argyres & Mayer 2005. The authors note that firms must make conscious efforts to synthesize or aggregate team-level contract design capabilities to the firm level; i.e., to transform individual- or group-level knowledge into a true organization-level competence. Here, the authors argue, contract templates and the firm's internal legal department have an important role in codifying knowledge about contracting for general use within the firm. *See also* Weber & Mayer 2005.

⁶³ In Argyres & Mayer 2005, the authors discuss the trade-offs and contract design capabilities for detailed commercial contracts from a managerial perspective. They argue that knowledge about the management of the trade-offs resides differentially in managers, engineers and lawyers as regards different types of contractual provisions. – Here as well as in Argyres & Mayer 2004, the authors draw on several examples from actual contracts to illustrate how firms develop contract design capabilities and learn how to use contracts to manage their interfirm relationships over time. For complementarity and evolution of two types of contractual provisions in IT services contracts, namely contingency planning and task description, *see* Argyres et al. 2005. *See also* Weber & Mayer 2005, where the authors, drawing mainly on transaction cost economics and also incorporating insights from neo-institutional theory, develop a series of propositions to help guide firms in their use of standard form contracts. According to the authors, one key aspect of contract design capability involves the use of standard form contracts: when to use one versus designing a contract from scratch, what to include in one, and who should negotiate it.

and optimize their respective knowledge and skill sets.⁶⁴ For training Proactive Contracting skills, it would be ideal for Law Schools, Business Schools and Technical and other Universities to collaborate in developing cross-training: multi-professional curricula and learning environments where students can work with real-life issues and business deals, simulated or real, together. This opens new avenues for education, enhancing both future lawyers' and clients' chances of success.

The time has come for multi-professional collaboration among businesses, educators, and researchers. Proactive law as applied in corporate contracting has potential to become a catalyst for cross-professional collaboration and for bridging education, research, and business reality.⁶⁵ Today's students and their future employers would benefit greatly from a curriculum containing elements of proactive law: the theory, the way of thinking, and the skills related to their applications. Proactive Contracting, particularly contract planning, contract drafting and transactional skills, where materials for students and teachers are already available,⁶⁶ can lead the way to teaching proactive law in context.

4 Proactivity in Action: Examples of Client (Self-)Care Applications

The capability to make, manage and perform contracts effectively is crucial for corporations. No lawyer or other individual in a large organization, however knowledgeable, can secure good-quality contracts and successful business transactions working alone. Contracting is not a craft activity conducted by an expert at a desk. In today's complex, multi-locational deals, contracting is a process in which a wide range of people, functions, and technologies are involved: a collaborative venture that requires a knowledgeable and well-connected team.

⁶⁴ For contract design capabilities, *see* Argyres & Mayer 2005 and Sections 2.2–2.4, with references.

⁶⁵ One of the main goals of the Helsinki 2003 Conference “Future Law, Lawyering and Language. Helping People and Business Succeed” was to begin to design and build that bridge. The Nordic School of Proactive Law Conference held in Stockholm in 2005 “Fusing Best Business Practices with Legal Information Management and Technology” added new elements, including new technologies, and took it one big step further. – For more information on the Conferences, *see* author's Introductory Article to this Volume of Scandinavian Studies in Law, under footnote 11.

⁶⁶ *See* Macneil & Gudel 2001 and other resources discussed in Section 2.4. For educating deal/business lawyers, *see* Fleischer 2002, Fox 2002, Stark 2004, and Stark 2005, with references. The author of the latter two, Tina Stark, has compiled a Transactional Training Resource Guide, a wide selection of searchable materials relating to the teaching of transactional skills. This Guide, designed to be helpful both to law school professors and to professional development directors, is published on Stark Legal Education Inc.'s web pages at “www.starklegaled.com/resources/”. The Guide includes training materials that are commercially available, treatises, textbooks, and articles on the pedagogy of teaching transactional skills. It contains two segments on Contract Drafting.

Cross-functional collaboration is key to good-quality contracts and corporate contracting success. Strong fact-finding, goal-setting and drafting skills are needed. For businesses, the contract is not the goal; successful implementation is.⁶⁷ The contract is a tool toward that goal. To be a good tool, the various pieces of the contract puzzle (see Figure 4) must match. The tools do not work without users: contracts must be properly implemented and managed. Knowledge, skills, processes and systems must be in place to provide support.

The best way to successful corporate contracting is for proactive lawyers and business managers to work together and establish processes, practices, checklists, and templates that help the entire business team take care of the key issues in a systematic way. In order to secure success on an ongoing basis, everyone involved in solicitation, procurement, bidding, sales, and project implementation needs to know how to do the right thing, and do it right the first time and every time. People should also know what is required of them, what is important, and why.

Technology offers new solutions to automate current processes and to deliver services, old and new. Automated processes and forms can enhance the success of Proactive Contracting – provided they automate well thought out processes and good-quality contracts and forms in a safe and secure way.⁶⁸ If they don't, instead of profits, they may be generating problems at Internet speed. To secure success in electronic contracting, a proactive approach, cross-professional collaboration, and the quality of contracts and contracting processes become crucial. Vague concepts and ambiguous rules are not easily transformed into strict concepts that can be executed by a computer.⁶⁹

With tools and techniques that are now available, proactive lawyers can help corporate clients to design and manage their contracts so that they produce predictable results, promote business success, and avoid unnecessary problems, offline and online. Broad based training and easy to use tools can help embed proactive law into a company's everyday activities. In this way, well thought-out contracts are reproducible on a regular basis, even when people change and no lawyers are around.

⁶⁷ See Ertel 2004. According to the author, most negotiators have a deal maker mind-set: They see the signed contract as the final destination rather than the start of a cooperative venture. What's worse, most companies reward negotiators on the basis of the number and size of the deals they're signing. The author asserts that organizations and negotiators must transition from a deal maker mentality, which involves squeezing your counterpart for everything you can get, to an implementation mind-set, which sets the stage for a healthy working relationship long after the ink has dried. "The best deals don't end at the negotiating table -- they begin there."

⁶⁸ For setting up an e-commerce website, incorporating the "rules of the game" into the contractual relationship and designing a legal interface for contracting on the Internet, see Ramberg 2005. For the concept of Safe Sales in Cyberspace, see Haapio & Smith 2000.

⁶⁹ See Magnusson Sjöberg 2005c, p. 520. For incorporating law in e-solutions, trusted legal infrastructures, and different approaches to law in this context more generally, see Magnusson Sjöberg 2005b. As regards battles of forms, see also Section 3.2, with references.

4.1 Improving the Contracting Process – a Case Study

Proactive Contracting improvements can often be accomplished by using programs and systems that clients have already in place, for example within the framework of Quality Management, Six Sigma, and Contract Management systems. It can be enhanced using existing procedures, Contract Reviews, and self-assessment activities. With some updating and refining, these can be adjusted to secure on-going pre-emptive action in business transactions. In this way, proactive law combined with quality and legal risk management can be integrated into business strategy and everyday activities, and remains there.

Improving the Contracting Process – a Case Study

A 130-person engineering and architectural firm made their professional services contracts as many other companies: they used old contract forms – each Project Manager had their own – or they agreed to their clients' proposals for contracts. This way of working continued, until they came to realise that the profit from and the risk assumed with a project depend on the contract. The firm found that to remain viable, they had to negotiate equitable agreements which limit the risks assumed and allow an acceptable profit. Within the framework of a Total Quality Management program that had been launched in the firm, a Better Agreement Team (BAT) was appointed to improve contracts and the contracting process.

First, the BAT defined a “perfect” contract: determined those provisions that should be included in a “perfect” professional services contract. A one page 32-item check list was developed with points assigned to each provision related to its relative importance. A “perfect” agreement would include all those provisions and score 100. Copies of their most recent agreements were scored by the BAT. The average score for the agreements was 49, with a high of 79 and a low of 14. There was definitely room for improvement.

The BAT analyzed the existing situation, located the fundamental reasons for defects in contracts and prioritized the areas that needed to be improved. Then they suggested three areas for improving the contracting process:

1. “Perfect” Agreement Forms: have “perfect” draft agreement versions available for the forms used, and have the Project Managers begin the preparation of a contract with the appropriate “perfect” form, which would score 100;
2. Agreement Training and Reference Notebook: provide training and have a notebook which includes the provisions of a “perfect” contract with information as to their intent and importance and provide Project Managers with the notebook when they begin the preparation of a contract; and
3. Agreement Check List: have a check list in which a “yes” answer to all questions would indicate a “perfect” contract and any “no” answer requires a “why not” response and require a completed check list accompany every agreement prior to execution.

The agreements of the firm did indeed improve – even during the time period preceding the scoring test. The average score in the test was 68. The test results encouraged the firm to implement BAT recommendations. Draft contracts and other material were prepared, Project Managers and management were informed about the new process, and training was provided. In the next test the average

score of the contracts was 71. The BAT succeeded, and the results were measurable.⁷⁰

4.2 *Legal Intranet – a Multi-lingual Contracting Toolbox*

With the help of existing technology, it is possible to offer new kinds of tools, performance support and reference materials. Legal Intranets can help both lawyers and clients by extending the geographical reach of proactive lawyers' support and assistance.

Legal Intranet – a Multi-lingual Contracting Toolbox

A Scandinavian-based corporate legal department – like many others – found itself spending a great deal of time responding repeatedly to similar routine questions from clients, and providing copies of the same check lists, contract templates, and Terms and Conditions. Keeping track of their most current versions in various European languages was a never-ending task nobody enjoyed doing. The department wanted to take a more proactive approach. With the help of their IT team, they decided to use web-based technology and the corporate Intranet to serve as a resource for lawyers and clients alike. They set up a Legal Intranet containing, i.a., Frequently Asked Questions together with Answers, and a multi-lingual Contracting Toolbox available 24 hours a day, 7 days a week. Corporate clients were instructed to use the Intranet as a first step before approaching the legal department. By directing routine requests to the web-based Contracting Toolbox, the department has more time to deal with the more complex issues. Both business management and the legal team benefits from the new way of working together.

4.3 *Contract Libraries and Toolkits Work for Private and Public Organizations*

In organizations with thousands of transactions at any one time, legal professionals cannot attend to the preparation of all deals and contracts: people in sales, purchasing, etc., can. They have the possibility of recognizing opportunities and preventing problems on a daily basis. Harnessing them to this task with support from proactive legal professionals is worthwhile. The following examples show that the approach can work in private and public organizations alike, both on the sell-side and on the buy-side..

Metso Contract Library and Standard Templates for Purchase Contracts

Metso Corporation has business operations in over 50 countries. It owns production plants in Finland, Sweden, Norway, and various other countries, including the UK, USA and Australia. Metso specializes in fiber and paper technology (Metso Paper), rock and minerals processing systems (Metso Minerals), and process industry automation and control solutions (Metso Automation). Its shares are listed on the Helsinki and New York Stock Exchange.

Every year Metso spends more than two billion euros on materials, components, machines, equipment, subcontracting and services. Hundreds of Metso employees in various units around the world purchase products and

⁷⁰ For further information, see Clark & Paul 1996.

services for Metso. A library of Metso's standard purchase contract templates and conditions has been established and features the basic templates and instructions for partner and framework agreements which are used with important volume suppliers. The contract templates and general purchase conditions in the library are intended for global use, excluding North America. The templates include the key issues that should be taken into account in procurement and negotiations.

The contract templates and general purchase conditions provide a good and sound framework also for people who seldom encounter buying situations. Metso's contract library is a part of the Material Management function's supply management system (MSOP). Metso and its units have also organized special training about purchase contracts, and related matters are included in Metso's procurement training.⁷¹

In the United Kingdom, the Office of Government Commerce (OGC) maintains a Successful Delivery Toolkit website⁷², which is useful for management and counsel both in the public and in the private sector. Its many segments include guidelines and briefings on, e.g., Effective Partnering,⁷³ Proposal Evaluation, Contract Preparation, and Contract Management⁷⁴, the latter covering issues involved in managing long-term service contracts following contract award (including managing service delivery, managing the relationship, contract administration, seeking performance improvements, and managing changes). OGC's IT Supplier Code of Best Practice⁷⁵, according to its Introduction, aims to facilitate a more mature acquisition and delivery environment that provides: for the customer, greater certainty of successful delivery and better value from IT-enabled programmes, and for the supplier, more successful and sustainable business for a fair rate of return. The Toolkit further contains various checklists and decision maps that help users to ask the critical questions. Its Procurement section⁷⁶ sets out the process for acquisition within EC procurement rules, with a foundation for subsequent contract and service management. Particular attention is paid to the roles and responsibilities of those involved in the procurement lifecycle. OGC places emphasis on the importance of forward planning and seeks to put into effect sound dispute avoidance and dispute management practices. It also provides model clauses as well as terms and conditions for goods and services, both IT and non IT.

71 See Metso Corporation Sustainability Report 2004 – In the Report, Metso Automation's Juhani Kaukonen, Vice President, Procurement Development, is quoted stating: “Because we do business in so many different countries, the terms of our agreements do matter. The contract templates are a good way to eliminate problems before they arise, and thus form a part of Metso’s risk management.”

72 “www.ogc.gov.uk/sdtoolkit”. October 14, 2005.

73 See, e.g. OGC’s Successful Delivery Toolkit – Effective Partnering: An overview for customers and suppliers 2003 and OGC’s Successful Delivery Toolkit – Managing Partnering Relationships 2005.

74 See OGC’s Successful Delivery Toolkit – Contract Management 2005.

75 See OGC’s Successful Delivery Toolkit – IT Supplier Code of Best Practice 2003.

76 See OGC’s Successful Delivery Toolkit – Procurement 2005.

UK Office of Government Commerce: OGC's Successful Delivery Toolkit

The Toolkit describes proven good practices for, i.a., project, contract, risk, requirements and service management. One of the reference documents recently added to the website, the Guide related to Supply Chain Management,⁷⁷ provides key insights into the management of multi-tiered supply relationships within the government procurement environment. It helps contracting authorities to understand the role that they and their main suppliers must play in managing the supply chain.

A report recently identified considerable scope for contractual standardisation across the UK Government. The OGC Successful Delivery Toolkit website, "www.ogc.gov.uk/sdtoolkit/", now contains updated Model Terms and Conditions of Contract for (i) General procurement (non IT): one set for goods and one set for services, and (ii) IT: one for procurement Goods/Supplies (inputs); and one for procurement of Services (outputs / outcomes), as well as guidance notes on the practical application of these Terms and Conditions.⁷⁸

The UK Treasury Public Private Partnership website⁷⁹ provides access to a wide range of information about the Private Finance Initiative (PFI) in the UK, including standard wording and guidance to be used by public sector bodies when drafting PFI contracts. Both the Public Private Partnership website as well as the OGC Successful Delivery Toolkit website provide valuable guidance for private procurement organizations as well. The model terms and conditions together with the related guidance notes (as well as all the above mentioned reference documents) are free to download.

UK Treasury Public Private Partnership Guidance and Standard Contracts

The aim of the Standardisation of PFI Contracts (SoPC), first published in 1999, is to provide guidance on the key issues that arise in PFI projects in order to promote the achievement of commercially balanced contracts and enable public sector procurers to meet their requirements and deliver best value for money. The guidance has been used by many different authorities in a wide range of sectors, and has provided the basis of sector specific guidance and contracts in, e.g., the defence, health, and education sectors.

The main objectives of the guidance, according to its Introduction are: first, to promote a common understanding of the main risks which are encountered in a standard PFI project; secondly, to allow consistency of approach and pricing across a range of similar projects; and thirdly, to reduce the time and costs of negotiation by enabling all parties concerned to agree a range of areas that can follow a standard approach without extended negotiations.⁸⁰

⁷⁷ See OGC's Successful Delivery Toolkit – Supply Chain Management in Public Sector Procurement: a Guide 2005.

⁷⁸ See OGC's Successful Delivery Toolkit – Decision Map Part 4 Annexes: Model Terms and Conditions 2005.

⁷⁹ "www.hm-treasury.gov.uk/documents/public_private_partnerships/ppp_index.cfm". October 14, 2005.

⁸⁰ See Public Private Partnerships 2005, Private Finance Initiative (PFI): Standardisation of PFI Contracts (SoPC) 2004, p. 9.

4.4 *Lawyers and Business People as Strategic Partners*

DuPont, with its Legal Model⁸¹ and Proactive & Preventive Legal CareSM program, is one of the pioneers in the field of corporate proactive lawyering. The DuPont Legal Model provides legal education and resources to give the businesses a competitive edge while minimizing the risk. It is a comprehensive and integrated process that takes a business-focused and results-oriented approach to the law, and helps law firms and corporate law departments improve the quality, cost and efficiency of legal services.

DuPont Proactive & Preventive Legal CareSM Program

DuPont's Proactive & Preventive Legal CareSM program, which embraces the slogan "It means good business", encourages DuPont's lawyers and business people to become strategic partners. It places lawyers in an important new role where they contribute to the company's bottom line by identifying new business opportunities, evaluating risks, and helping the client avoid costly litigation. The program includes a series of Proactive & Preventive Legal CareSM Law Days for top executives and leadership teams of DuPont business units. The main goal of these meetings is to sensitize key personnel to important issues facing their businesses and familiarize them with the legal resources at their disposal. CD-ROMs have been developed that contain role-playing games, videos of simulated business situations implicating legal issues, and reminders of basic legal points. The program is also developing a "Legal Health Check-Up Form," which commercial lawyers can use to determine their legal needs, and a one-on-one education program via an internal Intranet.⁸²

Under the Legal Model, DuPont's business units – the clients – gain more cost-effective and better-focused legal services from lawyers who ask: "What is my client's objective in this case?" "How does this problem impact my client's business?" "What solution to this problem will provide maximum value to my client?" The strategic partnering approach has many benefits for the client, the in-house law department, and the individuals working there. It ensures that business objectives as well as other relevant aspects are fully considered, a careful and thoughtful approach is taken to legal issues, and surprises are minimized. Clients then become integral members of the legal team.⁸³

In large corporations like DuPont, proactive lawyering impacts the legal department, but its impact is not confined to the department's boundaries. Proactive lawyering impacts the whole corporation. Shifting the focus from processing lawsuits to promoting business success and preventing business problems also has an impact on the work of law firms and outside counsel working for the company.

The DuPont example demonstrates that proactive lawyers working in corporations do not have to wait for an assignment to solve a problem; they can take the initiative and facilitate the creation of practices and procedures which

81 For DuPont Legal Model, see "www.dupontlegalmodel.com/files/aboutlegal.asp".

82 Proactive & Preventive Legal CareSM is a service mark of E.I. du Pont de Nemours and Company. For DuPont Proactive & Preventive Legal CareSM program, see "www.dupontlegalmodel.com/files/ourinitiatives_4.asp".

83 See DuPont Legal. The Benefits of Strategic Partnering 2005.

help clients to achieve their objectives, foster fruitful long-term relationships, and avoid negative surprises. They can help ensure that clients do not overlook applicable legal requirements. By applying a proactive approach, they can help their clients and co-workers to become more successful. The approach gives inside counsel a more strategic role,⁸⁴ which makes him or her more valuable to the business units and the corporation. Working together as strategic partners, proactive lawyers and their clients can give the corporation a competitive edge and establish a strong legal foundation for its business.

5 Concluding Remarks

Most of corporate deal-making and contracting is done by non-lawyers. From a business point of view, crafting a contract may be seen as a necessary evil – a step without which internal procedures do not allow a business deal or a project to proceed. It may also be seen as an important initial step in articulating the business plan and in thinking through potential contingencies that may affect the project.

Many unnecessary problems in the architecture of business processes and electronic commerce solutions are due to the fact that the territories of presales, sales and contracting have not been very well explored or mapped. Insufficient attention has been paid to the legal dimensions of business models, old and new. As new business models and technologies develop, a more proactive approach is required, and early integration of business, legal and technology-related skills is called for.

Proactive Contracting facilitates informed decisions that lead to increased legal certainty and a reduction in overall risk exposure. Working together, proactive lawyers and their clients can put in place tools, systems and training that help secure sound contract crafting – both online and off-line – and successful contract performance. Proactive law then translates into everyday actions, helping clients to take better care of their deals and relationships.

In the past, many corporations perceived their legal departments as cost centers, a necessary evil, the services of which most other departments would rather do without. Successful examples show that a proactive legal department can change this picture. Proactive lawyers can become designers, mentors, coaches, and strategic business partners, who add value and contribute to the company's bottom line. When clients see the benefits of the proactive approach, they may start to see lawyers in a new light. Getting in touch with the legal department is then no longer postponed to the very last minute.

Success in business transactions and relationships requires a systematic approach to contracting, informed advance choices, and strong contracting skills. The required skills do not occur or develop by themselves. If aspects of proactive law are made part of educational programs at Law Schools, Business Schools and Universities, future lawyers will be better prepared to help their clients maximize business opportunities while minimizing risks, and future

⁸⁴ For strategic lawyers, *see also* Chanen 2005.

business managers will be better equipped to use the law, manage their contracts and work effectively with their legal advisors.

Proactive law is based on a strong belief that business disputes and litigation are not a fact of life we have to live with. While not all disputes and litigation can be prevented, many can and should be. Avoiding legal problems is an important aspect of proactive law. However, helping clients to achieve their objectives and promoting business success are even more important. Proactive law aims at joining the forces of lawyers and business people in an effort to not only stay out of legal trouble but also to take full advantage of the opportunities the law and contracts provide. The benefits will be great for both lawyers and clients.

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