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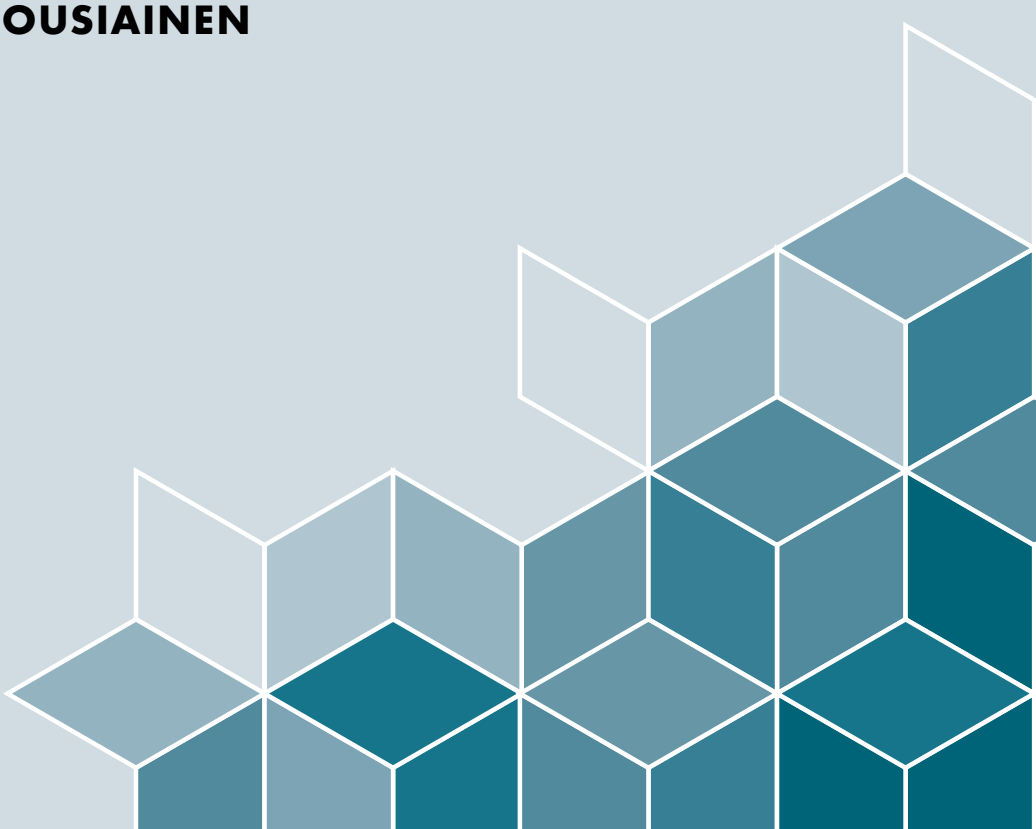
Measuring the impact and value of legal design in commercial contracting within the law and economics framework

KATRI NOUSIAINEN



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Key words: Commercial contracting, law and economics, legal design, corporate governance

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CONTENTS

1 INTRODUCTION

"Everything must be made as simple as possible. But not simpler."

Albert Einstein (Einstein, 1934)[1]

Through extensive fieldwork, it has become apparent that there exists room to improve the current negotiation and contracting practice with human-centred design. This work addresses the fundamental problems of *legalese*[2] and information asymmetry in the context of negotiation and commercial contracting practice. It provides a framework to discuss how complexity in contracts evolves and what kind of transaction costs as well as risks the current practice entails. The work intends to provide practical incentives and benefits for contract drafters and companies to develop their negotiation and contracting practice to be more comprehensible, transparent, user-centric, ethical, and written within plain language. Legal design intends to transform legal products, processes, and services to be more understandable for people with no judicial training. The research aims to have a direct impact on the current negotiation and commercial contracting practice, ethics related contracting decisions, and contractual policy development. The work is oriented towards the practical employing of legal design in contracting practice in the corporate and legal world. The research generally employs an interdisciplinary and international approach. It has been the intention to conduct an empirical and novel research that is deeply motivated by real-life business and legal practice. A case study on a music industry and an artist contract is conducted to gain further understanding of employing legal design in contracting practice.

The dissertation work consists of three peer-reviewed academic scientific papers. The first two papers lay down the general theory of legal design in commercial contracting within the law and economics framework.[3] [4] These papers introduce the general theory of legal design through lenses of law and economics. The papers present legal design

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[1] Albert Einstein (1934) On the Method of Theoretical Physics. Philos Sci; 1:163.

[2] Note: *Legalese*: "*language used by lawyers and in legal documents that is difficult for ordinary people to understand*", Cambridge Dictionary, Cambridge University Press & Assessment 2023, https://dictionary.cambridge.org/us/dictionary/english/language.

[3] Katri Nousiainen, *General Theory of Legal Design in Law and Economics Framework of Commercial Contracting*, Journal of Strategic Contracting and Negotiation Vol. 5(4) 247-256 (2021).

[4] Katri Nousiainen, *Legal Design in Commercial Contracting and Business Sustainability – New Quality Metrics Standards*, Journal of Strategic Contracting and Negotiation Vol. 6(2), 137-158 (2022).

within economic contract theory,[5] evolving of contract complexity, introduce comprehension as a novel legal quality metric[6], and suggest ways of measuring the impact and value of legal design in commercial contracting. These papers also lay down a novel foundation for further research on the general theory of legal design in commercial contracting with the law and economics framework, and on the legal quality metrics, especially in assessing efficiency in the context of comprehension.[7]

The third paper, "Measuring the Impact and Value of Legal Design in Commercial Contracting with the Law and Economics Framework: An Empirical Case Study",[8] tests some of the expectations in a case study presented in the general theory of legal design in commercial contracting within the law and economics framework (the two theoretical papers).[9] The presented results are the first empirical results gained from the particular case study. The three articles[10] comprise a solid project first by creating a theory, and then testing empirically some of the hypotheses of this theory (Figure 1.). The compaction of the article's methods, purposes, and main contributions are shown in Table 1.

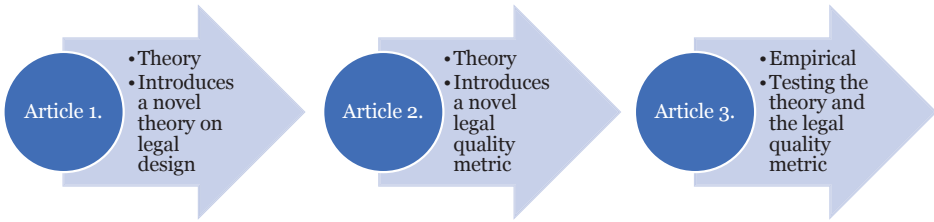


Figure 1. Article red thread

[5] *supra* note 3.

[6] *supra* note 4.

[7] *supra* note 3.; *supra* note 4.

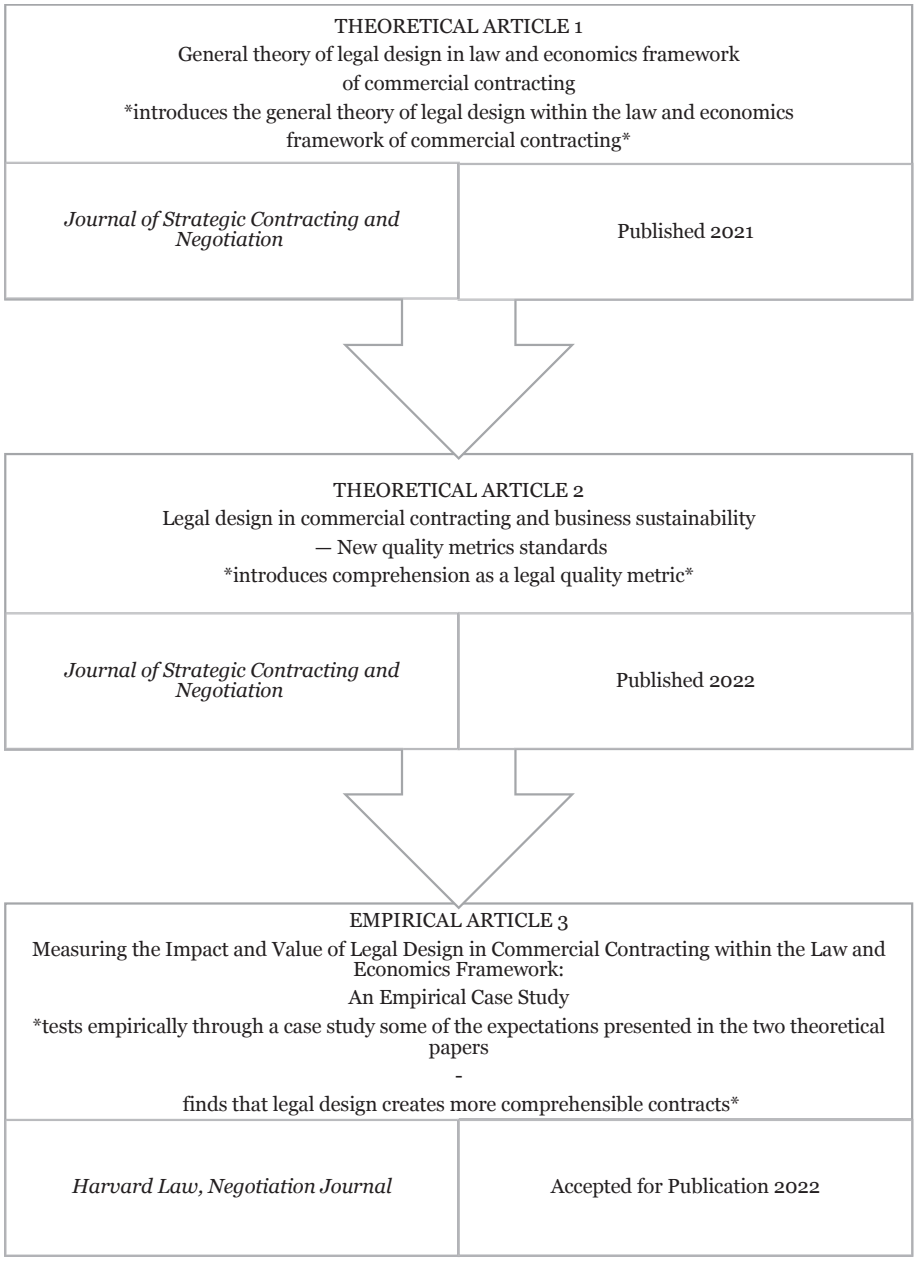
[8] Katri Nousiainen, *Measuring the Impact and Value of Legal Design in Commercial Contracting within the Law and Economics Framework: An Empirical Case Study*, HARVARD LAW, NEGOTIATION JOURNAL (2023 forthcoming).

[9] *supra* note 3.; *supra* note 4.

[10] *Id.*; *supra* note 7.

1.1 Compaction of the articles' methods, purposes, and main contributions

Table 1 Compaction of the articles' methods, purposes, and main contributions[11]



[11] *Id.*

1.1.1 Description

Legal design intends to make legal information, services, products, and processes more comprehensible and approachable. The merge of design methods, and technological innovations paves as a way to reach a more user-centred approach.[12] In addition, legal design takes the advantage of interdisciplinary know-how, for example of law and economics, psychology, and behavioral economics, in creating efficient, high quality, and valuable legal products, services, and processes that have the end-user in the core of the design.[13] The ambition of the work is to scientifically measure some of the impact and value of legal design, and to find, for instance, metrics to evaluate quality and efficiency in legal products, services, and processes.[14] Legal design is not a single solid document, it is an ongoing process. The work investigates the possibilities and challenges of legal design in relation to the negotiation and commercial contracting practice.

1.1.2 Scientific contribution and statement of objective

The legal and economic field has been missing academic empirical research carried out in the subject area of the legal design in negotiation and commercial contracting within the law and economics framework.[15] Undeniably, it is crucial for end-users, economic operators, legal professionals as well as governmental instances to recognize the possibilities and limits in the application of legal design as a tool for simplifying and renewing legal services, products, and processes.

1.1.3 Societal and academic contribution

For the knowledge of the candidate, this work provides the first scientific empirical research in the field of legal design that has measured the impact and value of legal design within the law and economics framework. This offers a promising scientific, societal, and academic contribution for the international plane.

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[12] *supra* note 3.

[13] *supra* note 4.

[14] *Id.*; *supra* note 7.

[15] *Id.*

1.2 The time schedule

The research has been conducted at:

- Program on Negotiation, at Harvard Law School, the USA (2022-2023),
- Center on the Legal Profession, at Harvard Law School, the USA (2021-2022),
- Department of Land Economy, University of Cambridge, Law School, the UK (2021-2023),
- Berkeley Center for Law & Technology, UC Berkeley Law School, the USA, (2020-2021),
- Department of Economics, University of Aix-Marseille, France (2019-2020).

1.3 Academic support, sponsoring and mentoring

Kukkonen Matti, Professor of Tax and Commercial Law, Head of Subject, Hanken School of Economics, Helsinki, Finland dissertation supervisor

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Subramanian Guhan, Joseph H. Flom Professor of Law and Business, H. Douglas Weaver Professor of Business Law, Harvard Business School, Chair, Program on Negotiation, Harvard Law School, The United States

Smith E. Henry, Fessenden Professor of Law, Director, Project on the Foundations of Private Law, Harvard Law School, The United States

Kaplow Louis, Finn M. W. Caspersen and Household International Professor of Law and Economics, Harvard Law School, The United States

Oker-Blom Maximilian, Adjunct Professor, Hanken School of Economics, Helsinki, Finland

2 SUMMARY OF THE THEORETICAL PART

2.1 Summary of Article 1

Katri Nousiainen, *General Theory of Legal Design in Law and Economics Framework of Commercial Contracting*, JOURNAL OF STRATEGIC CONTRACTING AND NEGOTIATION Vol. 5(4) 247-256 (2021). https://doi.org/10.1177/20555636211061611

This article for the first-time introduces the intersection of legal design and the framework of law and economics on negotiation and commercial contracting.[16] The article begins by discussing concepts drawn from the standard economic theory on contracts.[17] Next, it proceeds in employing behavioral economics, and behavioral law and economics to reflect reality better, in complement to the teachings from neoclassical economic theory.[18] The standard economic theory often expects uncooperative, even selfish behavior, rationality, and perfect knowledge.[19] These teachings are revised, as they are inadequate to explain the behavior we observe in the world we are living in. In this publication, it is emphasized that empirical approach, and conventional wisdom, are needed, as they provide for better reflection on what should be investigated in the context of the legal design. To demonstrate, the demand for better understanding of real human behavior, *ultimatum bargaining game*[20] is discussed.

In this article, the law and economics theory on contracts is applied to legal design. It is argued, in the light of the law and economics theory on contracts, that legal design would bring benefits for the contracting parties and the society at large. Furthermore, the article emphasizes that the context of law and economics provides valid tools for measuring the impact and value of legal design in the negotiation and commercial

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[16] *supra* note 3.

[17] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, NEW YORK: WOLTERS KLUWER LAW & BUSINESS (2014).

[18] See for instance, Cass R. Sunstein, Christine Jolls, Richard H. Thaler, *A behavioral approach to law and economics*, STAN. L. REV. 50(5) (May): 1471–1550, at 1476 (1998).; Russel B. Korobkin and Thomas S. Ulen, *Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics,* CAL. L. REV. 88, no. 4 (July 2000): 1051–1144 (2000).

[19] Richard A. Posner, *Nobel laureate: Ronald Coase and methodology*, THE JOURNAL OF ECONOMIC PERSPECTIVES 7(4) (Autumn): 195–210 (1993).

[20] COLIN CAMERER, BEHAVIORAL ECONOMICS GUIDE 2020, BEHAVIORAL SCIENCE CONCEPTS, BEHAVIORAL SCIENCE SOLUTIONS LTD 146, 178 (2020).; ROBERT D. COOTER R & THOMAS ULEN, LAW AND ECONOMICS, BOSTON: ADDISON-WESLEY, PEARSON EDUCATION, INC., 50-51 (2012).

contracting practice. The article discusses 7 benefits and incentives stemming from the utilization of legal design in the negotiation and commercial contracting practice (See Table 2).

Table 2 Some of the expected benefits and incentives of employing legal design in the negotiation and commercial contracting practice

Some of the expected benefits and incentives of employing legal design in the negotiation and commercial contracting practice are:
➔ Decrease in opportunity and transaction costs, and shorter time for negotiation.
➔ More deep-rooted contractual commitment and collaboration. Increase understanding of the contractual objects, rights, and obligations. Increase mutual trust.
➔ Decrease in re-negotiation and breaches.
➔ Decrease in strategic "non-compliance".
➔ Savings in legal and other administrative costs. Savings in reclamation costs.
➔ To enable sustainable business development and creating profits through signaling company's implemented legal design practice in the market.
➔ To create competitive business advantage and profits through signaling of quality and trust.

The article ends by considering the application of *Schumpeter's innovation theory*[21] and *game theory*[22] to legal design. As regards the innovation theory, the legal design's innovative approach upon the negotiation and commercial contracting practice is seen as aligned with the theory and expected to foster profitable commerce and revenue. Further, as regards *game theory*, in most cases, self-interest is not interpreted as being opposite to co-operation and trust,[23] instead companies should contract more clearly even if they are self-interested profit maximizers, pursuing only their own rational interest. Therefore, it is in the company's best interest to employ legal design within its negotiation and contracting practice. The article concludes that making legal products,

[21] Karol Śledzik, Schumpeter's view on innovation and entrepreneurship, Management Trends in Theory and Practice, University Publishing House, Faculty of Management Science, and Informatics, Zilinia, Slovakia: University of Zilina, 89–94 (2013).

[22] Robert Axelrod, *Axelrod's Tournament 1980*, Stanford Computer Science. Accessed February 16, 2023. https://cs.stanford.edu/people/eroberts/courses/soco/projects/1998-99/game-theory/axelrod.html

[23] *Id.*

services, and processes more comprehensible does not conflict with profitable commerce – rather, the practice of employing the legal design is considered to support business profitability and revenue.

In summary, the article lays down a novel foundation for further research on this theory within the law and economics framework.

2.2 Summary of Article 2

Katri Nousiainen, *Legal Design in Commercial Contracting and Business Sustainability – New Quality Metrics Standards*, JOURNAL OF STRATEGIC CONTRACTING AND NEGOTIATION Vol. 6(2), 137-158 (2022). https://doi.org/10.1177/20555636221138972

In order to empirically measure the impact and value of the legal design in commercial contracting, it is important to first understand the theoretical framework behind all the metrics and elements that should be empirically investigated and monitored. The publication "*General theory of legal design in law and economics framework of commercial contracting",*[24] together with this article[25], answers on this demand and provides a novel contracting theory on legal design within the law and economics framework. The article discusses legal design in the context of business sustainability and new quality metrics standards.[26] It presents for the first-time *comprehensibility* as a novel legal quality metric – another way of assessing efficiency in contracting - and as a tool to foster business sustainability as well the transition of the legal profession. Moreover, new cumulatively applied legal quality metrics such as usability, plain language, length, and time are also discussed within the legal design context.

The article begins by discussing complexity of contracts, and its evolution. Then it presents some challenges and advantages for this practice, following with some learnings from other professions and disciplines. The presented benefits and incentives include the reducement of complexity, and the improvement of quality due to more comprehensible contracting. By employing legal design in negotiation and contracting practice one can foster legal quality and thereby, support business sustainability. Incentives, such as competitive business advantage, value creation, higher quality, and

[24] *supra* note 3.

[25] *supra* note 4.

[26] *Id.*

decreased transaction costs, are holistically discussed. It is anticipated that the benefits of employing legal design in commercial contracting would outweigh the associated costs of implementing it. This article establishes a solid foundation for future research on legal quality metrics, in assessing comprehensibility from an efficiency perspective, within the law and economics framework.

3 SUMMARY OF THE EMPIRICAL PART

3.1 Summary of Article 3

Katri Nousiainen, *Measuring the Impact and Value of Legal Design in Commercial Contracting with the Law and Economics Framework: An Empirical Case Study*, HARVARD LAW, NEGOTIATION JOURNAL (forthcoming 2023).

An extensive field work in a music industry and an empirical study on an artist contract, show that the current negotiation and contracting practice within the field can be improved with human-centred design. Commonly, people do not understand their rights and obligations under an artist contract. This work addresses the fundamental issue of *legalese*[27] and information asymmetry in the context of music industry and an artist contract. Within an artist contract, the position of power is often asymmetrically divided between a record company and an artist. Moreover, the parties to an artist contract frequently regard that their incentives and interest can vary. Generally, artist contract clauses are drafted by the record company, thus regarded as given by the artists. The article entails a case study in measuring the impact and value of legal design in commercial contracting (See Table 3). Based on the general theory of legal design in commercial contracting in law and economics framework,[28] some of the anticipated benefits and metrics of legal design are evaluated. Even though the study is only a small experiment, and in particular industry, the novel empirical results are promising, in support of the theory[29].

Table 3 Study design

Study Design
• To assess the impact and value of legal design in commercial contracting, an empirical case study is conducted on an artist contract.
• The study uses an artist contract that a lawyer had recently renewed using traditional legalese approach, and then this same contract is renewed using legal design.
• The legal design redesigned artist contract is then compared with the renewed traditional legalese contract. The different forms of the artist contracts are tested empirically with the stakeholders to assess the impact and value of legal design in contracting practice.
• The prediction is that the advantage of legal design is to create more comprehensible contracts.

[27] *supra* note 2.

[28] *Id.*; *supra* note 3.

[29] *Id.*

3.1.1 Study design

In this study, extensive interviews with stakeholders/end-users of the contract were conducted. The participants are shown randomly assigned brief descriptions of the contract terms. The subjects are then entreated to comment and discuss these terms from the perspective of comprehensibility, approachability, clarity, assent, and transparency. Subjects are asked to answer a series of follow-up questions after each term and add any comments they have regarding the terms or other things that come to their mind, and their reading comprehension of the contract terms is tested. In addition, participants repeatedly are asked questions about the emotions that these contract terms generate. During the study, the participants also share their personal experiences with artist contracts and reflect on how those experiences affect their understanding and feelings toward the terms of the contract. Finally, the participants are asked to evaluate and compare the contract terms written in legalese with the terms that are redesigned employing legal design.

It is predicted that legal design would create more *comprehensible* contracts. By *comprehension,* it is meant here that the "*parties can read and understand the contract's terms without consulting a lawyer or having a legal background themselves".*[30] In addition to predicting that contractual terms that are written with traditional legalese would be more difficult for the stakeholders to comprehend, it is also anticipated that terms in legalese would create negative emotions and increase transaction costs compared to the contract terms using legal design. It is further hypothesized that the contract terms written within legal design would bring benefits, such as, greater understanding, better approachability, evoke positive emotions like empathy and trust, more-deep rooted contractual commitment between parties, and a decrease in transaction costs.

[30] *supra* note 7.

3.1.2 Results

Even though the empirical case study is only a small experiment, in a particular industry, the novel empirical results are promising and align the theoretical expectations[31]. (See Table 4 and 5, Figure 2 and 3).

Table 4 Legal design creates more comprehensible contracts

Legal design creates more comprehensible contracts
• Almost 2/3 (62.5%) of the respondents preferred the legally designed contract terms over the traditional legalese terms.

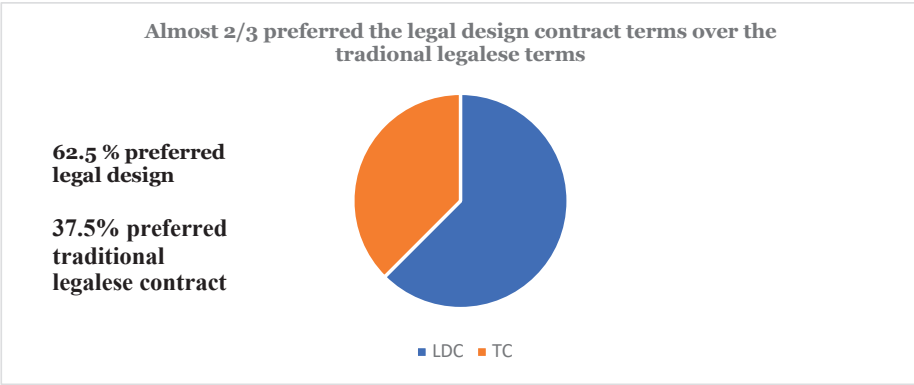

Figure 2 Almost 2/3 preferred the legal design contract terms over the traditional legalese terms[32]

Table 5 Unnecessary complexity in legalese legal drafting

The results show that there exists unnecessary complexity in *legalese* legal drafting
• Almost 67% of the respondents identified *legalese* items as ambiguous and,
• Almost 89% said that there is room for improvement in them.

[31] *supra* note 3.; *supra* note 4.

[32] *supra* note 7.

Participant	Ambiguous	Room for Improvement
Mean	70,0%	87,1%
Median	66,7%	88,7%

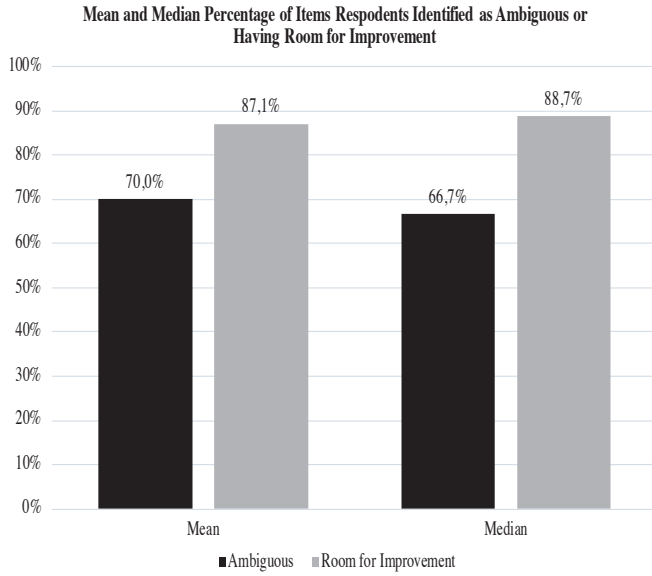

Figure 3 Mean and median percentage of items respondents identified as ambiguous or having room for improvement[33]

The small experimental study shows that legal design can benefit legal professionals to prove for higher quality, comprehensible contracting. The advantage of legal design to create more comprehensible contracts brings benefits and incentives, such as, innovation for sustainability, signaling of trust, image, and transparency, decrease in transaction and opportunity costs, competitive business advantage, and more deep-rooted contractual commitment.

The empirical study could benefit from a longitudinal business and process data (the past & future) to analyze the impact of design even further. The longitudinal business and process data could improve the analysis in future projects, and assist, for example, to form an economic model, and to better understand the costs of employing legal design. Further, the longitudinal data could also be of use within possible regulatory interventions and policy making with the aim to decrease information asymmetry in

[33] *Id.*

commercial contracting. Being able to analyze the data difference - between old traditional legalese contract practice and the legal designed contract - can further demonstrate the importance of applying legal design in commercial contracting practice to foster comprehensibility and quality in the legal profession. The future studies could, for instance, benefit from a deeper understanding of psychological and behavioral aspects. The empirical case study opens new research directions (Table 6) and a call for action to increase contractual comprehensibility and legal quality (Table 7).

Table 6 Novel research directions and a call for action

Opens novel research directions
➔ to conduct comparative longitudinal study to further analyze the impact and value of legal design in commercial contracting.
➔ potential business-to-business and business-to-customer advantages should be studied to learn whether the advantages are being different.
➔ to conduct empirical study on contract complexity and prospective litigation in heavily negotiated rights: i) inviting for further research in highly complex M&A agreements, ii) opening a new research direction to conduct longitudinal study to further analyze the impact and value of legal design in litigation, iii) in this framework, potential business-to-business and iv) legal certainty advantages should also be studied.

Table 7 A call for action

A call for action
➔ lawyers have an important position to safeguard the empowering of people within their legal matters and decreasing the legal information asymmetry present in society today.

In conclusion, this article shows that the legal profession could benefit learning from interdisciplinarity and other professions. The article presents a novel empirical case study and demonstrates and analyzes how to measure the impact and value of legal design in commercial contracting. It presents new scientific knowledge: almost 2/3 (62.5%) of the study respondents preferred the legal designed contract terms over the traditional legalese terms. The article further presents some of the incentives and other implications to employ legal design in commercial contracting.

Special Issue: Contracting Principles

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JSCAN

General theory of legal design in law and economics framework of commercial contracting

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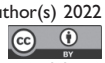

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Abstract

We need law and economics to do the scientific measurement necessary for legal design to be seen as on the stage of science. Law and economics—which is the application of economic theory, especially microeconomic theory, to the analysis and the practice of law–is a valid tool and approach to reflect on what should be empirically investigated in the practice of legal design. The neoclassical (mainstream) theoretical foundation of economic analysis of law is, however, at times far from reality as it often predicts uncooperative and even selfish behaviour. In real life people do cooperate, have empathy, emotions and even behave in an altruistic way. For those reasons, behavioural law and economics and conventional wisdom are needed to complement the teachings from standard theory in the field of commercial contracting.

Keywords

Law and economics, theoretical basis for legal design, behavioral economics < theoretical perspectives, contract theory < theoretical perspectives, commercial contracting < topics

Is law and economics the valid tool for assessing the total impact of legal design in commercial contracts?

The idea of legal design is to make judicial information, services and products more approachable and understandable via using user-centred design. A more user-centred approach to law is reached by combining design methods as well as the latest innovations in the field of law and technology. Other fields of science are used to find the best practical solutions to legal challenges at hand. The legal design approach is highly interdisciplinary in its nature as its users try to learn from other fields of science and have a dialogue with them in order to find new best practices that can be applied to law.

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In my work as a lawyer, I have seen that contracts have become greatly comprehensive and complex. Frequently I have witnessed that lawyers are hesitant in deleting excessive clauses from contracts. These contracts may have been around for a long time, and senior lawyers or in-house counsel may have added more and more clauses over time. Such a process, where clauses are added, or kept for even remote contingencies—but hardly ever any clauses are deleted—creates more comprehensive contracting which is neither ethical nor efficient. There exists a great need to modify commercial contracting services, products and processes with plain language, visuals and user-centred design. I am interested in understanding the impact of legal design in commercial contracting. In order to conduct an empirical study, one needs to know what precisely is required to be investigated, and which elements need to be monitored and why. Getting scientifically measured some of the various effects of legal design, will facilitate its use, as then procedures and decisions can be grounded with quantitative, empirical data:

> "*When you can measure what you are speaking about, and express it in numbers, you know something about it, when you cannot express it in numbers, your knowledge is of a meager and unsatisfactory kind; it may be the beginning of knowledge, but you have scarely, in your thoughts advanced to the stage of science."*
>
> *— Lord Kelvin (Kelvin, 1883)*

We need law and economics to do the scientific measurement necessary for legal design to be seen as on the stage of science. Law and economics—which is the application of economic theory, especially microeconomic theory, to the analysis and the practice of law—is a valid tool and approach to reflect on what should be empirically investigated in the practice of legal design when measuring the total impact of it in commercial contracting. The neoclassical (mainstream) theoretical foundation of economic analysis of law is, however, at times far from reality as it often predicts uncooperative and even selfish behaviour. In real life people do cooperate, have empathy, emotions and even behave in an altruistic way. For those reasons, behavioural law and economics and conventional wisdom are needed to complement the teachings from standard theory in the field of commercial contracting.

Currently, no empirical studies have been conducted in the field of legal design—and in particular of commercial contracts—that build on the economic analysis of law. I see here something regrettable that needs to be changed! Economic analysis of law is a valid tool to understand the purpose and expectations of legal design, and therefore it needs to be tested empirically.

This paper is divided into four different sections. In the first section, I rely on the rational choice theory to grasp the essence of legal design especially as applied to commercial contracts. In the second section, I discuss further the transaction and opportunity costs of negotiation and contracting. In the third section, I cover the impact of signalling. In the fourth, and last section of the paper, I analyse the application of innovation theory and game theory to legal design approach.

Rational choice theory versus "Study man as he is" *(Posner, 1993)*

Neoclassical economics is far from reality and often follows the theory of "rational man," underestimating human character and evolution. The assumption is that human beings are self-interested, rational maximisers of their own satisfaction. They will respond to incentives, and if they can increase their satisfaction by altering their behaviour to adjust to changes in their surroundings, they will do so. People are assumed to be rational utility maximisers in all areas of life.

However, rational maximisation of expected utility is not regarded as the same notion as conscious calculation; nor is economics a theory about consciousness. Richard Posner remarks that perfectly normal persons are not always rational, and, in some situations, non-calculable risk may preclude a rational choice (Posner, 2014: 3–5). In Posner's opinion, however, even though people do make deviations from rational behaviour, this does not invalidate the rational choice theory as it stands because these occasional deviations, according to him, will cancel out. Cognitive psychologists and economists have shown, however, that human behaviour reveals *systematic departures from rationality* (Posner, 2014: 18–19). For instance, the essential insight of behavioural economics and neuroeconomics is that human beings make predictable errors in cognition, decision-making and in judgement. People are "*predictably irrational*" (Ariely, 2009; Cooter and Ulen, 2012: 51). What comes to our mind before we make choices and decisions is shaped by memory and highly selective perception, which influence our choices and decisions, frequently diverting them from the predictions of rational choice theory. Explanation for some of the cognitive deficiencies that the rational choice theorists tend to ignore can be found in human evolution. For instance, majority of people have hardship dealing rationally with events that have low-probability, and this may well be traced back to the period of human prehistory when survival required full-time attention to high-probability threats and opportunities (Posner, 2014: 19).

> "When economists find that they are unable to analyze what is happening in the real world, they invent an imaginary world which they are capable of handling."
>
> — Ronald Coase 1988 (Samuels, 2011: iv)

Human behaviour demonstrates systematic departures from rationality and not all economists have been satisfied with the conception of economics as the science of rational choice. Two of the greatest economists of the twentieth century, John Maynard Keynes (a liberal macroeconomist) and Ronald Coase (a conservative microeconomist), are both well-known skeptics of rational choice theory. Coase has written caustically that the rational model of human behaviour is:

> "*unnecessary and misleading*" since *"[t]here is no reason to suppose that most human beings are engaged in maximizing anything unless it be unhappiness, and even this with incomplete success.*"

Keynes, like Coase, wanted to be realistic as regards decision-making. Methodologically, Coase and Keynes were alike; both of them utilised the essential tools of economics while being disdainful of mathematics and the rational model of human behaviour. Furthermore, they were both disposed to take people as they are instead of constructing a "*rational man*". Neither of them considered the realism of their assumptions as irrelevant nor sought to test a theory by the precision of its predictions, as Milton Friedman had famously suggested in Positive Economics (Friedman, 1966: 3–16, 30–43; Posner, 2014: 23–26).

Modern microeconomic theory, which assumes that decision makers are rationally self-interested, has been under attack for several decades. The attack against the rational choice theory has been principally empirical and it has been based on experimental findings that people do not behave as rational choice theory predicts. Daniel Kahneman and Amos Tversky are two leaders in the experimental literature critical of rational choice theory. Cass Sustein and Richard Thaler are often regarded as the founders of behavioural law and economics (Cooter and Ulen, 2012: 50).[1]

These attacks on the rational choice theory demonstrate that economic analysis of law has more to offer for today's science within empirical and experimental studies than with the outdated neoclassical theory. Behavioural law and economics, behavioural economics and neuroeconomics could lead us in the right direction through empirical studies and experimental findings.

Homo economicus[2] (Mills, 1836) and *The ultimatum bargaining game*

Behavioural economics describes and studies economic decision-making. According to the field's theories, actual human behaviour is less stable, selfish, and rational than traditional normative theory suggests, due to limited self-control, social preferences, and bounded rationality. The *ultimatum bargaining game* is one of the empirical examples of behavioural economics that has particular relevance to law and that revealed a violation of the standard assumption of rationality (Camerer, 2020: 146, 178). In this game, there are two participants who do not know each other, and they interact anonymously. Their goal is to divide a small sum of money, say 20 dollars.

The rational choice theory assumes that the player 1 will take advantage of his position and propose a disproportionate division of the sum, say 15 dollars. It is possible, in fact, that the Player 2 might regard the Player 1 as selfish, but still settle for 5 dollars as regarding it to be better than nothing. The ultimatum bargaining game has been played in experiments in over 140 countries, some poor and some wealthy, and among groups with greatly diverse ages, education levels, incomes, religions, and the like. The most common outcome of the game is that the stakes are split equally 50–50, both participants receiving 10 dollars. In many countries it has been noticed that if the Player 1 tries to acquire more than 70% of the stakes, then the Player 2 will reject the proposal and both of the players receive nothing. Cooter & Ulen point out that in *the ultimatum bargaining game* strangers rarely take advantage of one another. Instead, it seems that the norm is to treat the other party fairly, the way one treats oneself (Cooter and Ulen, 2012: 50–51). The observed behaviour in the ultimatum bargaining game cannot be explained or supported with the standard assumption of the rational choice theory. The observed behaviour is neither uncooperative nor is it selfish, as the most common outcome of the game is that the stakes are divided in an equal manner. The experience from the ultimatum bargaining game demonstrates that people do cooperate and even behave fairly with strangers. I expect from the empirical understanding that the aligned result would occur where parties divide a mutual gain from a contractual arrangement.

The neoclassical approach of standard rational choice theory is not enough to explain observed behaviour in real life. The ultimatum bargaining game demonstrates that teachings also from other fields of science and conventional wisdom are needed to better understand human behaviour. More empirical approach can reflect what should be empirically investigated in legal design (Table 1).

Table 1. The ultimatum bargaining game—a violation of the standard assumption of rationality.

Player 1
Makes a proposition of how the money should be divided between the parties
Player 2
Can accept the proposal, in which case the sum is divided as proposed
OR
Can reject the proposal, in which case none of the parties receives any money

Transaction and opportunity costs of negotiation and contracting

Economic analysis of law as a tool and approach reflects on what should be empirically investigated in the practice of legal design when measuring the impact of it in transaction and opportunity costs of negotiation and contracting. Law and economics is the application of economic theory, especially microeconomic theory, to the practice and the analysis of law. Behavioural law and economics is needed to better understand and complement the teachings from standard neoclassical theory of commercial contracting. Behavioural law and economics explores the implications of *actual* human behaviour for the law (Sunstein et al., 1998: 1476). Emphasis on how people respond to information and how it bears on the role of law has relevance for the application of legal design approach. Legal design clarifies complex legalese, improves and empowers ethics and efficiency of legal products, services and processes. All too often, whether a contract is boilerplate or uniquely drafted, they have one thing in common; namely, contracting parties too frequently have no clear understanding what rights or obligations they have under these contracts. The lack of knowledge and understanding puts businesses at risk. The legal design approach enables parties to save in transaction and opportunity costs and maintain reciprocal trust. Transaction cost is any cost involved in making an economic transaction. They may include, among others, administrative costs, legal fees and costs of judicial proceedings, communication charges or even labour costs. Transaction costs are always sunk costs whereas opportunity cost refers to the loss of alternatives, when one alternative is chosen; it is the value one needs to give up in order to get something else. Moreover, legal design approach can reduce or even eliminate the knowledge and information asymmetry between contracting parties and by that, enable "better" contracting decisions:

> "*Everything should be made as simple as possible, but not simpler"*
>
> — Albert Einstein (Calaprice, 2000: 314)

Clarity in contracts should be the new standard and not just the privilege of only a few end-users of legal products and services—legal design approach should be applied more widely among operators. Legal design can empower people, with no judicial training, with their own legal matters in a way that even lawyers are not always needed in contract negotiating and drafting processes. Furthermore, understandability and clarity in legal language are widely recognised rights in judicial systems (European Union, 2016 and Finlex, 2003).

When contracts are comprehensive and complex, then transaction costs are already excessive when drafting and reading those contracts. Prolonged contract negotiations cause remarkable transaction costs. Often parties strive to negotiate complex—and often ambiguous—contract clauses that, they hope, will work to their benefit in case of a disagreement (Cohen, 2011: 148). We encounter the same strategy with boilerplate contracts; however, with one little difference, boilerplate contracts are not often negotiated. When contract clauses and terms are written with clarity and plain language, then a prolonged pursuit of self-interest in contract drafting—that can burden the whole contracting relationship and bring excessive costs—can be avoided altogether.

From the law and economics theory on contracts we expect the following benefits from the use of legal design in commercial contracts:

- The first expectation is to lower transaction and opportunity costs due to clear (transparent) communication, and particularly in the form of shorter time for negotiation.

- The second expectation is to find a deep-rooted contractual commitment. Transparent and clear language contract negotiations often deepen collaboration, increase mutual trust and understanding of the basis for negotiations, and about the objectives, obligations and rights of the negotiable agreement at hand.
- The third expectation is to find less re-negotiation and breaches. When parties to a contract understand their rights and obligations, unintended contractual breaches are less likely to occur. Furthermore, negligent behaviour or negligent contractual breaches will decrease as the parties to a contract have accomplished transparent, a more deep-rooted level of understanding of the objects and the meaning of the contract for both of the parties. When from the beginning of contractual negotiations, the objectives, aims and means of the contract are clearly and transparently discussed, it creates more deep-rooted commitment than with a comprehensive and complex traditional legal or boilerplate contract;
- The fourth expectation is to find less strategic "non-compliance" as the relationship has now more human dimension. Plain language and less legalese contracts diminished the ground for ambiguity, which earlier could have allowed for the pursuit of self-interest through complex legalese.
- The fifth expectation is to find savings in reclamation, judicial and other administrative costs. Remarkable transaction costs can emerge from reclamation and dispute proceedings as a part of a contractual relationship. Reclamation and dispute proceedings can be time consuming and require a lot of communication between the contracting parties and their representatives. Moreover, having and educating personnel for customer service can be costly. With clear and plain language contracts, the number of reclamations and disputes can be decreased; because when contractual clauses and terms are unambiguous, leaving no room for legalese, there will be fewer unnecessary claims as parties to a contract better understand their rights and obligations under the contract regime. In case a contractual relationship is damaged, and the parties have their dispute before a court, the transaction costs are significant. Judicial proceeding transaction costs can be avoided with a clear, user- and human-centred design approach to law, negotiation and contractual proceedings. Furthermore, a proactive and transparent contracting increases mutual understanding of the objectives and means of the contract and thereby, decreases the emergence of possible future transaction costs of negotiation. In addition, it is the more human dimension of the contractual relationship, created through legal design approach, that decreases the unnecessary claims as mutual trust and the maintaining of the relationship is regarded as valuable. Legal design approach is expected to bring significant savings in transaction and opportunity costs when applied with negotiation and contractual operations.
- The sixth expectation is to find signalling of an implemented legal design approach to a company's negotiation and contractual practice to create profits and enable sustainable business development. Negotiation and commerce are based on trust. Trust is especially important when no efficient contractual judicial enforcement tools are available. Mutual trust and its signalling are the grounds for long-term collaboration and business. Partners who are unreliable are suitable for only one-off agreement, if any. Clear, plain language and transparent negotiation and contracting practice, demonstrated in the market, signal potential customers and partners of the company's trustworthiness as well as of the willingness to be bound by its contractual obligations. Furthermore, this legal practice is expected to increase trust and create a good reputation in the market. Well-working contractual relationships enable long-term contracting or the renewal of short-term contracts. It is a win-win situation for the

company and its partners. Signalling a company's implemented legal design approach to negotiation and contracting will foster sustainable business development and create profits.
– The seventh expectation is to find signalling of trust as a business advantage that creates profits. Before legal design approach becomes the new standard, it will be a competitive advantage for those actors who apply it. A company that executes a legal design approach in its negotiations and contracting signals that it is not a "bad apple". When trust has been created through transparency in contractual operations, it is natural for customers to recommend the company for others as well. A recommendation in a commercial framework is a strong signal and it helps a company to strengthen its position on a market.

These are the hypotheses of effects that we have tried testing through empirical studies. We are currently analysing gathered data and we are expecting preliminary empirical research findings in the near future. There are, however, also costs associated with the use of legal design. These costs can include, among others:

– the entering costs to legal design approach,
– the use of interdisciplinary expertise for renewing and/or drafting (sometimes from a scratch) new contracts,
– the time spent on implementing the new procedures as part of a company's practice,
– the education of relevant personnel,
– the integration of the change to a company's strategic level.

It is our intention to investigate through empirical testing that the benefits largely outweigh those costs.

Schumpeter's innovation theory and legal design approach

Schumpeter has argued that anyone seeking profits must innovate. Schumpeter's Innovation Theory is grounded within the idea that an entrepreneur can earn profits by introducing successful innovations (Śledzik, 2013: 89–94). Within the economic theory framework, the legal design approach can be regarded as innovative since it combines design methods as well as the latest innovations in the field of law and technology, and since it intends to improve the quality and efficiency of legal products and services. According to Schumpeter, innovation refers to any new policy that reduces the total cost of production or that increases the demand for sold products. The legal design approach is expected to do both, and it can fit into these two categories; namely, the first category incorporates all operations which decrease the total cost of production, for instance, the introduction of a new technique or a method of production, or an innovative method of organising an industry. The second category of innovation incorporates all operations which increase the demand for a product, for instance, the introduction of new quality goods, opening or emerging of a new market or a design of a product (Śledzik, 2013: 89–94). Legal design's innovative approach to commercial contracting is aligned with profitable commerce and revenue, and therefore also with Schumpeter's Innovation Theory.

The application of game theory to legal design

Economists have always insisted that co-operation is in the interest of everyone. In most cases, self-interest is not seen as being opposite to co-operation and trust (Axelrod, 1980).[3] According to the

theoretical understanding from the law and economics of contract, within the legal design approach, firms should contract more clearly even if they are pursuing only their rational self-interest This is in accordance with the application of non-cooperative game theorical approach. It is in the firm's best interest to apply legal design approach in its operations:

> "Doux Commerce (Sweet Commerce)!"
>
> — Montesquieu 1748 (Montesquieu, 1748)

Making law more approachable and understandable through legal design is not in a conflict with profitable commerce. Quite the opposite. Transparent, ethical and empowering contractual operations go hand-in-hand with profitability and revenue. The legal design approach gives preference to more ethical and judicially sustainable negotiation and contractual operations development as part of a company's growth. When a company leads the way with transparency and clarity in judicial services, products and processes, other companies in the market must follow the path, otherwise they will be left behind or end up being regarded as "bad apples"; eventually "bad apples" are pushed out of the market. People "voting with their feet" and influential millennials in social media bring imperativeness for having more ethics, humanity and human-centred design in negotiation and contracting operations.

Conclusion

This essay has laid the pioneering groundwork for further research on theory of legal design in law and economics framework of commercial contracting. The essay began by presenting concepts drawn from the standard economic theory on contracts, and then used behavioural economics and behavioural law and economics to predict reality better, and to complement the teachings from standard economic theory. This essay applied law and economics theory on contracts to legal design for the first time, arguing that using legal design approach to commercial contracting would, in the light of law and economics theory on contracts, bring great advantages for the parties to a contract and the society at large, and that law and economics is the valid tool for assessing the total impact of legal design in commercial contracting. These expected advantages of using legal design approach included, among others, the decrease of transaction costs, the increase of understanding and trust between contracting parties, and better reputation as well as competitive advantage when signalling the application of the legal design approach within contractual operations. The essay ended by discussing the application of innovation theory and game theory to legal design by concluding that making law more approachable and understandable through legal design is not in conflict with profitable commerce, but quite the opposite—as transparent, ethical and empowering contractual operations go hand-in-hand with profitability and revenue. Applying legal design approach should even game theoretically be every operators' choice as it supports business profitability and revenue.

I am of the opinion that legal design approach to negotiation and contracting will be the new mainstream—if it is not that already!

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Supplemental material

Supplemental material for this article is available online.

Notes

1. A legal analysis that takes account of these empirical findings is called *behavioural law and economics*, whereas the economic body of literature is called *behavioural economics*. *For a summary of the fields, see Sunstein, Cass R., Jolls, Christine and Thaler, Richard H. 1998. "A Behavioral Approach to Law and Economics." Stanford Law Review, vol. 50, no. 5 (May): 1471-1550.* https://doi.org/10.2307/1229304; *Korobkin, Russell B. and Ulen, Thomas S. 2000." Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics.". Cal. L. Rev. 88, no.4 (July 2000): 1051–1144.* https://doi.org/10.2307/3481255.
2. *Homo Economicus is a term and model for human behaviour to describe a rational human being that has unlimited capability to make rational decisions.*
3. Exceptions for co-operation exists. See, for instance, tit-for-tat strategy.

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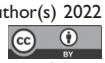

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Abstract

There is surely room for improvement in commercial contracting practice. The current contracting evolution often leads to a situation where contracts become increasingly and may be needlessly, complex. The paper discusses how complex contracts evolve and how the proposed legal design approach can bring comprehensibility for tackling complexity in contracting. This approach is providing for various benefits and incentives, such as business sustainability, reduced transaction costs, and competitive business advantage. A novel legal quality metric is introduced. This metric will foster the measuring of quality in the legal profession. The metric, comprehensibility, would better serve both lawyers and clients in measuring the true quality of legal services, processes, and products – than the often used, easily misleading metrics such as time spent, cases won, and hours billed. Through this innovative approach to legal quality metrics, the paper will bring further understanding of the impact of comprehensibility in commercial contracting.

Keywords

Law and economics, contract evolution theory, commercial contracting, business sustainability, new legal quality metrics, corporate governance, theoretical basis for legal design

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Introduction

Commercial contracting practice could be improved toward more clarity. Often contract drafters and lawyers try to make the contract drafting processes less time-consuming and intend to benefit from the wisdom of their predecessors. Unfortunately, the current commercial contracting practice can raise concerns about whether it is socially optimal and whether it serves the best interest of the client of a lawyer. Regrettably, this practice often leads to a situation where contracts have become increasingly – and maybe unnecessary – complex, repetitive, and overly extensive. A legal design approach can provide comprehensibility for tackling complexity in commercial contracting. This approach can provide various benefits and incentives, such as business sustainability, reduced transaction costs, and competitive business advantage.

In this paper, it is intended to further understand the impact of legal design on commercial contracts. To empirically measure the impact of the legal design approach, one needs to first understand the theoretical framework behind all the elements and metrics that need to be empirically investigated and monitored. The law and economics approach has an extensive scientific economic contract theory that can be adapted to the legal design approach to better understand how markets, people, and law interact in a society. The economic analysis of law is necessary to conduct the scientific measurement needed for the legal design approach to be regarded as being on the level of science. The economic analysis of law – which is the application of the economic theory to the practice and analysis of law – is a well-grounded approach and tool to analyze the economic contract theory in relation to the legal design and to investigate and measure the impact of it within the commercial contracting framework. This paper, together with the *General Theory of Legal Design in Law and Economics Framework of Commercial Contracting* (Nousiainen 2021) (hereafter *General Theory*), provides a novel and solid foundation for further research on the theory of the legal design in the law and economics framework.

This paper introduces a novel way to measure quality in legal profession. It builds upon and beyond the existing literature in introducing comprehensibility as a novel way to measure legal quality and as another way for assessing the efficiency of contracting practice in the law and economics framework. This metric would better serve both lawyers and clients in measuring the true quality of legal services, processes, and products – than the often-used, easily misleading metrics such as time spent, cases won, and hours billed. Through this innovative approach to the legal quality metrics, I will bring an understanding for the impact of comprehensibility on commercial contracting.

In this paper, I will discuss how legal design can improve the comprehensibility of legal services, products, and processes. The comprehensibility is seen as a novel way to measure legal quality. I will further present how this approach can support business sustainability, reduce transaction costs, and provide a competitive business advantage.

This paper is divided into four sections. In the first section, I will discuss how the complexity of contracts evolves and the incentives, advantages, and disadvantages of keeping the present state of complexity. In the second section, I will introduce learnings from other disciplines for the design. In the third section, I will cover some of the incentives to leave the present state of the complex contracting and to move forward in making the contracting more sustainable and comprehensible through the legal design. In the fourth and last section, I introduce a pioneering approach to comprehension as a novel legal quality metric, and as another way of assessing efficiency. I will further discuss the application and advantages of comprehension.

Complexity of contracts

How complex contracts evolve. Contracts have become considerably complex. I have often observed that contract drafters and lawyers are reluctant to delete excess contract terms. These contracts might have been there for quite a while, and they might have an established standing as a part of the regular repertoire of a lawyer.

In-house counsels or senior lawyers may have added clauses to contracts over time. Such development, where contract terms are added or retained in a contract for safeguarding purposes for yet highly unlikely contingency – but barely any terms are cut out – develops more complex contracting (Nousiainen 2021). A lawyer will on all occasions suffer for not prospecting the occurrence of a contingency, despite how unlikely this contingency is. The impact is much larger than the impact of her being prepared and providing for a contingency that takes place. The outcome is a bias that favors the practice of overinclusion (Kahan and Klausner 1996), and thereby complex contracting. The complex contracting practice raises challenges for the quality and comprehensibility of contracting.

This defensive approach creates challenges, and it is one element of complex contracting. Cohen has discussed that sometimes drafters aim to negotiate complex terms that hopefully would work to their interest and advantage in the event of a possible dispute (Cohen 2011). Complex contracting can also create further billable hours, for instance, if in the future there is a disagreement over the complex contract. Eventually, this practice results in contracts – which are often written in "legalese," and they are ambiguous and overly lengthy – this all is unethical, and it leads to further contract complexity.

Boilerplate contracts. Standardized contracts have sparked a lot of discussion among scholars (Ahdieh 2006; Choi and Gulati 2004; Choi, Gulati, and Posner 2013; Choi, Gulati, and Scott 2017, 2018; Hill 2001; Scott, Choi, and Gulati 2020). Next, I will cover how the complexity of contracts evolves and the incentives, advantages, and disadvantages of keeping the present state of complexity. Klausner and Kahan have analyzed the positive implications of learning and network benefits of the standardized contract terms, namely the economics of boilerplate (Kahan and Klausner 1997). They state that the appeal of a commonly employed contract term – that is, a term that is standardized – due to the fact that contract terms can provide "increasing returns" to users when more operators adapt the same term. The private benefits to an operator of employing a commonly used contract term can be classified into two abstract categories, with distinct implications. The first category of benefits "learning benefits" takes place when an operator employs a contract term that in the past has been widely used – without respect to whether in the future the other operators will also use it. The second category of advantages "network benefits" takes place as an operator employs a term that is also included in many other operator's contracts, without respect to whether in the past it has been widely used (Kahan and Klausner 1997, 718).

Experience with a term may produce a level of learning that is regarded as invaluable for the present users of the term. The same holds for a contract term that in the past has been widely employed. The prospective "learning benefits" of the standardized default terms comprise drafting efficiency, decreased uncertainty over the soundness and suitability, and what is meant by a term on the account of the earlier legal decisions rulings, and the understanding of a term among a professional and related community. The more operators that have employed a specific term, the greater the prospective benefits tend to be (Kahan and Klausner 1997, 719–720).

One great incentive to use a term that has been employed in the past is the efficiency in drafting. This efficiency has two parts: the decrease in the costs related to the mechanical work of copying the contract term, and the decrease in the anticipated cost of errors in its formulation. The second part alone, however, leads to prominent increasing returns. As regards the mechanical work of drafting, it is effortless to record a term that has been used once earlier as it is to record one that has been used multiple times; the focus is therefore on the decrease in the cost of the formulation errors. The drafting may become expensive. A term that has not been widely employed, or a term that is newly customized, may induce relatively high error costs. The employed term may turn out to suggest something else than the drafter intended, or an incidence may take place that the drafter was unable to predict. Such errors may be the outcome of the usage of language that is ambiguous or equivocal, trivial drafting mistakes, or limited anticipation and deliberation on the part of the drafter. Once a contract is written these cost of errors can occur in several forms, namely, the term may manifest itself to be judicially invalid; it may cause restrictions on the management or activities that constitute to be undesirable; it may be unsuccessful in creating desirable restrictions on the operator's management or activities; the operator may unintentionally violate the term and endure legal sanctions; or, to avoid these challenges, the operator may have to suffer the transaction costs of replacing the term later. In contrast, an extensively employed term has generally been considered and examined by many prior users and implemented in a range of circumstances. The fact that the term has endured without causing significant problems or challenges is an indication of its usability, utility, and workability. In addition, the prior users of the term may have observed problems in its formulation and altered the term correspondingly. As a result, the present formulation of the term may demonstrate the modifications and improvements made over time. Hence, while the widely used term may not be ideally suited to a given operator, the operator's implementation of such a term may still be advantageous and beneficial (Kahan and Klausner 1997, 720–721).

Kahan and Klausner note, however, that there may be limitations to the learning that accumulates to a term that is commonly used. Sometimes, the accrued experience of the preceding users of a term may discourage an operator from changing or modifying the term even though that operator perceives a plausible improvement. Consequently, the operator accepts the term with no further analysis and review, and from then on, an "informational cascade" can take place that prevents further learning (Kahan and Klausner 1997, 721). Accepting terms without analysis and review creates risks as the employed terms might not be the best suited for the clause or situation at hand, or they are otherwise ill-suited for the overall contractual purpose. This practice can lead to a situation where the contract clause can be ambiguous and difficult to comprehend, and this difficulty eventually creates risks for the parties to a contract. When no term analysis or review takes place, and when no further learning is present, this outcome favors the practice of complex contracting.

"THE FORM". A little literature on contract scholarship has discussed the production process for contracts – where most contracts are drafted only a little altering the terms that have been employed earlier, or which other parties have employed in related transactions (Choi, Gulati, and Posner 2013, 1; Hill 2001, 77, 2020, 515, 518, 2009, 191, 193; Jennejohn, Nyarko, and Talley 2021). Hill has described how lawyers have developed a production method whereby every lawyer can have a passage to the accumulated sagacity and knowledge of many, namely the "form." The "form" is a genuine contract that a lawyer, contract drafter, or some other predecessor has employed in one or many past transactions. With the passage of time, the form transforms, mainly for the better. Many faults get corrected, in particular those with severe consequences. However, the outcomes are far from ideal. The deficiencies and imperfections primarily are the redundant complexity

and length. Occasionally the deficiencies and imperfections are more severe, namely when, the obscurities remain uncorrected. The development process, supposed to help lawyers and contract drafters, acquires knowledge readily and in an efficient manner from their experience and from the knowledge of others, results in, maybe awkwardly, into these deficiencies and inadequacies (Hill 2001, 59–60). The "form" practice results in a lower legal quality.

The contract-producing process may cause unwanted risks and inefficiency. An example of an unfortunate scenario is when unrelated contractual clauses are kept in a contract because the contract has not been properly reviewed after previous usages and predecessors' input. According to Hill, lawyers often trust the contract drafter, who has created the contract and "reviewed" it, and therefore, they feel no need to review the earlier work of their competent predecessor. In addition, in the cases where each drafter bypasses the more familiar provisions quickly, expecting his/her predecessors to have paid careful attention and consideration to them, many provisions may never have been reviewed carefully (Hill 2001, 67–68).

Contracts become complex when contract drafters practice contract clause overinclusion, a defensive approach – for instance, to anticipate the possible future disagreements and court cases – and use the "legalese" language within contracting – often to align the style of their predecessors. All these practices alone, and cumulatively, result in the practice of complex contracting. This practice often leads to contracts that are lengthy, risky and they have deficiencies as well as imperfections. This kind of contracting practice is neither efficient nor ethical and it impedes the best interest of the client (Nousiainen 2021). The use of "legalese" in contract drafting diminishes comprehensibility, and thus decreases the legal quality. The less "legalese" and complexity, the better comprehension and legal quality. Williams has pointed out that, further empirical research on the complexity of divergent contract classifications is needed to explain why some contract categories are more complex than others (Williams 2020, 274). An empirical analysis could further assist to find the measures to make contracts more comprehensible.

Some pros and cons of the standardization practice. Network effects, switching costs, and path dependence elucidate how the "second-best," inefficient phenomenon occurs and last despite these deficiencies and imperfections (Hill 2001, 61–62). Next, I will present some of the incentives to keep the present contracting state of the standardized practice.

Drafting and reviewing. Drafting from scratch would not be beneficial, either for junior lawyers or seasoned practioners, as ready access to others' experience and accumulated wisdom is regarded as of crucial importance in contract drafting. The learning successfully from knowledge and experience necessitates generalizing its pivotal characteristics. In addition, a review conducted from scratch would produce high costs, and the probability of detecting anything justifying this cost is small (Hill 2001, 64, 66, 68).

Remote contingencies, risk aversion, and overinclusion. A firm that does not provide for a commonly anticipated remote contingency will look very bad if that contingency takes place; however, the firm will not appear as unsuccessful if they fail to anticipate a likewise distant contingency that is not widely anticipated. Lawyers' calculations thus result in a bias in the favor of including excessive commonly used provisions. Frequently, lawyers will make as few modifications as possible, since they might worry that any larger changes in the provisions could make the contract not work. Some scholars have even argued that legal drafters make unnecessary modifications just to increase the billable hours for their own advance (Anderson and Manns 2017, 57). Further, lawyers are not varied in keeping their workplace. Therefore, they will evaluate a distant risk of

losing their employment in a different way as they would evaluate other distant risks, such as a risk where their share portfolio would entirely forfeit its value (Hill 2001, 68–69, 73).

An attitude of thinking that reputable aspects will not limit an evil-minded party from trying to take an advantage of each contractual gap, regardless of how small (Hill 2001, 67), will further incentivize the practice of overinclusive, defensive, and complex contracting. This kind of thinking, however, seems to be a bias of the human mind. Since some of the empirical examples of behavioral economics have shown that persons who do not know each other seldom take an advantage of each another, but rather behave fairly toward the other party (Cooter and Ulen 2012; Güth, Schmittberger, and Schwarze 1982, 367–388; Güth and Tietz 1990, 417–449; Ulen 1998, 1747).

Learning the process and the gradual cost of each later use. Once lawyers learn how to use and navigate the process of contract formation, and gain the understanding of the structure, provisions, and terms of the form, then the gradual expense for every later application of the procedure is going to be low, and then the learned practice will make available the quickest and cheapest method for the contract producing. In addition, the contract review process is going to be accelerated. Further, as regards network effects, the legal commune has interpreted and considered the standard terms and clauses (comprising the substantive clauses and the boilerplate) on numerous occasions and, thereby, each company benefits from having other companies using similar kinds of contracts, detached of the substantive value of specific contracts. A clauses' deficiency of the substantive value as in contrast with a not so widely used available another possibility is not insignificant, though, benefits gained from the network might occasionally overthrow the benefits of a "better" clause (Hill 2001, 70).

Disapproving innovation. There may also have been some legal interpretations of specific terms and clauses. Keeping the benefits of these judicial interpretations serves as further ground for disapproving innovation. However, some scholars argue in favor that meaning is created by the lawyers – not by the courts (Waibel 2015).

Moreover, innovation may be regarded as increasing the chance of bad outcomes. Thereby, one is unable to seek an exceptionally great result unaccompanied by carrying a larger risk of an unpleasant outcome. Lawyers in consequence acting in a rational manner would focus their efforts more onto the direction of moderately improving upon the industry-wide standards – evading a possible unpleasant outcome and seeking a common good outcome – than trying on innovative approaches (Hill 2001, 70–72).

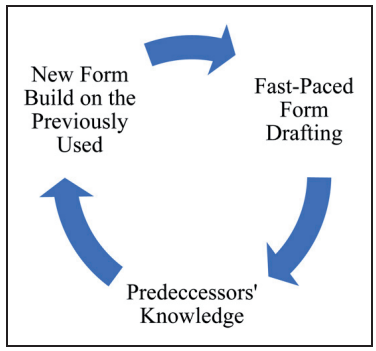

Figure 1. Fast-paced cyclic process.

Fast-paced cyclic contractual processes. Contract forming can be a fast-paced process (Figure 1). After a transaction is completed, lawyers have no incentive to review the final contract as signed, and they have probably already moved on to other transactions (Hill 2001, 69).

Risk aversion, overestimation, and inability for the estimation of bad outcomes. Risk aversion and overestimation create inefficient contracting. Economists and cognitive psychologists have evidenced that human behavior discloses systematic departures from rationality. For example, the fundamental perception of neuroeconomics and behavioral economics is that humans make anticipated errors in decision-making, judgment, and cognition. Many people face difficulty dealing in a rational manner with incidents that have a small prospect of occurring (Cooter and Ulen 2012, 51; Güth, Schmittberger, and Schwarze 1982, 367–388; Güth and Tietz 1990, 417–449; Korobkin and Ulen 2000, 1051–1144; Posner 2014, 19; Sunstein, Christine, and Thaler 1998, 1471–1550; Ulen 1998, 1747). Lawyers tend to overrate the prospect of bad incidents. They tend to entrust with a larger likelihood to some unwanted incidents than is justified and thereby overrate the likelihood that (i) they made a mistake (ii) it is going to be found (iii) the made mistake will have terrible consequences for the lawyer herself (iv) and for her client (and/or) (v) they are not as proficient as their peers (Hill 2001, 73). Before people make decisions and choices, what comes to mind, is shaped by their selective cognition as well as memory, which will impact the corresponding decisions and choices (Edwards 1954, 380; Posner 2014, 19; Rabin 1998, 11–46; Schwartz 2004; Tversky and Kahneman 1985, 25–41). According to the research on memory, subjects remember most precisely the events of great emotional arousal, thereby bad events are more greatly weighted in part since they are more vivid and available (Hill 2001, 73).

The inability for the estimation of bad outcomes and "knowing that you don't know" creates further biases. If many lawyers assign higher probabilities on the bad outcomes, they might then practice law in a defensive way. The more uncertainty, the larger the seduction to withdraw to something promising possibly more assurance, or a proper defense – at the fewest. In this respect, "the form" also provides comfort. The lawyers then should endorse relying on the form, which somebody has reviewed and vetted, rather than having confidence in themselves, whom nobody has reviewed or vetted. The incentive to have confidence in the precedent – to keep away from one's own discernment, is straightforward: acknowledging the limit of your knowledge compels toward having confidence in the experience and knowledge of the authors who have created "the form" (Hill 2001, 73).

Next, I will present some of the incentives to move on from the legalese standardized contracting practice toward more innovative, comprehensible, higher quality, and user-centered contracting.

Innovation for sustainability, profits, and competitive advantage. For anyone searching for profits, it is a necessity to innovate. Schumpeter's Theory on Innovation has its grounds in the thought that in producing successful innovations an entrepreneur may gain profits (Śledzik 2013, 89–94). Within the framework of the economic analysis of law, the legal design approach is innovative as the approach benefits from various design methods, innovations in the field of technology, and law. In addition, the approach aims to enhance the efficiency as well as the quality of legal services and products (Nousiainen 2021). According to Schumpeter, the concept of innovation itself refers to each novel procedure that decreases a production's total cost or that raises the demand for the products that are sold. It is expected that the legal design approach can do both, and it fits into the two classifications. The first classification comprises each operation that reduces the total production cost, say, the introduction of a

novel production method or a technique, or an innovative process for the organization of an industry. The second classification of the innovation includes each function or operation which enhances the product demand, say, the bringing up of a novel commodity, the initiating or the nascent of a novel market or a product design (Nousiainen 2021; Śledzik 2013, 89–94). The legal design approach employed within the legal profession fosters the conveying of legal information in a more comprehensible manner. Therefore, it may increase the demand for some legal products as the end users have now a better understanding of them and their applicability to their needs – for instance, this can be the case with risk and business management products. In addition, since the legal designed products take the demands of the end users better into account new business segments may arise when the end user needs are revealed, recognized, and acted on. Furthermore, the innovative approach of the legal design to the contracting practice is in align with the cost-effective and profit-making commerce, and hence within Schumpeter's Theory on Innovation (Nousiainen 2021).

Law firms may effectively support client-driven innovation in developing internal organizational incentives and routines – since clients look for good quality lawyers, and this character again necessitates lawyers to take a notice on their clients' interests – and internalize them (Jennejohn 2018, 73). This practice is aligned with the legal design approach for contracting which promotes the better legal quality and comprehension through innovation. Empirical analyses have found that more marginal law firms are likely at the early stage of the innovation cycle to be the leaders, whereas the dominant law firms will lead at the later stages (Choi, Gulati, and Posner 2013, 1).

Benefits and incentives from the use of legal design in complex contracts and cyclic contractual processes. The cyclic contract-forming process presented earlier results in contracts that are incompetently drafted, notoriously troublesome and difficult to read (Hill 2001, 70). The next drafter will use the previous final contract as a form for his/her contract, yet the next drafter will use it but not analyze or review it – but builds straight his/her new contract upon the earlier work of his/her predecessor, "the form." The cyclic contractual process creates more contracts that are ambiguous and complex. This is how complex contracting evolves (Figure 2). More user-centered contracting could increase the legal quality and stop this unfortunate cyclic process – that does serve neither the drafters nor the parties to the contract.

A human-centered design approach holds a substantial promise for developing and improving the delivery of legal services (Hagan 2021, 155). When employing a more user-centered approach to law, the contracts will become more approachable, readable, and understandable to their users. This will

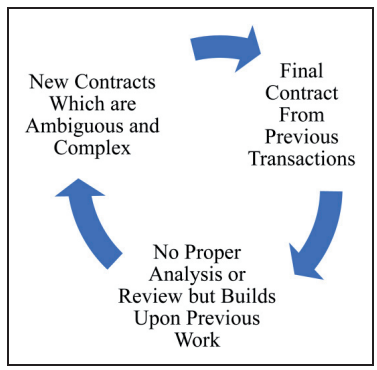

Figure 2. Creating complex contracting.

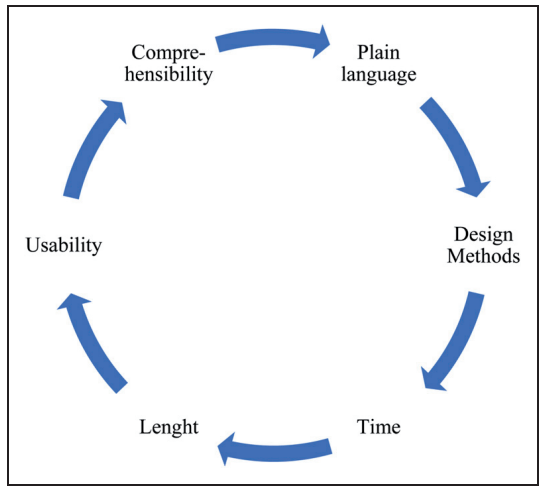

Figure 3. Quality metrics cycle – more user-centered contracting.

increase the legal quality of contracting. Thus, comprehensibility works here as another way of measuring the efficiency in developing and improving the delivery of legal services. Within the proposed legal design quality metrics cycle (Figure 3), one could learn from the predecessors, and from the interdisciplinary best practices, to achieve the best quality contractual drafting outcomes for the end users. Standardization is not regarded as bad, as per se, but it should be conducted within the legal design approach to law and innovation. Many scholars have noticed the benefits of the design methods, such as translating information into a more accessible and understandable form within the use of plain language, visualization, modularity, and text length as short as possible to convey the needed information to empower the end user within their legal matters (Barton, Berger-Walliser, and Haapio 2013; Berger-Walliser, Barton, and Haapio 2017; Berger-Walliser, Bird, and Haapio 2011; Hwang 2016; Hwang and Jennejohn 2018; Katz, Dolin, and Bommarito 2021; Mitchell 2015; Nousiainen 2021, 2022; Passera 2018; Scott and Triantis 2006; Smith 2006; Triantis 2013; Williams 2020). The prospective "learning benefits" and "network benefits" take place with the choice of a legal design approach to contracting. According to the economic analysis of Khan and Klausner (1997, 718–720), it is expected that the prospective "learning benefits" of the standardized terms drafted according to the legal design approach will bring benefits such as drafting efficiency, decreased uncertainty over the meaning of terms, and the understanding of the plain written terms among professionals, laypeople, and the community. The "network benefits" will take place as more operators employ these plain language terms. From the economic theory of the boilerplate, it is expected that the absence to date of any prior judicial disagreements over legally designed contracts indicates that the plain language terms have endured without causing significant problems or challenges; this is an indication of the utility, usability, and workability of these legal designed contract terms and legal designed contracts (Kahan and Klausner 1997, 720–721).

Learning from other disciplines

The legal design approach learns from other disciplines. The users of this approach wish to benefit from the interdisciplinary best practices and apply them to law. The legal design approach may

benefit, among others, from behavioral economics, law, visual arts, linguistics, technology, business research, economics, psychology, neuroscience, law and economics, quantum, engineering, and various design methods. In the recent years, various scholars have observed the overlap of design, legal practice, and other fields of science (Katz, Dolin, and Bommarito 2021, 39). In this section, I will further discuss how the applications of engineering, design, and law can be used to analyze some of the current contract practice.

Lawyers as engineers. Howarth, among others, has acknowledged the similarities between legal practice, engineering, and design. According to him, engineers, lawyers, and designers have a similar kind of role in their professions: clients turn to them to receive help with their challenges, and then the professional intends to offer customized advice, guidance, or solutions for the challenges at hand. Within this framework, engineers, lawyers, and designers create devices for their clients. Within the legal sphere, the form of these devices is often that of judicial documents and the lawyer's process consists of the drafting of that document (Howarth 2014). Howarth has raised the question of whether law should be seen more like engineering (Howarth 2004). According to him lawyers mostly act as facilitators for transactions and deals. He sees that this facilitation via a lawyer is of the same type as the one of the professional engineers. Howarth argues that each legal design as well as the engineering design incorporates the ladders of

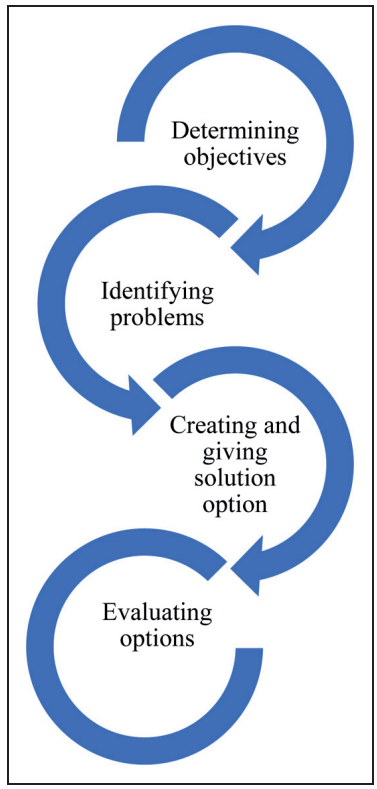

Figure 4. What both legal design and engineering design incorporate according to Howarth (Scholtz, 2014: 426).

determining objectives, identifying problems, creating, and giving solution options to these problems, as well as evaluating these options (Figure 4). According to Howarth, seeing law as a type of engineering will provide a better view of what lawyers do, thereby giving a metric to assess and improve lawyers' practice (Scholtz 2014). Like in engineering, employing more human-centricity, lawyers can provide better quality services, and thus offer "better solutions" for the challenges at hand.

The human-centered design process is not perfectly linear (IDEO 2015, 11), but rather cyclical. It is a participatory and collaborative process involving professionals from various fields. The process consists of three main stages: inspiration, ideation, and implementation (Brown 2008, 4). Through these stages, one can build deep empathy for the people one is designed for – for instance through interviewing them – to design a solution for a challenge at hand and to build and test the ideas for a solution before implementing them into the world (IDEO 2015, 11). According to Brown, the design process can be metaphorically depicted, as a scheme of the spaces in preference to a sequence of the organized ladders defined in advance. These spaces set the boundaries for divergent sorts of connected operations and activities that form together the continuity of innovation (Brown 2008, 4) (Figure 5).

Design and engineering. Buchanan on the other hand underlines the intersection between design and engineering. He notices that something to be regarded as useful or working is a common challenge in both fields, and that the designers continue exploring their relationships with other fields of science and disciplines that have a reference to engineering (Buchanan 2001, 1). Wilson and Corlett suggest that when designing products, designers may utilize various design techniques to evaluate and inform the design process. In the recent years, the interest

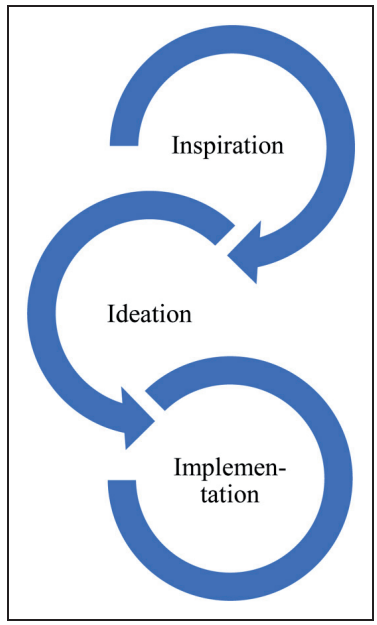

Figure 5. Human-centered design process.

especially in utility and cost benefits related to early design base evaluation has increased (Stanton et al. 2017).

Sustainability and value through legal design approach

The aim of the legal design is to provide and convey legal information, products, and services in a comprehensible manner through user-centric design. The legal design approach applies various design methods to law as well as the novel innovations in technology (Nousiainen 2021). The technology-driven approach focuses attention on the ways to create systems that users find desirable to utilize, which can be employed, and which create value for their users (Hagan 2021, 155). Over time the innovation's terrain has been expanded to the human-centered activities in which the design methods can make a pivotal difference, such as many new sorts of processes, services, healthcare, software, IT-powered interactions, entertainments, and the practice of collaborating and communicating – its objectives are no longer just physical products (Brown 2008, 2). The human-centered design intends to find the solutions that are desirable, feasible, and viable – namely the solutions which the end users find desirable (human), which are technically feasible (technology), and how to make the prospective solutions economically and strategically viable (business) – in a way that they are also successful and sustainable (IDEO 2015, 14). These two approaches, technology- and design-driven, support each other, and therefore, should be applied together to reach the best possible outcomes.

Creating value through design approach. Leaders around the world are now seeing innovation as the main source of competitive advantage and differentiation (Brown 2008, 2). Breakthrough ideas are created and inspired by a profound understanding of the end users' conditions, and the use of the principles of design to innovate and build value (Brown 2008, 6; Liedtka 2018, 72–79). According to Brown, companies would do well to include a way of design thinking into every stage of the process, searching for ways to create value, to gain competitive advantage, and differentiation (Brown 2008, 2). The design approach can recognize, for instance, a feature of human behavior and then convert this finding into both a business value and a customer benefit (Brown 2008, 8). Nowadays, many companies employ the design approach within their legal operations to create value and higher quality services (Dottir; Fennia; Fondia).

The results from experimental and empirical innovation case studies demonstrate that using the design methods can create value to its users, and that the design methods can help build systemic

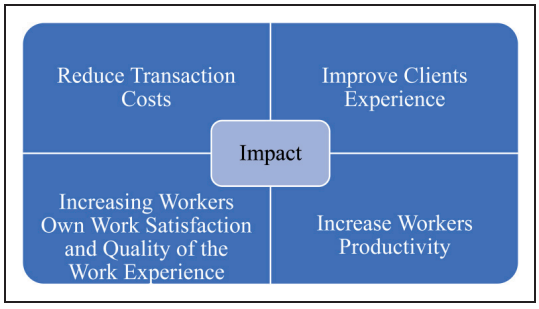

Figure 6. Impact of the use of design approach.

solutions to complex social challenges (Brown 2008, 2–8). In addition, these studies demonstrate that applying a human-centered design approach and methodology, in both corporate and society setting, can bring a significant monetary, ethical, and societal impact. Some of the benefits that have been found in the experimental and empirical innovation case studies include (Figure 6).

General theory of legal design in a law and economics framework. In the previous section, I discussed some of the results from the experimental and empirical innovation case studies that demonstrated that employing the design methods can create value to its users, and the design methods can help build systemic solutions to complex social challenges. In this section, I want to discuss the benefits and incentives that I expect under the economic analysis of law theory on contracts. The following advantages and incentives are introduced in the *General Theory* (Nousiainen 2021). The law and economic theory on contracts gives a promising indication for what can be expected from the practical application of the legal design in commercial contracting. I expect the following advantages and incentives from the utilization of the legal design approach:

Signaling. Adapted from Spence's theory on signaling (Spence 1973, 2001), I expect the following advantages and incentives by applying the legal design approach in the contracting practice. It is expected that a signaling company's legal design grounded contracting practice in the market enhances the generating of returns and enables a business development that is sustainable (Nousiainen 2021). I expect, building upon Spence's theory, that clarity in language and transparent contracting practices demonstrate and signal to the prospective clients in the market of the company's reliability and willingness to obey contractual obligations (Nousiainen 2021; Spence 1973, 255–374, 2001). Trust is important for successful negotiation and commerce. This is, for instance, well demonstrated with the longitudinal work of Kleine Woolthuis et al., where they studied how the various combinations of the contract and trust influence the development of a relationship and the quality of its outcome (Woolthuis, Hillebrand, and Nooteboom 2005, 813). The results revealed that trust will usually precede contracts and that it enables a detailed comprehensive contracting (Woolthuis, Hillebrand, and Nooteboom 2005, 833). As discussed in the *General Theory* and aligned with the study of Kleine Woolthuis et al., a deep-rooted collaboration and contractual commitment are expected when contract negotiations are conducted within transparent, plain, and clear language. This approach to contracting is meant to strengthen co-operation, deepen mutual trust, and comprehension on the grounds for contracting and of the aims, rights, and obligations within the contract (Nousiainen 2021; Woolthuis, Hillebrand, and Nooteboom 2005, 833).

By taking the advantage of the legal design approach I expect that the strategic "non-compliance" will decrease since now there will be a deeper humane and empathic aspect. This more humane and empathic dimension of the contractual relationship diminishes unnecessary claims since the maintenance of the relationship and mutual trust is regarded as valuable. The comprehensible contracts with less legalese will decrease the grounds for obscurity, which previously might have enabled self-seeking behavior – in taking the advantage of complex contracting and the use of legalese (Nousiainen 2021). Here, comprehensibility also correlates with legal quality. The higher comprehension, the less grounds for ambiguity leading to better legal quality and lower transaction costs.

In a situation where there are no effectual contractual legal execution and enforcement measures readily available, trust is considered particularly important (Cooter and Ulen 2012, 301). I expect that trusting in each other and its signaling is the foundation for a long-term business as well collaboration, and that the contracting parties who are untrustworthy are suited just for a one-shot agreement, if any. As grounded in the *General Theory*, I expect that the proposed legal practice will increase mutual trust and build a successful reputation. Signaling of trust is regarded as a business advantage that

generates financial gain, since until the proposed approach becomes the standard novel mainstream; it plays as a competitive advantage for those who practice it (Nousiainen 2021).

Furthermore, a successful relationship provides long-term contracts or the renewing of one-shot or short-term ones. This is regarded to benefit all the contracting parties (Nousiainen 2021). Adapted from Spence's theory on the legal design approach, a company can advance sustainable business development as well as generate profits by signaling the implemented legal design approach on its contracting practice (Nousiainen 2021; Spence 1973, 255–374, 2001).

Akerlof has discussed the economic models in which trust is an important factor to overcome the condition of being difficult to distinguish qualities – to screen good from bad. Adapted from Akerlof's theory (Akerlof 1970, 488), when a company employs the legal design approach in its contracting practice it will signal not being a "lemon" but a good quality. The transparency enhances mutual trust and makes it pleasant for clients to give out recommendations for their peers and other stakeholders. In the commercial framework, recommending is considered as a powerful signal. This kind of signaling can foster a company to consolidate its market position (Nousiainen 2021).

Decrease in transaction costs. Coase's work, "The Problem of Social Cost" (Coase 1960), has laid the fundamental ground for the transaction cost theories. His work has later been refined by the American economist Oliver Williamson continuing the work on Transaction Cost Economics and receiving, as Coase did, the Nobel Prize for his achievements in 2009 (Williamson 2009).

The transaction costs, which result from the economic trade in a market, are considered as sunk costs (Corporate Finance Institute). Transaction costs are the total costs of making a transaction. These might comprise, but the list is not exhaustive, the cost of planning, time, searching for ways to coordinate the actions of the parties, deciding, changing plans, renegotiating, adding terms/provisions, resolving disagreements and judicial disputes, ensuring performance and after-sales services. For these reasons, transaction costs are one of the most significant factors in business management and operation (Young 2013, 2548). The legal design approach applied to contracting can reduce this ex-ante but also ex-post costs.

Based on the economic literature and transaction cost theories (Coase 1960, 1–44; Scott and Triantis 2005, 190, 2006, 814), the legal design is expected to decrease opportunity and transaction costs because it brings information in a comprehensible form into the negotiation and the following contractual operations. The legal design reduces the time necessary for negotiations; it saves in the complaint, legal, and other procedural, as well the administrative costs. Legal design increases the quality of legal services. Moreover, thanks to the use of the legal design approach, I expect less re-negotiation and fewer intentional and unintentional breaches of contracts. When the contracting parties comprehend the rights and obligations of the contract, then unintentional breaches will more unlikely take place. Further, according to the theory, I expect that negligent behavior or negligent breaches will rarely take place as the contracting parties have succeeded in bringing about a more transparent and stronger mutual comprehension on the meaning and aims of the contract. When from the very beginning of contracting, the goals and objectives of a contract are discussed in a comprehensible manner; it is expected to generate more stronger obeyance and commitment than what is reached with complex legalese or the traditional boilerplate contract. Significant transaction costs can emerge, as ex-post contracting costs, from dispute, legal, and reclamation procedures. Proceedings in dispute as well as reclamation might take a lot of time and necessitate a significant communication between all the relevant parties – and often also their lawyers – before the matter is resolved. Further, it can be costly to have as well to educate customer service personnel (Nousiainen 2021). Economic contract theorists acknowledge that information is costly, and in the final stages,

parties suffer from the ex-post costs which are related to the contract design decisions concluded at the ex-ante stage (Scott and Triantis 2005, 190, 2006, 814). Investing in greater front-end term specificity decreases the likelihood of judicial proceedings, and thereby the back-end costs (Williams 2020, 264). The legal design approach for contracting could reduce these ex-post stage costs, because with more comprehensible contracts, the number of disputes as well as reclamations could be lowered; less unnecessary claims will take place since the parties better comprehend the contract – they know their rights and obligations. Hence, the likelihood that the contracting parties will bring their dispute before a court is also lower (Nousiainen 2021).

As discussed in the first part of this section, costs to implement legal design comprises, inter alia: (i) the entrance costs within the approach; (ii) the employing of learnings from other disciplines and professions in drafting contracts (at times from the very beginning) and/or renewing them; (iii) the time that is spent to implement novel practices in a company; (iv) the training of a personnel, and (v) the integrating of the transformation into a company's strategic level (vi) the learning costs and (vii) externalities. It is my intent to examine via an empirical study that the incentives, advantages, and benefits brought about by the legal design largely outweigh these costs (Nousiainen 2021).

Comprehension, time, and contract length as legal quality metrics. Judicial systems widely recognize clarity and understandability in the legal language as important judicial rights (Executive Order 1993, 1996, 2011; Financial Conduct Authority 2021; Hyvän kielen vaatimus [Administrative Procedure Act] 2003; Public Writing Act 2010; Regulation 2016/679, General Data Protection Regulation 2016). States support to an increasing extent the usage of plain language in communication (Australian Government Office of Parliamentary Counsel 2016; Plain Language Community; U.S. General Services Administration (GSA)). To assess successfulness to reach the goals, the contracting practice should move away from the old-fashioned approach of measuring the legal quality by time, won cases, and billed hours and move into a new quality metric that truly measures and rewards comprehension. Comprehension should be seen as another way of assessing efficiency. In this section, I introduce a new quality metric that would better serve the users of legal products, processes, and services by measuring factors including comprehension, time, and contract length.

Commonly, the old-fashioned metrics approach tells very little about the quality of the legal services, products, and processes that are provided. It could be for instance that a lawyer won a case, not because his/her service and knowledge were of a high quality but may be because the other party was just poorly prepared for the court. Moreover, the metric of time might also tell very little about the quality of work. For instance, a lawyer may spend hours and hours on a task, but that does not automatically correlate with the quality of the service and thereby increase the quality of the work conducted. It could be even the case that more hours were spent because the quality of the work was so poor, and the lawyer did not possess the appropriate knowledge to carry out the task within the time that it usually requires from other lawyers. But valuing speed instead of the time spent is not helpful either, as tasks may be completed so quickly that the quality of the legal work suffers. This same line of thought unfortunately applies for estimating the quality through price. How hours are priced tells very little about the quality of the legal work, and it makes it difficult for the users of these services to assess the quality that they are receiving or what they could expect for a given price. To empower the end users, firms, and society, we need better metrics to assess the quality of legal services, products, and processes. I would like to, therefore, introduce comprehensibility as a new legal quality metric that can be seen as another way of assessing efficiency.

The comprehensibility should be accompanied, and applied cumulatively, with the other legal quality metrics such as length, usability, time, design methods, and plain language – as they form together the foundation for high-quality legal products, services, and processes (Figures 3 and 7).

The understanding and comprehension of legal services and products can be increased using techniques and tools such as pictures, layouts, figures, infographics, videos, and legal icons in commercial contracting. The idea is to make the legal information more understandable using different design methods and plain language. In the ideal situation, information is provided in a comprehensible and accessible form to users who do not necessarily have any legal knowledge or background. Visualization, for instance, can be used to increase and support the understanding and conveying of wanted information. Technology can further increase comprehension, for instance, in providing means of making supporting information more available for those who need it for understanding a legalese written text. This help from the technology can take, for instance, the form of little pop-up windows that define the difficult legal terms or phenomena in plain language and gives subject-related examples of the used legal terms that are present in the contract. In some countries, this approach and way of using technology combined with legal design to support the comprehension of laypeople has brought more understanding and efficiency in filling in standardized legal forms. This is especially the case in legal areas, such as taxation, where standardized forms are often regarded as complex and difficult to understand (Finnish Tax Authority; Australian Government Office of Parliamentary Counsel 2016). The legal design approach can be used to increase comprehension, and reduce, or even abolish, the information asymmetry between contracting parties. The comprehensibility of legal information will naturally further empower people, firms, and societies within their judicial matters when they are able to take more strategic decisions based on the information that is available for them.

The comprehensibility can be assessed in several ways. For instance, one can analyze whether the end user has understood the provided information with multiple tools, such as reading comprehension tests, explaining to others – tests and writing a summary of the main points – tests, surveys, and interviews. The comprehensibility should ideally be tested and improved during all the different steps in the contracting process.

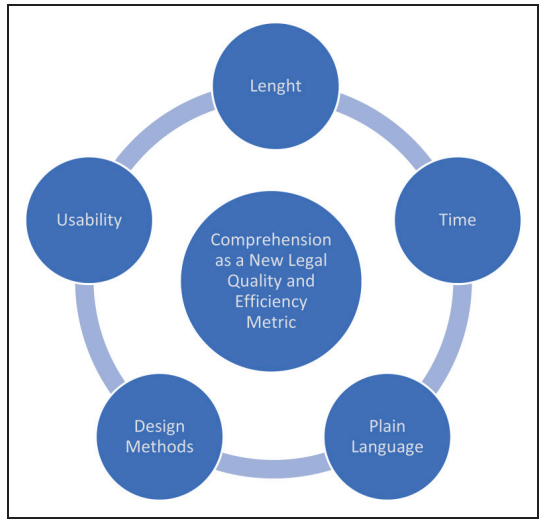

Figure 7. Comprehension as a new legal quality metric and another way for assessing efficiency.

In addition to the tests, the actions, reclamations, and other feedback from the end users can indicate whether they have understood the contract, for example, their rights and obligations under a contract regime. Quantitative data collected, for instance, of the unintended contractual breaches can indicate in some cases about the comprehension of a contract. The unintentional contract breaches could reflect that the contract is written in a way that makes it challenging for the end user to understand what is expected from him/her under the contract. This kind of complex contracting practice is neither socially optimal nor ethical.

An international or national level certificate on comprehensibility could make comparing the quality of legal services, products, and processes more feasible for the end users. This could be realized, for instance, by international associations, national bar associations, at the governmental level or even the field-based chambers of commerce. This kind of specialization could help providers to comply within international requirements, field-specific contracting features and when applicable, with national legislation.

A commonly agreed quality metric certificate could further create learning and externality benefits. When operators will use the innovative design approach to enable better comprehension, these benefits can then be employed within the market. Applying comprehension as a metric for an indication of the operator's service, product, or process quality, and as another way for demonstrating efficiency, will work as a competitive advantage for those applying it first External benefits are created when the other operators follow the same path, and high-level comprehension becomes a widely accepted norm.

Conclusion

This paper has provided the pioneering foundation for further research on the theory of the legal design within the economic analysis of law framework of commercial contracting. To measure the impact of the legal design, one needs to first understand the theoretical framework behind all the elements and metrics that should be empirically investigated and monitored. The law and economics contract theory can be applied to the legal design approach, and it can assist in understanding how markets, people, and law interact in society. The law and economics theory is necessary to conduct the scientific measurement indispensable for the legal design approach to be regarded as being at the scientific level. This paper, together with the *General Theory*, has answered on this demand by providing a pioneering solid contractual theory on the legal design in the law and economics framework. However, empirical research is needed to demonstrate and support the expectations on incentives and benefits derived from the economic analysis of law theory on contracts.

The paper began by discussing the complexity of contracts and how it evolves, and then presented the advantages and challenges for this contractual practice. Next, the paper followed with some learnings from other disciplines and professions. Then it proceeded to discuss the incentives and benefits to leave the present state of the complex contracting and to move forward in making the contracting practice more sustainable and comprehensible by employing the legal design approach. Although acknowledging that comprehensibility is not the only goal in contracting, this paper has presented why it might be particularly important in the legal profession going forward. Further incentives and advantages, such as business sustainability, competitive business advantage, and reduced transaction costs, were holistically discussed. It was anticipated that the incentives, advantages, and benefits brought about by the legal design largely outweigh the associated costs of implementing the legal design approach in one's contracting practice. Furthermore, the paper presented the wider implications of the legal design approach for contracting generally. There is a pressing

urge for a more human-centered approach in negotiation and contracting practice, particularly for industries in transition. In the recent years, the legal profession has faced an irreversible change and the field is under transition. This change in the industry cannot be ignored and it inevitably affects the contracting and negotiation practice. The legal industry transition further provides incentives for lawyers and organizations to reduce the complexity of their contracting practice to support business sustainability, legal quality, and value creation for all stakeholders.

This paper built upon and went beyond the existing literature in presenting a novel quality metric in the law and economics framework for assessing the efficiency in contracting practice. The goal was to develop measures of contracting quality metrics; thus, this paper has introduced comprehensibility. The paper ended by claiming for the first-time comprehension to be regarded as a legal quality metric, and as another way of assessing the efficiency in commercial contracting – and generally in the legal profession. New cumulatively applied legal quality metrics such as usability, design methods, plain language, time, and length were also discussed within the legal design framework. The paper has laid the foundation for further research on the legal quality metrics in assessing the comprehension from an efficiency perspective in the law and economics framework. Thus, the paper has opened a new research direction for further research on comprehensibility in this sphere.

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In the event a dispute arises out of or relating to this Agreement, the parties agree to first make a good-faith effort to resolve such dispute themselves. Upon failing, the parties shall engage in non-binding mediation with a mediator to be mutually agreed on by the parties. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, which the parties cannot settle themselves or through mediation, shall be settled by arbitration.

This transaction may be conducted by electronic means and the parties authorize that their electronic signatures act as their legal signatures of this Agreement. This Agreement will be considered signed by a party when his/her/its electronic signature is transmitted. Such signature shall be treated in all respects as having the same effect as an original handwritten signature. (You are not required to conduct this transaction by electronic means or use an electronic signature, but if you do so, then you hereby give your authorization pursuant to this paragraph.)

This Agreement constitutes the entire agreement between the parties with respect to its subject matter, and supersedes all prior and contemporaneous agreements, understandings and representations. No amendment or modification of any provision of this Agreement shall be valid or binding unless made in writing and signed by all parties.

Consent for Commercial Electronic Messages

You hereby provide your express consent for the Proprietor, its affiliates and licensees (expressly including SAGE, where SAGE is not the Proprietor), and their respective designees to contact you in connection with any business communication or other correspondence. The parties agree that such consent may be withdrawn by you at a later time by providing written notice (including by email) to the Proprietor (and/or SAGE if different than the Proprietor). This clause shall survive expiration or earlier termination of this Agreement.

Katri Nousiainen

Measuring the impact and value of legal design in commercial contracting within the law and economics framework

Through extensive field work, it has become apparent that there exists room to improve the current negotiation and contracting practice with human-centred design. This work addresses the fundamental problems of legalese and information asymmetry in the context of negotiation and commercial contracting practice. It provides a framework to discuss how complexity in contracts evolves and what kind of transaction costs as well as risks the current practice entails. The work intends to provide practical incentives and benefits for contract drafters and companies to develop their negotiation and contracting practice to be more comprehensible, transparent, user-centric, ethical, and written within plain language.

The research intends to have a direct impact on current negotiation and commercial contracting practice, ethics related contracting decisions, and contractual policy development. Legal design provides for greater comprehensibility—especially for people with no legal training—reducing the likelihood of conflicts in negotiation and contracting practice. Legal design builds upon interdisciplinarity. It works at the intersection of design methods, technology, and law. It provides valuable methodology and tools for legal professionals to reduce complexity. Legal design intends to make legal products, processes, and services more understandable for people with no judicial training.

The empirical study results show that the legal designed contract terms were regarded as more comprehensible than traditional legalese contract terms – i.e., the formal and technical language used by lawyers that is opaque, full of jargon, and hard to understand. Almost two thirds (62.5%) of the study's participants chose legal designed contract terms over traditional legalese contract terms. In addition, the results revealed that the legal designed contract terms were more comprehensible – even to lawyers and sophisticated parties. The study shows that legal design will foster competitive business advantage, business sustainability, contractual commitment, risk management, and the high-quality legal services as well as reduce transaction costs. It is demonstrated that legal design can help legal professionals to best serve their clients' interest in offering comprehensible legal services. Aligned with the empirical results, comprehensibility is presented as a legal quality metric.

The work is oriented towards the practical employing of legal design in the negotiation and contracting practice in the corporate and legal world. The research generally employs an interdisciplinary and international approach.

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