

Proactive Contract Management in International Projects

A reliable foundation for successful projects and strong supply chains

Project Management Club, University of Vaasa, 26 January 2010

Proactive Contract Management in International Projects



Project Management Club
University of Vaasa, 26 January 2010
Helena Haapio, Lexpert Ltd

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1

Introduction

Helena Haapio, LL.M., MQ (Master of Laws, Master of Quality) works as Contract Coach with Lexpert Ltd (www.lexpert.com) based in Helsinki, Finland. She supports clients in defining and managing successful trading relationships, helping them use contracts to get better business results and stay out of legal trouble.



Helena is a Member of the Advisory Council of the International Association for Contract and Commercial Management, IACCM (www.iaccm.com), and the Founder-Coordinator of IACCM Finland. She is actively involved in the development of the *Nordic School of Proactive Law* (www.proactivelaw.org) and of the *ProActive ThinkTank* (www.proactivethinktank.com) and acted as Expert to the European Economic and Social Committee in preparing its Opinion on the *Proactive Law Approach* published in the Official Journal of the EU in 2009.

Before founding Lexpert Ltd Helena served for several years as in-house Legal Counsel for Wäertsilä Group in Finland, Norway, Sweden and the US. Her articles have appeared in many business and professional publications and she currently co-authors a book for managers on using the law for competitive advantage, *Proactive Law for Managers*. She acts as arbitrator in business disputes and regularly conducts corporate training workshops in various parts of the world.

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2

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Today, Contracts Are Everywhere

Today's fast moving economy means

- shorter cycle times, rapidly changing technology
- increased uncertainty, new risks, more complexity
- increased outsourcing and networking
 - increased inter-organizational dependency
 - more (and more complex) **contracts**
 - more (and more costly) **legal risk & disputes**
- more cross-border communication and cross-professional, cross-functional collaboration

New challenges – and, at the same time, tremendous new opportunities for us all!

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What Exactly Do We Mean by "Contract"?

- 1) a deal, bargain, or agreement; or
- 2) the writing(s) or document(s) containing it

In international dealings, it is particularly easy to get confused:

- In many jurisdictions, no writing or document is required, and there is no requirement as to form
 - Quotation + Purchase Order = Contract
 - Purchase Order + Confirmation = Contract
- Even one-sided offers can be legally binding
- Email messages, telefaxes, phone conversations, etc., may create (or change) contracts

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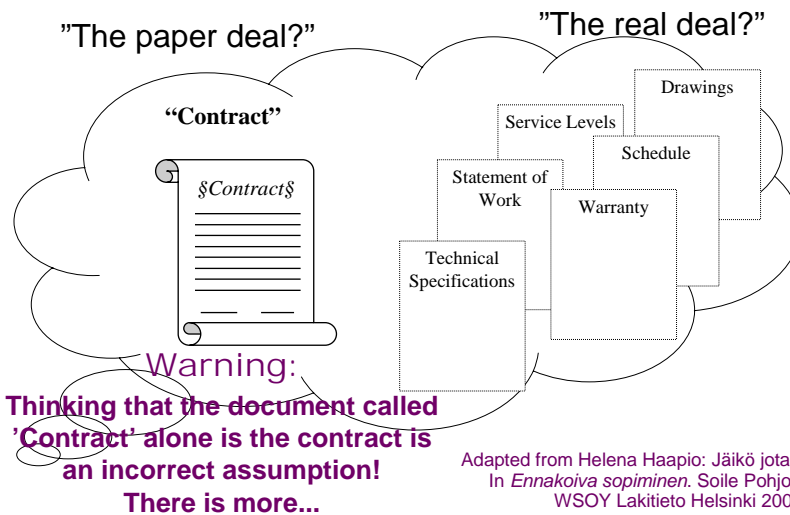
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What Exactly is a "Contract"?



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Why Do Projects Fail?

"Tech projects fail for many complex reasons. I've litigated those fiascoes. One recurring theme is communication failure, which easily occurs when you have techies, business people, bean counters and lawyers in one room pretending to speak the same language.

Techies understand what they can build. Business people know what they want for their customers. Bean counters want it to be close to free, and the lawyers -- what exactly is it that we do and why are we in the room anyway?

The lawyer is there to foster communication. You write a contract to prevent litigation."

Contract Negotiation Crucial Before Website Development by Mark Grossman. The Miami Herald. November 6th, 2000. http://www.mgrossmanlaw.com/articles/mh1/contract_negotiation_before.htm

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Contract Terms: 80 – 20

”Our analysis shows that on average nearly 80% of the terms in business-to-business contracts are not really areas of significant legal concern and typically do not come within their area of review – they are the business and financial terms and this includes key documents like Statements of Work, Specifications and Service Level Agreements.”

Tim Cummins: *Contracting as a Strategic Competence*. IACCM, 2004.
<http://www.iaccm.com/contracting.pdf>.

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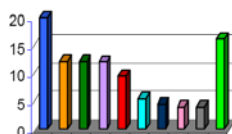
7

IACCM - International Association for Contract and Commercial Management

A Unique Community, poised to make a global difference

- Representing over 2,000 corporations, more than half the Global 500
- From more than 95 countries
- More than 25% at Director level or above
- An equal divide of members representing Procurement, Legal and Commercial Contracts

Industry Profile



IACCM leaflet “The global forum for innovation in trading relationships and practices”

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Why Contracts?

Contracts are Tools for

1. Managing business, projects and commitments
2. Creating, allocating and protecting value
3. Communication, coordination, motivation, and control
4. Sharing, minimizing and managing risk
5. Problem prevention, dispute avoidance & resolution

Good-quality contracts serve as *visible scripts* for parties working together.

Adapted from Haapio, Helena & Haavisto, Vaula: *Sopimusosaaminen: tulevaisuuden kilpailutekijä ja strateginen voimavara*. [Contracting Capabilities: Emerging Source of Competitive Advantage and a Strategic Resource]. *Yritystalous – Leader's Magazine* 2/2005.

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9

Key Concepts: Proactive, Proactivity

Being *proactive*

- the opposite of being *reactive* or *passive*
- implies acting in anticipation, causing change, taking control and self-initiation

These elements are part of the *Proactive Approach* to contracting & law, which differentiates two further aspects of *proactivity*:

- *promotive* dimension: promoting what is desirable; encouraging good behaviour
- *preventive* dimension: preventing what is not desirable, keeping legal risks from materialising

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10

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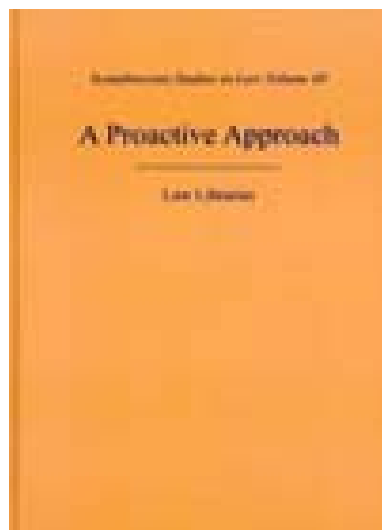
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The Proactive Approach: Brief Background

- Orientation: in the *future*, not in the *past*
- *Proactive* is the opposite of *reactive* - or *passive*
- The approaches specifically called *Proactive Law* and *Proactive Contracting* emerged in Finland in the 1990s.
- In response to a need to further develop practically oriented methods and legal theories in this emerging field, the *Nordic School of Proactive Law* was established in 2004 (see <http://www.proactivelaw.org>)
- To raise business leaders', managers' and lawyers' awareness of the techniques and successes of a proactive approach, the ProActive ThinkTank was established in 2007(see <http://www.proactivethinktank.org>)

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11



Peter Wahlgren &
Cecilia Magnusson Sjöberg (Eds.)

A Proactive Approach

Scandinavian Studies in Law, Volume 49.
Stockholm Institute for Scandinavian Law.
Stockholm 2006 – includes, among others

Edward Dauer: *The Role of Culture in
Legal Risk Management*

Tim Cummins: *Best Practices In
Commercial Contracting*

Helena Haapio:
*Introduction to Proactive Law: A Business
Lawyer's View*

*Business Success and Problem Prevention
through Proactive Contracting*

<http://sisl.juridicum.su.se/>

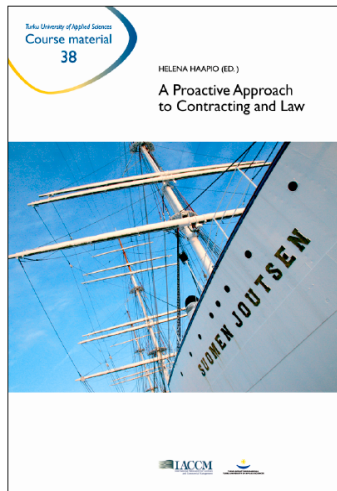
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12

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Helena Haapio (Ed.)

A Proactive Approach to Contracting and Law

co-published by the IACCM and Turku University of Applied Sciences. Turku 2008.

Includes, i.a.,

Edward Dauer:

Four Principles for a Theory of Preventive Law

Thomas D. Barton:

A Paradigm Shift in Legal Thinking

Marc Lampe:

A New Paradigm for the Teaching of Business Law and Legal Environment Classes

Katri Rekola:

Service Design as a Basis for Successful Commercial Contracting

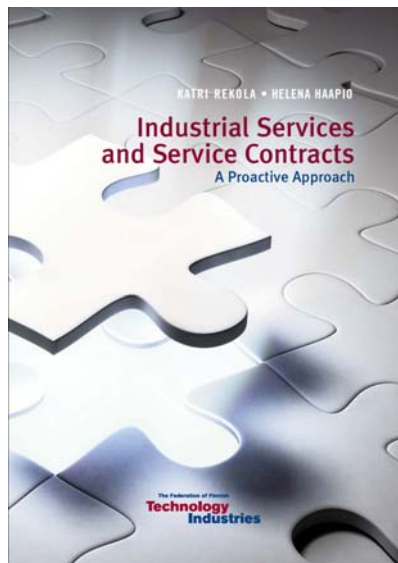
Helena Haapio:

Innovative Contracting

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13



Katri Rekola & Helena Haapio

Industrial Services and Service Contracts **A Proactive Approach**

The Federation of Finnish
Technology Industries,
Helsinki 2009

<http://www.teknologiainfo.net>

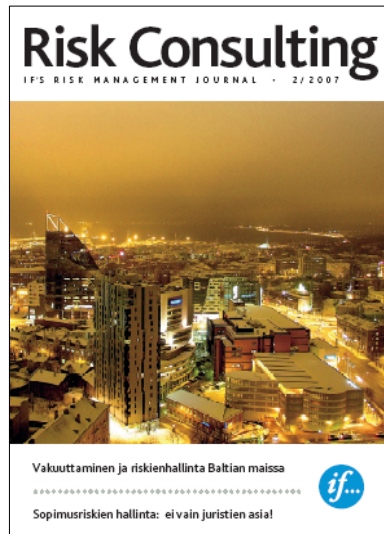
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14

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Risk Consulting 2/2007

If's Risk Management Journal includes, for instance:

Helena Haapio:

Contractual Risk Management: not just a matter for lawyers!

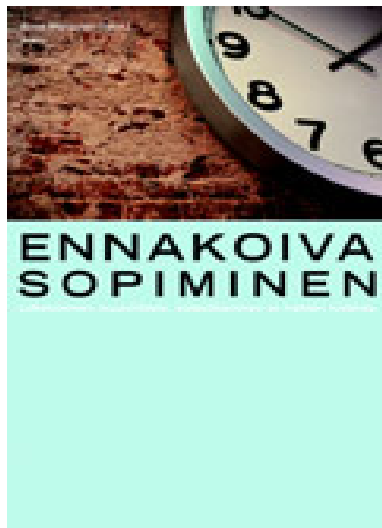
Hantering av avtalsrisker: inte enbart juristernas sak!

Sopimusriskien hallinta: ei vain juristien asia!

<http://ifnews.if.fi/en/risk-consulting/>

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15



Soile Pohjonen (toim.)

Ennakoiva sopiminen - liiketoimien suunnittelu, toteuttaminen ja riskien hallinta

mm.

Helena Haapio:

Jäikö jotain sopimatta. Kaukoviisautta kaupankäyntiin ja oikeudellisten ongelmien torjuntaan.

WSOY. Helsinki 2002.

<http://www.wsoy.fi/pro/kirjat>

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16

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George J. Siedel
Using the Law for Competitive Advantage

Jossey-Bass, 2002

Coming soon...

George Siedel & Helena Haapio

Proactive Law for Managers

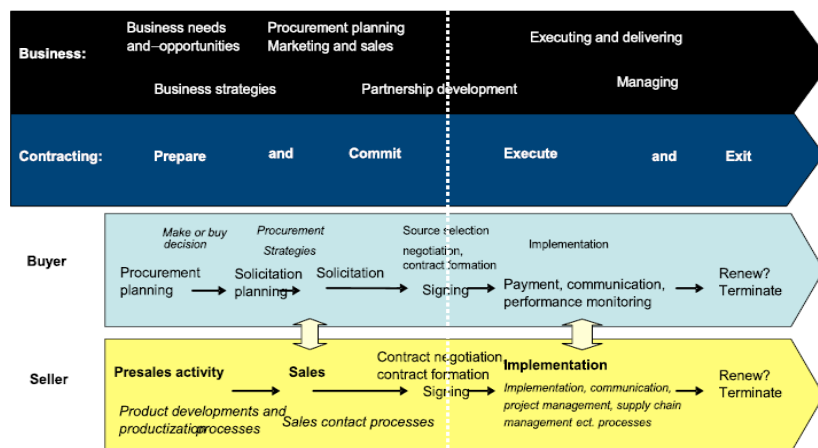
A Hidden Source of Competitive Advantage

To be published in 2010
by Gower Publishing.

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17

Contracting and Business Processes



Contracting Capabilities in Industrial Life-cycle and Service Business. Research Report. A summarized version in English, [http://yliopisto.joensuu.fi/oikeustieteet/sivili/CCC Research Report.pdf](http://yliopisto.joensuu.fi/oikeustieteet/sivili/CCC%20Research%20Report.pdf)

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18

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CISG

One Convention, many names:

= **C**onvention on **C**ontracts for the **I**nternational **S**ale of **G**oods

= the UN Convention

= the Vienna Convention

= the UNCITRAL Convention

UNCITRAL = United Nations Commission on International Trade Law

= (Uniform) International Commercial Code

= (Uniform) International Sales Law

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19

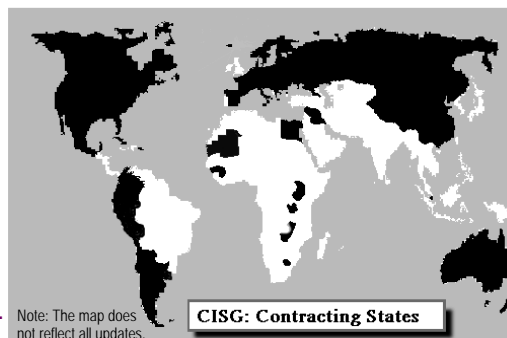
Risk through the CISG?

In international sales and purchases of goods, in many cases, the CISG applies automatically, by default, absent contrary agreement. The CISG (UN Convention on Contracts for the International Sale of Goods, a.k.a. Vienna Convention and UNCITRAL Convention) is now the “international sales law” of about 70 countries accounting for over three-quarters of all world trade.

For more information, see, e.g.,

Helena Haapio:
Invisible Terms in International Contracts and What to Do About Them.
Contract Management, July 2004.
See http://www.ncmahq.org/files/Articles/81EEB_cm_July04_32.pdf.

For texts of the CISG in different languages, see <http://www.cisg.law.pace.edu/cisg/text/text.html>



www.cisg.law.pace.edu/cisg/cisgintro.html

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20

Buyer's Law or Supplier's Law?

In the absence of choice (when the contract is silent), the strongest default rule in many countries is that it is **not** the **Buyer's** law, but the **Supplier's** law.

In the EU member states, this is now confirmed by the Rome I Regulation:

*"To the extent that the law applicable to the contract has not been chosen..., the law governing the contract shall be determined as follows: (a) a contract for the sale of goods shall be governed by the law of the country where **the seller** has his habitual residence; (b) a contract for the provision of services shall be governed by the law of the country where **the service provider** has his habitual residence;..."*

Your cross-border contracts should never be silent on the choice of law!

Buyer's Law or Supplier's Law: Why Worry?

The governing law is relevant to

- the parties' rights, responsibilities and remedies
- the balance of power and allocation of risks
- the interpretation of contracts / words and concepts, such as consequential loss, Force Majeure and warranty
- the duration of the parties' liability exposure
- if disputes arise, the ability to
 - foresee the parties' obligations and act accordingly
 - predict the outcome and avoid unnecessary problems

While people experienced in international contracting know that contracts should never be silent on the choice of law, others may not...

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Bimonthly Payments

Bi-month.ly

adjective

1. Happening every two months.
2. Happening twice a month: semi-monthly

adverb

1. Once every two months.
2. Twice a month: semi-monthly

<http://www.dictionary.com>
Copyright © 2002, Lexico LLC.

Bimonthly Payments

“Fees shall be paid bimonthly.”

Avoid ambiguity – say what you mean,
for example:

“Fees shall be paid on the 1st and 15th of each
month.”

“Fees shall be paid on the first day of every
second month.”

*These sample clauses may need to be modified to conform to the requirements of your
situation and jurisdiction. They in no way constitute legal advice. ☺*

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Damages

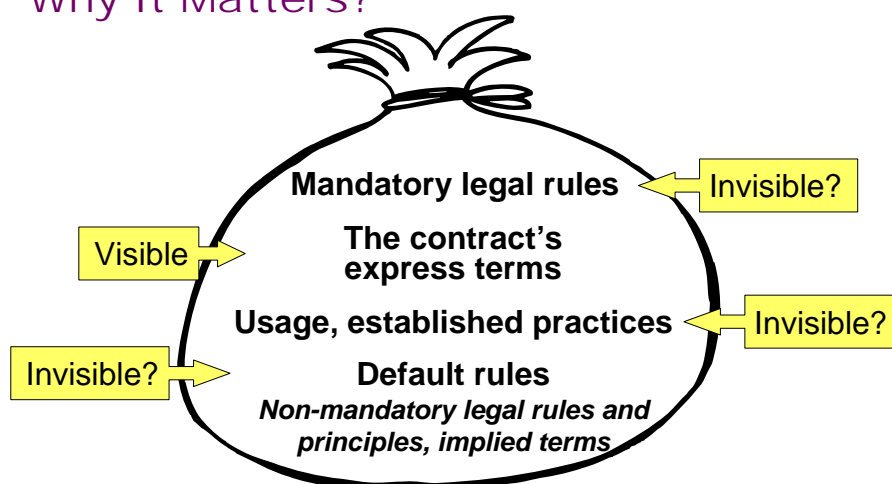
CISG Art 74:

Damages for breach of contract by one party consist of a sum equal to the loss, **including loss of profit,** suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

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Do You See the Invisible and Why It Matters?



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Contractual Literacy

It is in fact quite simple.

It only takes two things:

- 1) Reading
- 2) Understanding

two things:

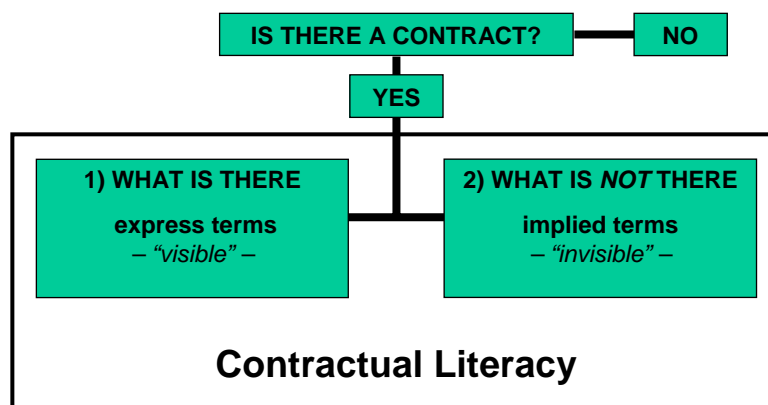
- 1) What the contract says
- 2) What it does *not* say (but still needs to be taken into account: e.g., implied terms)

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Contractual Literacy:

1) Read and 2) Understand



Helena Haapio: *Business Success and Problem Prevention through Proactive Contracting*.
In Wahlgren, Peter & Magnusson-Sjöberg, Cecilia (Eds.): *A Proactive Approach*.
Scandinavian Studies in Law, Volume 49. Stockholm Institute for Scandinavian Law, Stockholm 2006.

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Hypotheticals: What If... What Did We Learn?

If someone in the supply chain is late, everyone suffers.

We need to make sure we know of and keep the promises made.

We need to align our responsibilities in our sell-side and buy-side contracts.

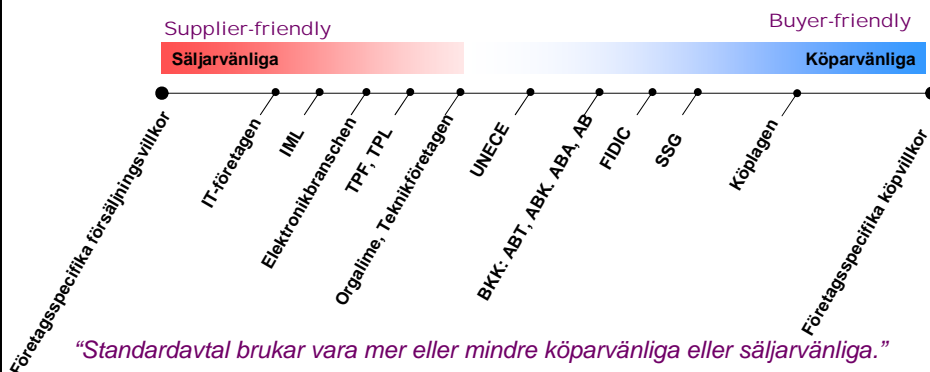
Passing them on / back-to-back clauses make sense, but do not always work the way intended. Few suppliers are ready to accept excessive or unlimited liability. Many are SMEs not in a position to pay damages anyway.

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“Standard Terms Tend to Be More or Less Buyer-friendly or Supplier-friendly”

Standard Contracts (Standardavtal)



Inköparens informations- och faktaforum:

En webbplats om professionellt inköp

<http://inkop-112.atspace.com/standardavtal.ppt#1>

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Hypotheticals: What If... What Did We Learn?

We need to **prevent** delays and **avoid** breaches of contract in the first place.

Contracts can contain incentives and remedies, but we need more.

We need to choose our critical suppliers carefully, monitor them, keep them on track, and make sure those involved have clarity as to what is required, where and when – even when changes to scope or schedule occur or claims are presented.

This is where *back-to-back* and other Proactive Contract Management (PCM) tools enter the picture.

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31

PCM for Project & Contract Success

- The goal: **successful projects** and **relationships**, with **predictable outcomes** and a **minimum of surprises**
- To achieve this, we need to
 1. Align expectations, define desired outcomes, allocate tasks clearly, and enable / provide incentives for good, expected performance => engineer opportunities and manage risk
 2. Identify, anticipate, and eliminate causes of potential problems => no reason for differences or disputes
 3. If a problem arises, make sure it is handled and solved before it develops into a dispute
 4. If a dispute does arise, solve it fast => preserve successful relationships, keep harm to a minimum

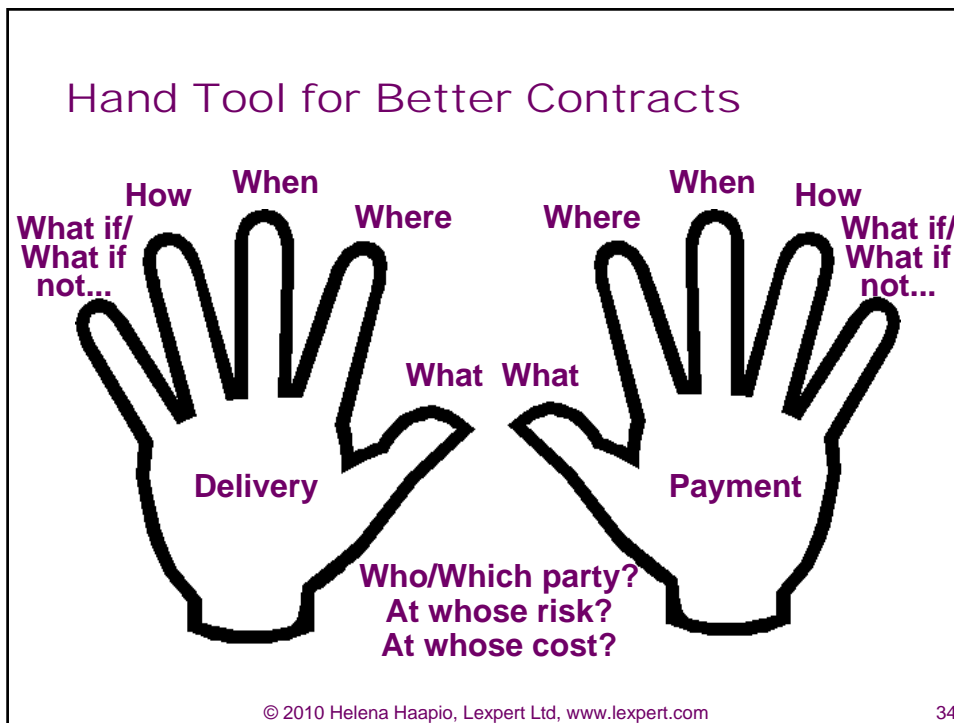
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“Contracts can prevent problems and communication failures...”

True!

Yes they can – when they are fair, good-quality contracts, planned, used and managed *proactively!*

When the risks and opportunities have been recognized, contracts can actually be used to

- guide and encourage desired performance
- clarify, allocate, manage and pass on rights, responsibilities and remedies
- **prevent problems and communication failures**

It takes a team to co-create such contracts – and Contract Literacy to work with them...

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Contracts Are Too Important...

Georges Clemenceau once stated: "War is too important to be left to the generals".

This session claims that contracts are too important to be left to lawyers!

Contractual Literacy is required of everyone who is involved, not just the experts.

In most projects, lawyers and other experts are not the audience to deal with the contract.

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36

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- **National Center for Preventive Law**, www.preventivelawyer.com
- **Pace University School of Law CISG W3 database**, www.cisg.law.pace.edu
- **International Chamber of Commerce (ICC): Guides, Handbooks and Model Contracts** <http://www.iccbooks.com>
- **FindLaw: Sample Business Contracts**, contracts.corporate.findlaw.com/index.html
- **UNIDROIT Principles of International Commercial Contracts 2004** <http://www.unidroit.org/english/principles/contracts/main.htm>
- **The Principles of European Contract Law, by the Commission on European Contract Law**, http://frontpage.cbs.dk/law/commission_on_european_contract_law/index.html
- **Managing Contract Risks. The Increasing Importance of Contracts.** Ernst&Young 2007, [ey.com/Global/Assets.nsf/Finland/Managing_Contract_Risks_2007/\\$file/Managing_Contract_Risks_2007.pdf](http://ey.com/Global/Assets.nsf/Finland/Managing_Contract_Risks_2007/$file/Managing_Contract_Risks_2007.pdf)
- **IACCM Top Ten Most Negotiated Terms 2007**, www.iaccm.com/articles/2008top10/
- **IACCM Top Negotiated Terms: Negotiators Admit They Are on Wrong Agenda.** Contracting Excellence 2009 <http://www.iaccm.com/contractingexcellence.php?storyid=923>

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37

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Liability Newsletter 5 November 2007, If P&C Insurance. ifnews.if.fi/en/latest-topics/liability-newsletter/contractual-risk-management--not-just-a-matter-for-lawyers-.html
- **Prevention beats cure — proactive contractual care for successful supply chains**
Contracting Excellence, October 2007. IACCM. www.iaccm.com/contractingexcellence.php?storyid=338
- **From Reaction To Proactive Action: Dispute Prevention Processes In Business Agreements**
(co-authored with James Groton) Paper presented at the IACCM EMEA Academic Symposium, London, 9 October, 2007. www.iaccm.com/loggedin/library/nonphp/Paper_7_-_From_Reaction_to_Proactive_Action_-_Dispute_Prevention_Processes_in_Business_Agreements.pdf
- **An Overview of ProActive Contracting** (co-authored with Linda Baines)
Paper presented at the IACCM EMEA Academic Symposium, London, 9 October, 2007. www.iaccm.com/loggedin/library/nonphp/Paper_10_-_Theory_into_Practice.pdf
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- **Quality and E-commerce: Online Sales, Automated Contracts, and Legal Issues**
Software Quality Professional, December 2001. American Society for Quality (ASQ). www.asq.org/pub/sqp/past/vol4_issue1/ecommerce.html
- **Safe Sales in Cyberspace** (co-authored with Anita Smith)
American Corporate Counsel Association's ACCA Docket July/August 2000. www.preventivelawyer.com/main/default.asp?pid=essays.htm and www.cisg.law.pace.edu/cisg/biblio/haapiosmith.html

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38

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An Ounce of Prevention...

“It usually costs less to avoid getting
into trouble than to pay for
getting out of trouble.”

Louis M. Brown

known as the Father of Preventive Law
in *Manual of Preventive Law*. Prentice-Hall, Inc. New York 1950.
www.preventivelawyer.org

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39

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www.proactivethinktank.com, and www.preventivelawyer.com.

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40