

PROMOTING BUSINESS SUCCESS THROUGH PROACTIVE CONTRACTING AND VISUALIZATION

by

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I. INTRODUCTION

With the tremendous growth of outsourcing and networking, inter-firm contracts have increased in both number and complexity. Several trends explain why: the expanding proportion of component parts being purchased from specialized suppliers in various parts of the world; the movement from intra-firm vertical integration toward inter-firm collaborative processes; the shift from readymade products to full-package services and life-cycle products; and the focus on continuous innovation and quality improvement. The emerging organizational networks and new business models need to be supported by contracts drafted in accordance with these changing business goals.¹ Recent empirical research proves the growing importance of contracts for the value chain of today's interconnected enterprises.² Accordingly, companies' contracting capabilities and legal resources become a potential source of competitive advantage.³ A good contract could – and should – be in essence a handbook for performance.⁴

Nevertheless, many business people still view contracts as a necessary time-consuming evil⁵, an administrative burden with which someone must be bothered. They would prefer to refer all contract-related matters to legal professionals – and just sign where necessary. The problem is not limited to standard forms and small print. In today's networked business, too many contracts that are much too long require more reading time than most managers can afford.

Furthermore, contracts contain concepts and language that non-lawyers often find overly complicated, obscure and unappealing. This is because most contracts seem to be written by lawyers for lawyers. Lawyers and the language they use are part of the problem. When law students learn legal writing and are advised to write for their audience, the “audience” refers to judges, arbitrators and opposing lawyers in a dispute. No wonder lawyers write as if the users of contracts were only judges and other lawyers. On top of this, of course, they get paid twice: once for drafting contracts that only the lawyers understand, and again for interpreting what these contracts mean.

So business people may enter into contracts every day without examining them, becoming accustomed to not worrying about whether or not they understand them. In fact, the problem is seldom an actual inability to understand, but instead a reluctance to try. If the contract was prepared or reviewed by a lawyer, why bother to read and understand it? Isn't that what they pay their lawyers for? Why should the manager care what the contract says and whether it reflects their business goals? After all, the document is only the “paper deal in case something goes wrong” – they and their counterpart on the other side know what “the real deal” is.

We argue that this is the wrong approach to contracts and contracting. We propose a new proactive vision and mindset that is directed towards improving business outcomes, creating value, and preventing problems. We first describe the proactive, *ex ante* approach to contracting and law⁶ and its theoretical foundation. We then introduce our metaphor, contracts as *visible scripts* for the parties to follow. Rather than reviewing court cases about ignorance or reluctance to read contracts or the consequences, which have been covered elsewhere⁷, we ask the following: what can we do to help people – with or without legal background – read their contracts? And since mere reading is not enough, we also ask: what can we do to help people understand what their contracts (or proposed contracts, terms and conditions, or similar documents) say? And how can they use their contracting processes and documents proactively, to promote business success while preventing unnecessary problems? We attempt to answer these questions in ways that are meaningful for business and legal practitioners and for future research.

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II. THE PROACTIVE LAW APPROACH

Legal certainty is one of the basic preconditions of successful business. Contracts are expected to provide businesses with predictable outcomes and legal certainty. Yet contract interpretation remains the largest single source of contract litigation between business firms.⁸ Sometimes when we look at court cases or complex contracts it seems that business people are ordered to tread through unknown regions to find the safe routes. It is too late when they hit a minefield; it is not in businesses' interest to develop case law around disputes which should have been avoided. Instead, businesses need to localize and recognize the "mines" in advance, navigate around them, and prevent them from exploding. This is where the proactive approach enters the picture.⁹

The approach specifically called *proactive law* emerged in Finland in the late 1990s. The first publication relating to the approach was a paper entitled "Quality Improvement through Proactive Contracting" that Helena Haapio presented at the Annual Quality Congress of the American Society for Quality in Philadelphia in 1998. This paper was followed by a series of publications and the first Proactive Law conference, which was held in Helsinki in 2003. This and other conferences eventually led to the formation of the Nordic School of Proactive Law and the ProActive ThinkTank.¹⁰

The word 'proactive' implies action and a forward-looking, *ex ante* focus. Being proactive is the opposite of being reactive or passive. It involves acting in anticipation, taking control, and self-initiation, instead of reacting to failures and shortcoming as traditional law usually does. The idea of an *ex ante* view or proactivity in law is not new in itself. It has been known for years that the earlier a dispute or a potential dispute is addressed, the better the chances of a fair and prompt solution. In the context of practising law, the idea of prevention was first introduced by Louis M. Brown, himself an experienced practitioner as well as a law professor. In his ground-laying treatise *Preventive Law* published in 1950, he states a simple but profound truth that has not lost any of its value. Indeed, many attorneys and in-house-counsel actually act according to this motto: "It usually costs less to avoid getting into trouble than to pay for getting out of trouble"¹¹. To this *preventive* dimension (preventing what is not desirable, keeping problems and risks from materialising) proactive law adds a second aspect – often neglected in traditional law: the *promotive* (or positive, constructive) dimension (promoting what is desirable; encouraging good behaviour).

Louis M. Brown's work on preventive law was targeted toward lawyers. While influenced by his work, the proactive law approach emphasizes the importance of collaboration between legal professionals and other disciplines. In the words of Soile Pohjonen, Docent at the University of Helsinki, "[Preventive Law] favours the lawyer's viewpoint, i.e., the prevention of legal risks and problems. In Proactive Law, the emphasis is on achieving the desired goal in particular circumstances where legal expertise works in collaboration with the other types of expertise involved. In Proactive Law, the need for dialogue between different understandings is emphasized."¹²

The Nordic School of Proactive Law is a network of researchers and practitioners from Denmark, Finland, Iceland, Norway and Sweden, each of whom has an interest in Proactive Law. The Nordic School was instrumental in the creation of the ProActive ThinkTank, led by a core team from Denmark, Finland, France, the Netherlands, and the United Kingdom. The mission of the ThinkTank is to provide a forum for business leaders, lawyers, academics and other professionals to discuss, develop and promote the proactive management of relationships, contracts, and risks and the prevention of legal uncertainties and disputes.¹³ Among the publications following conferences organized by the Nordic School are three English language books, *A Proactive Approach*,¹⁴ *Corporate Contracting Capabilities*,¹⁵ and *A Proactive Approach to Contracting and Law*.¹⁶ Some of the early work of the Nordic School is available in Finnish or Swedish only.¹⁷

The importance of exploring the proactive law approach further was recently recognized in the European Union, in the Opinion of the European Economic and Social Committee (EESC) on "The proactive law approach: a further step towards better regulation at EU level" published on 28 July 2009 in the Official Journal of the European Union in all EU languages.¹⁸

A contract designed according to the idea of proactive law aims, first of all, at helping the parties reach their objectives so as to implement their business plan in the way they themselves want. The contracting process and documents seek to align and express the interests of both sides of the contract in order to create value for both. If problems arise, the contract helps the parties work together to guide their collaboration back on track so problems do not develop into conflict or dispute. If a dispute is inevitable, the contract provides the most appropriate means to control and resolve it. With respect to the question of how to enhance legal understanding of business contracts, one can say that a proactive contract is designed and written for the parties, especially for the people in charge of its implementation in the field, not for a judge

who is supposed to decide about the parties' failures. A proactive contract seeks to provide clarity and to make it as easy as possible for everyone to understand its meaning. Moreover, proactive law is truly interdisciplinary. It calls for early collaboration between all stakeholders in the contracting process. Early involvement in the process increases the likelihood of the contract being understood as intended and makes implementation easier.

III. CONTRACTUAL LITERACY

People are reluctant to read contracts – and for good reason.¹⁹ Few managers – or people who are not lawyers in general – have formal training in *how* to read contracts or *why* they should do so. This is somewhat surprising, taking into account the important role contracts play in today's business.

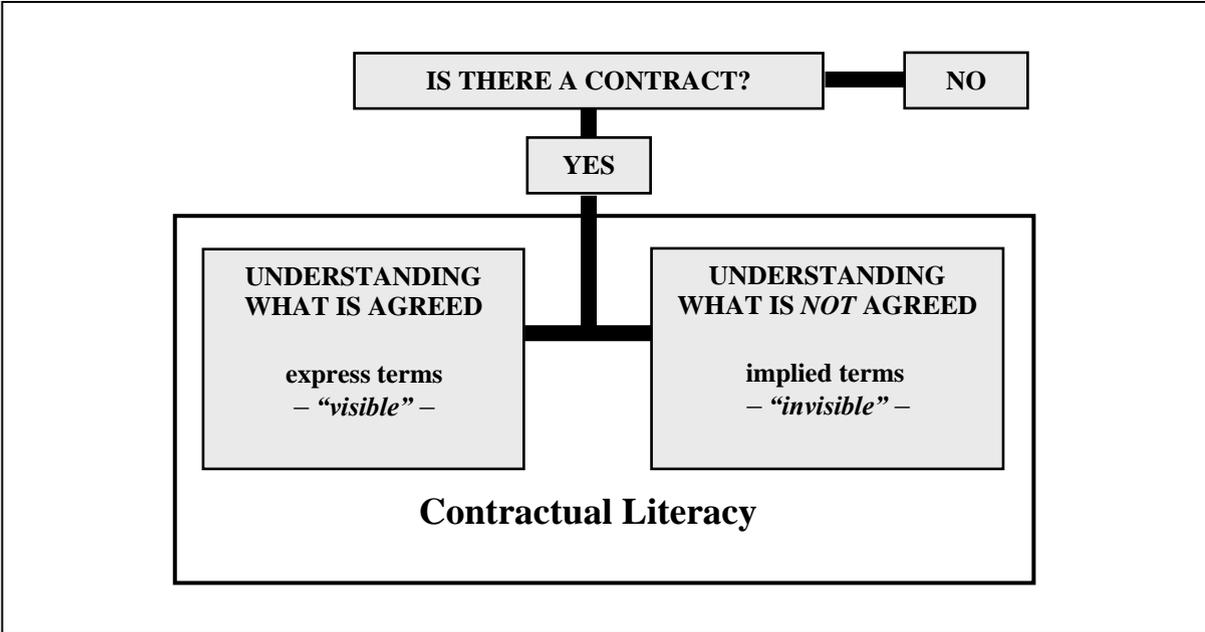
The proactive approach suggests that contracts are not only about risks and contingencies, a kind of legal risk insurance policy in case one party does not perform. They are the *visible script* for the parties to follow in their business relationship, a management tool helping the parties to reach their goals. It is not enough that lawyers read and understand contracts. Nor is it enough that lawyers plan or craft contracts alone. *Contractual Literacy* is required of everybody involved, especially of managers and engineers.²⁰

Crafting today's business contracts often requires subject matter (business, technical, contextual) and legal expertise. Macneil and Gudel²¹ divide contract planning into two main dimensions: 1) *performance* planning and 2) *risk* planning. The first dimension, as we see it, is about the core of the relationship and the parties' goals: translating goals and shared expectations into contracts which secure business success, ensure desired outcomes, and balance risk with reward. The second is about *risk and contingencies*: contract terms dealing with failure, risk allocation, Force Majeure, liabilities, remedies, and dispute resolution. For companies to succeed, managers and lawyers need to engage in group learning²² – otherwise, there is a real danger that, echoing Stewart Macaulay²³, there is a huge gap between the 'real deal' and the 'paper deal'.

In their case study, Argyres and Mayer show that much of the knowledge regarding, for instance, how to design roles and responsibilities provisions in contracts resides in managers and engineers, rather than legal professionals.²⁴ Once put together, contracts need to be easy to understand for delivery teams and business and project managers responsible for implementation. Companies need to learn to contract, and cross-professional collaboration is called for.²⁵

The express terms of a contract – we call them *visible terms* here – can get quite complicated, especially in international business. Apart from the visible terms, lawyers and managers alike need to develop an understanding of what we call the *invisible terms*.²⁶ Sometimes the law applicable to a contract, for example the CISG, becomes part of it, without the parties being aware of that fact. Trade usage and practice may become part of the contract as well, without any mention being made about it in the written agreement. These invisible terms may bring along requirements, liabilities and remedies that the parties did not know existed, even if they had read the contract carefully. In the interest of legal certainty, *Contractual Literacy* requires understanding of both the visible and the invisible terms, as illustrated by Figure 1.²⁷

Figure 1: Contractual Literacy



Contracts drafted by continental-European lawyers from the Civil Law tradition usually are shorter than their common law counterparts. Civil law lawyers tend to rely on statutory law and remain silent on issues that are implied by law. For example, when working for the buy-side in a sale of goods transaction, they may find no need to deviate from the buyer-friendly provisions of statutory law. Yet if the supplier is not aware of these provisions, negative surprises can follow. We believe that successful long-term relationships should be built on a sound contractual foundation, where both parties know the applicable requirements, rights, responsibilities, and remedies. In order to enhance a better understanding of contracts and to make contracts a visible script or a route map for the business relationship, even the “invisible terms” need to be made “visible” to the parties to the contract in a meaningful way.

The problem about making the invisible visible in a contract is that it adds to the already problematic length of the contract. The concept of *visualization* which we present next introduces an alternative way to present contract data, even legal information.

IV. VISUALIZATION OF CONTRACTS AND LEGAL INFORMATION

The recent ‘contractualization’ of business has caused practitioners and researchers to look into companies’ contracting capabilities as a strategic resource and a potential source of competitive advantage.²⁸ When combined with a proactive approach and Contractual Literacy, contracts offer many opportunities to use Proactive Law for strategic advantage.²⁹ But in order to use contracts in this way, people’s attitudes need to be changed.³⁰ Managers and engineers must overcome their reluctance to read contracts.

In this respect, the visualization of legal information (in German *Rechtsvisualisierung*),³¹ an emerging research topic originating in Central European legal informatics, combined with strategy visualization and non-textual communication in business more generally, seems to offer a promising new direction for contracting research and practice. Business people (unlike lawyers) commonly use visuals to communicate information and business goals. The idea of legal visualization is to use visual communication tools to convey information in a way that makes the information easily accessible and understandable for the intended audience. While legal visualization is relatively new as a research field³², in practice graphs and other visuals, even audio-visuals, are used more and more to explain legal concepts in legal education. They enhance the classroom experience for students that have grown up in a multi-media environment and seem to be less receptive to black and white text than former generations.³³ As far as these educational practices are being analyzed and new methods are being developed, an emerging research area in the area of visual legal education can be identified.³⁴

The use of images and visual technologies is also common practice in court and has been subject to superior courts’ decisions³⁵ along with some academic research in this area.³⁶ Besides the use of visuals in legal education and the courtroom, academic research as well as practical use of legal visualization seems to primarily concern the visualization of laws and regulations. A nice example of visualization of legal information in this context is the Street Vendor Project carried out by Candy Chang, a designer, urban planner and artist, in collaboration with the Center for Urban Pedagogy in New York. Having noted that the “rulebook of legal code” was “intimidating and hard to understand by anyone, let alone someone whose first language isn’t English”, they prepared a visual Street Vendor Guide that makes city regulations and rights accessible and understandable. The Guide called “Vendor Power!” is available online (<http://candychang.com/street-vendor-guide/>).

Looking at the outcome of these and similar projects it is surprising that visualization is not more commonly used in business contracts, apart from exhibits containing technical product or service descriptions.³⁷ Business people usually are receptive to flowcharts, mind maps, and graphs and many use them on a daily basis. Why not use these tools to describe legal information in a way that helps provide a better understanding of visible and invisible terms in contracts so as to improve the contracting process and contract implementation? Academic and even professional literature in this field is scarce and, as far as we have identified, for now exclusively descriptive³⁸ or pedagogical³⁹. The aim of our future research would be to develop, test and prototype visual ways to present contract information, beginning with core terms of certain frequently used contracts. We expect these visual representations to make contracts accessible and contractual choices easier. Most companies’ current contracts are text-only, black and white, with no pictures, graphs or examples. We see tremendous opportunities for improvement here. Why not describe the parties’ areas of responsibility and interaction in infographs or images using existing design tools and methods? Why not visualize contracts, work scope specifications, and so on, for easier understanding and communication? In this way, we believe, a growing number of managers can become curious – even enthusiastic – about contracts and the law.

V. CONCLUSION

Recent research proves the growing importance of contracts for the value chain of today's interconnected enterprises. Given the economic importance of contracts for inter-firm relationships we propose a new, proactive mindset that is directed away from risks, problems, losses and failures towards improving business outcomes, creating value and preventing problems. Contracts are expected to provide parties with predictable outcomes. While contracts should provide legal certainty, contract design is not just about the law. Its core is the *performance* the parties expect, not just risk and contingencies. In order to function as business and management tools, contracts must translate goals, expectations and promises into a language that is understood in the way intended. Here, courts and opposing counsel are not the primary audience; people working in delivery teams implementing the contracts are. In order for contracts to translate into successful performance, the people in the field need to know what they are expected to do and refrain from doing.

Before contracts can be used in this way, people's attitudes need to change. Managers and engineers must overcome their reluctance to read contracts, and lawyers must change their decades old text-only-communication habits. Only then can they engage in true managerial-legal group learning and collaboration required for today's contracting success.

Translating goals and expectations into contracts which secure business success, ensure desired outcomes, and balance risk with reward is not an easy task. Relying on recent empirical research, this paper suggests that the planning and design of contract terms is a co-creative effort, best entrusted to business professionals working together with legal professionals. *Contractual Literacy* and *visualization* of legal information can help cross-professional communication, so that contractual choices become easier to make, and contracts easier to design and use, for legal and business professionals alike.

FOOTNOTES

¹ See generally Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 Colum.L.Rev. 431–502 (2009) and Vaula Haavisto, *Contracting in Networks*, in Peter Wahlgren (Ed.), *A Proactive Approach*, 49 Scandinavian Studies in Law, Stockholm Institute for Scandinavian Law (2006).

² E.g. Kaisa A.E. Sorsa and Tarja Salmi-Tolonen, *Contracting in Transition*, SSRN working paper, available at <http://ssrn.com/abstract=1120919> (last visited May 24, 2010).

³ Nicholas Argyres & Kyle J. Mayer, *Contract Design as a Firm Capability: An Integration of Learning and Transaction Cost Perspectives*, *Academy of Management Review*, October 2007, Vol. 32, No. 4, 1060–1077; Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 *Academy of Management Review*, 378–390 (2008); George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, *American Business Law Journal* forthcoming (2010).

⁴ R.J. Smith, *Risk Identification and Allocation. Saving Money by Improving Contracts and Contracting Practices*, *The International Construction Law Review* 40–71 (1996).

⁵ See Robert L. Nelson & Laura B. Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *Law and Society Review*, 457–494.

⁶ See generally Wahlgren *supra* note 1 and Helena Haapio (Ed.), *A Proactive Approach to Contracting and Law*, Turku University of Applied Sciences & International Association for Contract and Commercial Management (2008).

⁷ See, for example, Scott J. Burnham, *How to Read a Contract*, 45 *Arizona Law Review* 133–172 (2003).

⁸ Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 *Yale L.J.* 926–952 (2010).

⁹ Helena Haapio, *Introduction to Proactive Law: A Business Lawyer's View*, in Wahlgren, *supra* note 1.

¹⁰ *Ibid.*, p. 26. See also <http://www.proactivelaw.org> and <http://www.proactivethinktank.com> (last visited May 24, 2010).

¹¹ Louis M. Brown, *Preventive Law* 3, Prentice-Hall (1950).

¹² Soile Pohjonen, *Proactive Law in the Field of Law*, in Wahlgren, *supra* note 1; see also Soile Pohjonen, *Law and Business – Successful Business Contracting, Corporate Social Responsibility and Legal Thinking*, JFT Tidskrift utgiven av Juridiska Föreningen i Finland 470–477 (2009), available at <http://www.helsinki.fi/oik/tdk/henkilokunta/pohjonen/Law%20and%20Business.pdf> (last visited May 24, 2010).

¹³ Nordic School of Proactive Law, *supra* note 10, at ProActive ThinkTank Mission Statement.

¹⁴ Wahlgren, *supra* note 1.

¹⁵ Soili Nystén-Haarala (Ed.), *Corporate Contracting Capabilities. Conference Proceeding and other Writings*, 21 University of Joensuu Publications in Law (2008).

¹⁶ Haapio, *supra* note 6.

¹⁷ These include two books edited by Soile Pohjonen: *Ennakoiva sopiminen – liiketoimien suunnittelu, toteuttaminen ja riskien hallinta* [Proactive Contracting – Planning, Implementing and Managing Risk in Business Transactions], WSOY Lakitieto (2002) and *Ex ante – ennakoiva oikeus* [Ex ante – Proactive Law] Talentum Media Oy (2005).

¹⁸ European Economic and Social Committee (EESC), *Opinion on “The Proactive Law Approach: A Further Step Towards Better Regulation at EU Level”*, 2009/C 175/05, Official Journal of the European Union, C175, Vol. 52, 28 July, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:175:0026:0033:EN:PDF> (last visited May 24, 2010).

¹⁹ Burnham, *supra* note 7.

²⁰ See also Bagley, *supra* note 3, 383.

²¹ Ian R. Macneil & Paul J. Gudel, *Contracts – Exchange Transactions and Relations. Cases and Materials*, 3rd ed., Foundation Press 3rd ed. (2001).

²² Jeanne M. Wilson, Paul S. Goodman & Matthew A. Cronin, *Group Learning*, 32 *Academy of Management Review* 1041–1059 (2007).

²³ Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, in David Campbell, Hugh Collins & John Wightman (Eds), *Implicit Dimension of Contracts: Discrete, Rational and Network Contracts* 51–102, Hart Publishing (2003).

²⁴ Argyres & Mayer, *supra* note 3.

²⁵ Argyres & Mayer, *supra* note 3; and Nicholas Argyres & Kyle J. Mayer, *Learning to Contract: Evidence from the Personal Computer Industry*, 15 *Organization Science*, 394–410 (2004).

²⁶ Helena Haapio, *Invisible Terms in International Contracts and What to Do About Them*, *Contract Management* 32–35 (2004) available at http://www.ncmahq.org/files/Articles/81EEB_cm_July04_32.pdf (last visited May 24, 2010).

²⁷ Helena Haapio, *Business Success and Problem Prevention through Proactive Contracting*, in Wahlgren, *supra* note 1 170.

²⁸ Argyres & Mayer, *supra* note 3; Argyres & Mayer, *supra* note 25; Siedel & Haapio, *supra* note 3.

²⁹ Proactive contracting and other areas of the law affecting managers are explored in greater depth in: George J. Siedel & Helena Haapio, *Proactive Law for Managers: A Hidden Source of Competitive Advantage*, Gower Publishing (forthcoming).

³⁰ In order to change this attitude a group of European universities, business schools and other institutions currently works on an ERASMUS curriculum development project on Proactive Management and Proactive Business Law (PAM PAL) funded by the Lifelong Learning Programme of the European Commission, see <http://pampal.turkuamk.fi>.

³¹ Colette R. Brunschwig, *Visualisierung von Rechtsnormen – Legal Design* [Visualization of Legal Norms] Doctoral Thesis, 45 *Zürcher Studien zur Rechtsgeschichte* (2001), and Colette R. Brunschwig, *Visualising legal information: mind maps and e-government*, 3 *Electronic Government, an International Journal*, 386–403 (2006); see also the websites “Rechtsvisualisierung.net” and “semioticsoflaw.com” that provide further information and links (last visited May 24, 2010).

³² For available information in English see Brunschwig, *supra* note 31; John Brigham, *Visualizing Law* (2007), available at: http://works.bepress.com/john_brigham/17/ (last visited May 24, 2010).

³³ For an example of legal visualization in education see Eric Hilgendorf, *DTV-Atlas Recht*, Band 2 (2008), extract available at: <http://www.bilandia.de/multimedia/dtv/Hilgendorf-Eric-9783423033251-leseprobe.html> (last visited May 24, 2010); the library of Indiana University Maurer School of Law for example maintains a collection of audio tapes, videotapes, and DVDs available for checkout, see <http://www.law.indiana.edu/lawlibrary/collections/audiovisual.shtml> (last visited May 24, 2010).

³⁴ An on-going research project at the University of Edinburgh School of Law examines possibilities of “embodied legal learning”, <http://www.law.ed.ac.uk/beyondtext/> (last visited May 24, 2010); see also in German: Klaus F. Röhl & Stefan Ulbrich, *Recht anschaulich. Visualisierung der Juristenausbildung*, 3 edition *medienpraxis* (2007).

³⁵ For example in the decision *Michael Skakel v. State of Connecticut* the Supreme Court of Connecticut has approved the use of a compelling multimedia montage in the closing arguments of the trial, see <http://old.nyls.edu/pages/3981.asp> (last visited May 24, 2010).

³⁶ For example Neal Feigenson & Meghan A. Dunn Source, *New Visual Technologies in Court: Directions for Research*, 27 *Law and Human Behavior*, 109–126 (2003); David Taiti, *Rethinking the Role of the Image in Justice: Visual Evidence and Science in the Trial Process*, 6 *Law, Probability and Risk* 311–318 (2007). See also the website of New York Law School’s Visual Persuasion Project, founded and directed by Professor Richard K. Sherwin, at http://www.nyls.edu/centers/projects/visual_persuasion (last visited May 24, 2010).

³⁷ In certain fields, such as construction and equipment supply, drawings and visuals are sometimes used in technical specifications and product and services descriptions attached as exhibits. For an example of the latter, see <http://www.sec.gov/Archives/edgar/data/1372664/000119312507000742/dex101.htm> (last visited May 24, 2010).

³⁸ Henry W. (Hank) Jones III, *Envisioning Visual Contracting: Why Non-textual Tools Will Improve Your Contracting*, IACCM Contracting Excellence (2009), available at: <http://www.iaccm.com/contractingexcellence.php?storyid=949> (last visited May 24, 2010); Helena Haapio & Katri Rekola, *Better Business Through Proactive Productization and Visualization of Contracts*, 2 IACCM Contracting Excellence, available at: www.iaccm.com/contractingexcellence.php?storyid=906 (last visited May 24, 2010).

³⁹ Frank John Doti, *Contract Law Flowcharts and Cases: A Student's Visual Guide to Understanding Contracts* (2009).