

Contract Strategy in the Information Age

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Introduction

- The evolved procedures of legal systems are not designed to deal with the complexity, breadth, or volatility of modern problems. The Information Age is disrupting the capabilities and attractiveness of traditional legal approaches, including Contracting.
- Traditional Contracting should thus be strengthened through incorporating new techniques—methods of better communication, technology and organization--that offer greater sophistication and versatility.
- My talk today addresses the disruption of economic exchange by the Information Age, and the strategies we should use to restore greater Contract functionality.

Outline

I. Three Dimensions of Contracts

II. The Detachment of Those Three Dimensions from One Another, and the Domination of the Legal Dimension

III. Disruptions of the Information Age, to Each Dimension

IV. Building “Simpler” Contract Systems

- A. Better Comprehensibility
- B. Stronger Functionality
- C. Modularity and Scalability

V. Strategies for Re-Integration

- A. Language and Legal Simplification
- B. Coding
- C. Relational/Collaborative Contracting

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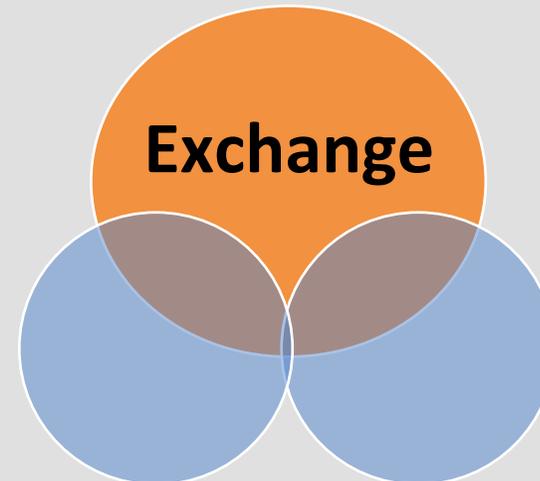
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- For me, a “contract” consists of three distinct but overlapping relationships:

- 1. an **“exchange”** relationship that voluntarily transfers goods, services, or the use of property.



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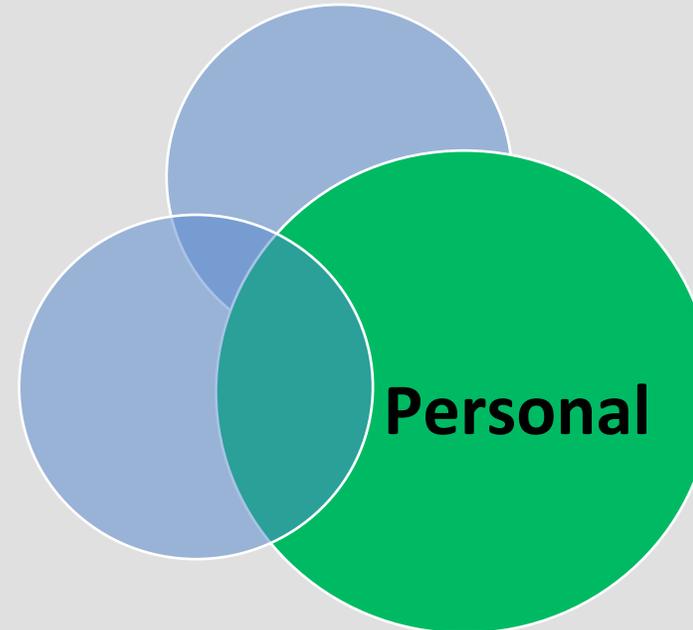
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- 2. a “**personal**” relationship involving qualities like trust, loyalty, empathy, and cooperation; but also suspicion, competitiveness, and potential exploitation.



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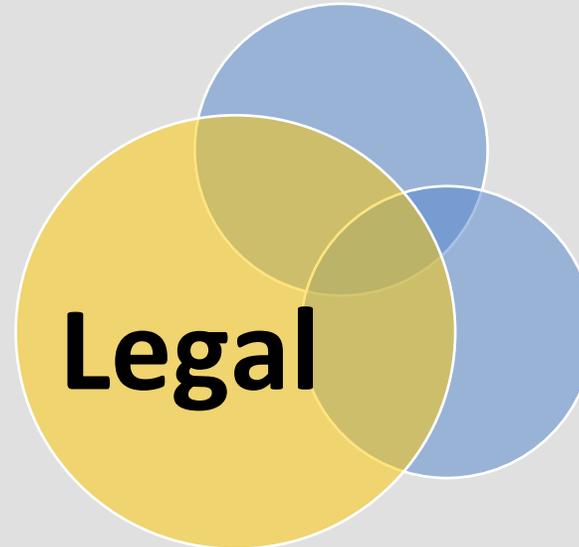
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- 3. a “legal” relationship formalizing the exchange relationship—and perhaps some of the personal relationship as well—and enabling each party to call upon the State to back up particular rights and duties embedded in the contract.



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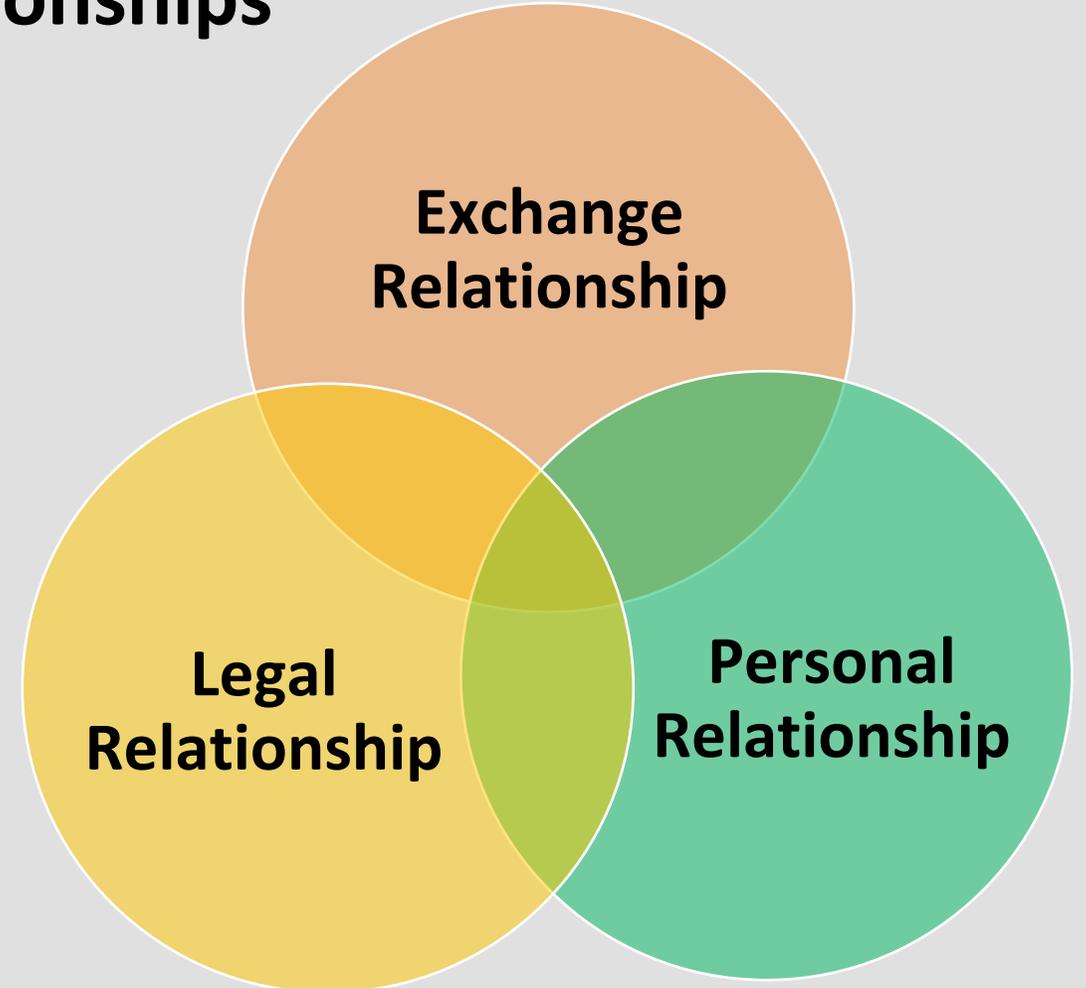
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• Contracts as Three Overlapping Relationships



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- All three of these relationships are crucial for us to identify an agreement as a “contract.”
- ***Further, for contracts to be optimally successful and efficient the three relationships must:***
 - ***support each other;***
 - ***and be appropriately balanced, any given economic exchange.***

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- But neither of those optimal conditions are typically met in contemporary commercial contracting.
- That is because ***two things have happened*** to the interaction of the exchange, personal, and legal relationships, and ***both of which need to change*** if contracts are even to keep pace with evolving commercial environments, much less spur innovation.

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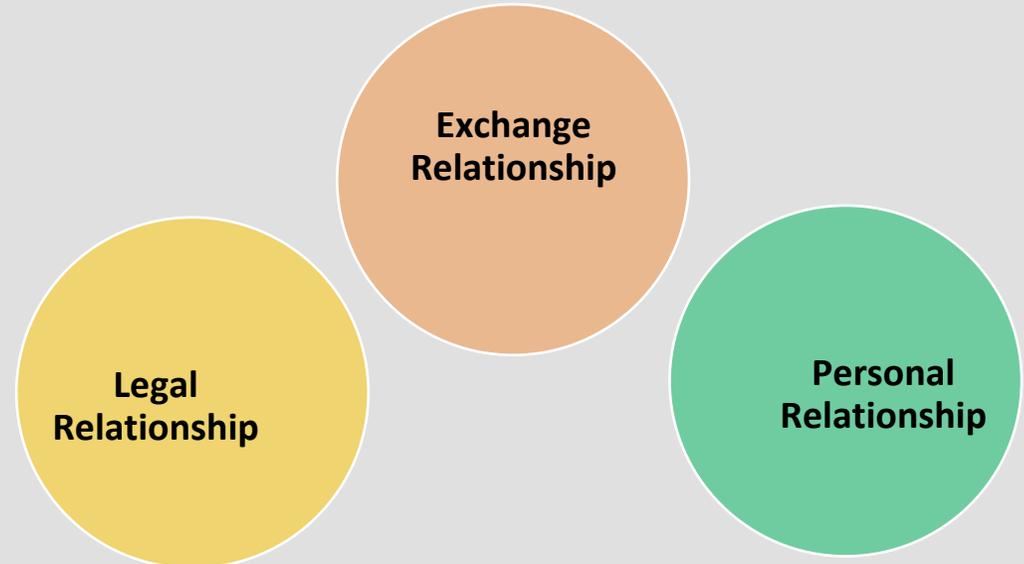
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- First, the ***communication problem***: the three circles have detached from one another, hived off into largely separate, disconnected realms. They no longer communicate well.



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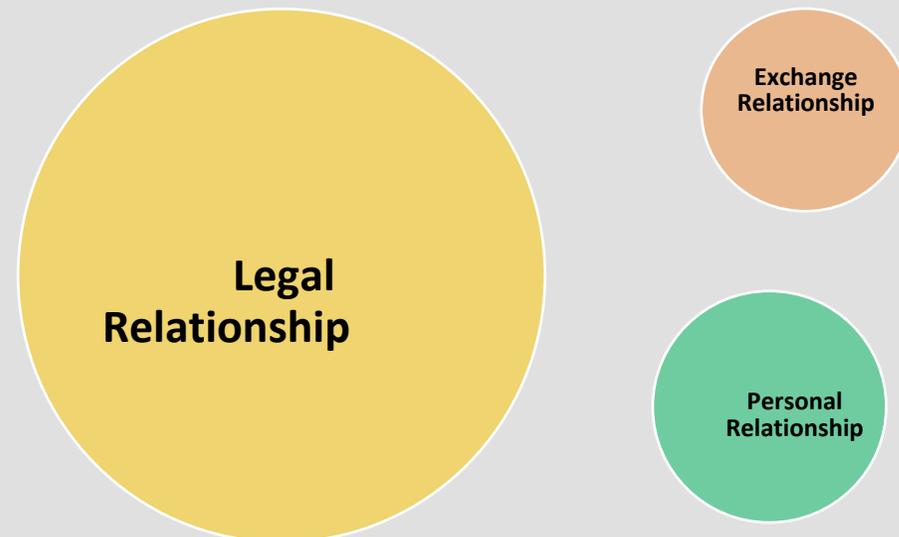
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- Second, the ***legal domination problem***: the legal relationship tends to monopolize the other two, arguably stifling value and innovation in ***both*** economic exchange and personal relationships.



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- My talk today will thus address:

- How did the circles diverge, with “legal” dominating?

- And how can we:

- --bring the circles back closer together;
- --plus reduce the relative dominance of the legal relationship circle, and thus find a better balance among the three relationships of contracting.

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I. How did the three circles detach, with “law” coming to dominate?

- Harvard Law Professor Larry Lessig suggested, by analogy, a possible way to explain the detachment and legal domination, through his discussion of “*simple*” networks versus “*smart*” networks.

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- A “smart” network is internally complex, and usually built by experts. It is typically designed with precision.
- A smart system requires that inputs follow templates, or fit within precise structures, that are *also* designed by the experts.

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- Smart networks are optimized to work efficiently, and effectively, for a relative narrow set of applications.
- The creative focus of smart networks is internal, and usually confined to highly skilled designers—it is ***not*** with the users.

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- Furthermore, operations within the system are also given over to the experts. Only they are qualified or capable of working within the system.
- The role of the *users* of the system, therefore, is peripheral. Their role is not creative, but passive. Efforts to control the system would be ineffectual at best, destructive at worst.

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- “Simple” networks, by contrast, are far more flexible and open to diverse inputs.
- They do not operate by elaborate internal rules or channel usage narrowly. The creative focus of a simple system is pushed to the outside, to the *users* rather than the experts.

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- Lessig offers old-fashioned dial-up telephone technology as one illustration of smart networking.
 - The *users* of a telephone can do only one thing on the network: make phone calls to speak with one other person (or in later refinements of the system, to more than one person).
 - Although the substance of their speech can vary widely, they can perform only one function: dialing a phone number.

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- Everything else is beyond the reach of telephone users, lodged with the telephone engineers.

- Behind the phone dial, not subject to user creativity or control, live the “smart” bits: highly engineered, complex switching and transmission systems.

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- A smart network thus is dependent on expert specialists for its design and operation; and so also the users of a smart system are dependent on those same specialists.

- But, the *entire* system is highly vulnerable to changes in the “inputs” or environment.

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- Smart networks are designed to work wondrously efficiently and effectively to resolve a limited set of problems that are presented in limited ways to the system.
- But that system is inflexible and can quick become relatively ineffective or expensive in the face of a change in either inputs or the surrounding environment.
- And that is what seems to be happening to Contracting.

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- Over roughly the past two centuries, contracting has gradually become an increasingly “smarter” system:
 - a network or system that is internally complex, full of rules that are designed by experts (the lawyers and judges);
 - whose operation is largely beyond the reach of the users of the system, because non-experts are not authorized to contribute or tinker with the system rules;
 - but whose rules and operations the users are unlikely to understand anyway.

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- The users of the contracting system are slowly reduced to a relatively non-creative, passive role. They become overly dependent on the lawyer-experts who build and operate the system.

- And users may tend, therefore, to abdicate to the lawyers even more creativity and control than necessary —because users do not know the boundaries of what may or may not be destructive to the system.

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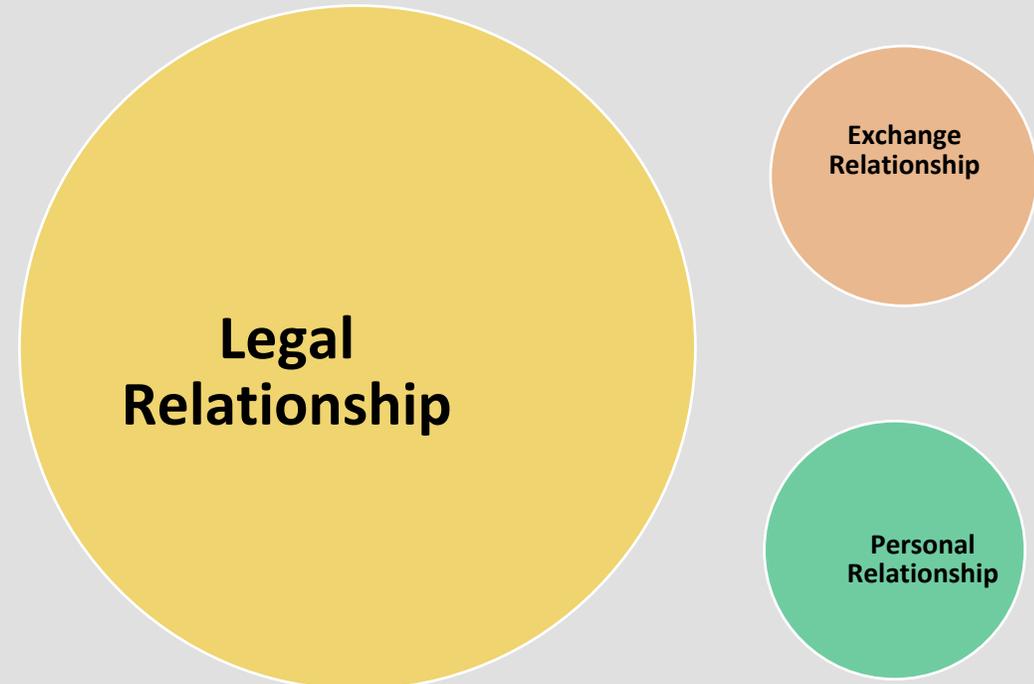
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- All of which causes the legal circle to detach from the users’ circles of the actual economic exchange, and their accompanying personal relationship:



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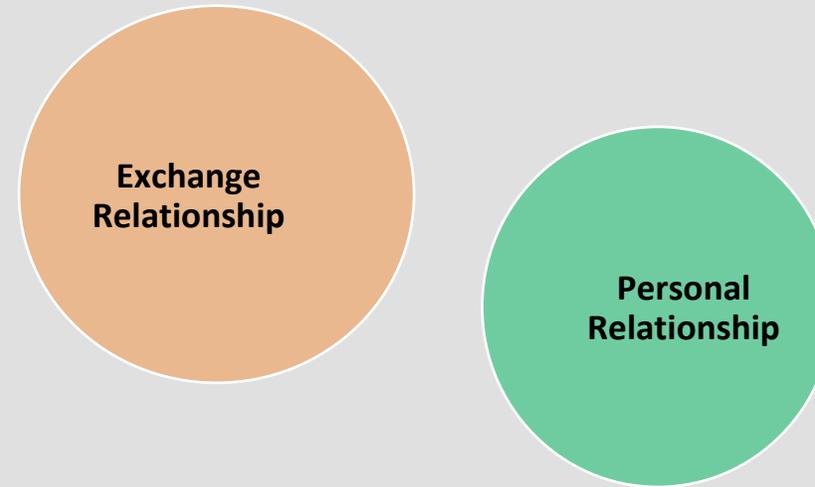
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- Furthermore, perhaps because of the dependence by users on the experts and uncertainty about when inter-party communications may become risky or destructive, the economic exchange circle detaches from the personal relationship circle.



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- The detachment of the three dimensions of Contract, and domination by the legal dimension, functioned tolerably during the agrarian and even Industrial eras.
- Legal experts created a body of Contract Law. Virtually any sort of transaction or exchange, among any sort of people, was stuffed into this single container.

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- But this efficiency was bought through an artificial standardization of people and their transactions:
 - both the economic exchange and the personal relationship dimensions of Contracting were structurally homogenized—made all the same even if in real life they differed significantly.

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- From the perspective of Contract Law, *economic exchanges* were basically alike in that what mattered most were their structural legal features:

- Offer;
- Acceptance;
- Consideration;
- Escape or limitation clauses; and
- Money transfer remedies for breach.

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- But from the perspective of Contract Law, *human relationships were **also*** basically alike in that what mattered most was the presumed structure, or image, of human beings:

- that parties were autonomous, rational choice-makers who stood at arms-length from one another, with their connecting relationship defined by the Contract itself.

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- This system, like all “smart” systems, was optimized for efficiency by designing itself to deal with fungible inputs of exchange and personal relationships.
- And yet—again like all smart systems—it was vulnerable: once the nature of the problems or setting changed significantly, the system reached a breaking point in which it no longer worked well.

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- Arguably that has now happened: economic conditions and patterns of social relationships—the two non-legal circles of Contracts--have been significantly disrupted by the Information Age.

- The disruptions are not limited to Contracting, although that may be where they are especially visible.

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- The traditional procedures of Western legal systems emerged inside agrarian societies to cope with relatively simple economic transactions.
- These farming communities were characterized by relatively stable, dense, face-to-face social relationships, generating economic activity like transfers of animals and crops, land boundaries, and seasonal labor needs.

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- The legal problems presented for resolution tended to be structurally simple, permitting correspondingly simple procedures.
- In these relationally simpler face-to-face economies, a contract for sale of a horse was either fraudulent or honest; the deal was either consummated or breached.
- Remedies were also structurally simple: if the horse were alive the law could deliver it to its rightful owner; if not, a money substitute sufficed.

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- But fewer modern Contracts can be fully described by the discrete transactional rights and duties of two individuals embedded in a market.
- Both the economic exchange and the relationships of the parties are often far more challenging.
- The exchange itself may be much more complex, and it may be set within dense and durable networks of business relationships.

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Increasingly, modern Contracting problems display one or more of the following attributes:

- more mobility of capital, goods, people, information, or pollutants, often across national boundaries;
- stronger complexity with intersecting interests or variables, and among multiple parties;
- higher velocity, i.e., the content of the problem is dynamic, sometimes rendering reform legislation obsolete by the time it is fully enacted;

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- volatility or instability of background conditions, which could involve changing cultural attitudes or greater penetration of problematic behaviors;
- blurring of public and private interests; and
- Growing inequalities of sophistication and wealth, with notable consequences for understanding, negotiating, modifying, and disputing contracts.

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- Human transactions and relationships continue to generate problems bearing these more challenging characteristics or set in these more difficult environments.

- Hence so also must contracting systems—legal, managerial, and technological-- evolve equally sophisticated structures.

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- Many examples could be cited, economically and socially:
 - the evolution of long, interconnected supply chains;
 - coordination of out-sourcing and off-shoring capabilities;
 - environmental concerns that magnify local actions into regional or even international concern;
 - political instability and corruption concerns as goods pass through multiple national borders or require marketing licensure;

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- unstable commodity and energy markets;
- differential trade restrictions and antitrust sensibilities;
- accelerating technological obsolescence cycles; product design that confronts thickets of patent licenses; and
- growing ease and profitability of product counterfeiting or intellectual property infringement.

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V. Strategies for Re-Integration

- A. Language and Legal Simplification
- B. Coding
- C. Relational/Collaborative Contracting

- In sum, the growing complexity of the exchange and business relationships may be slowly overwhelming the capabilities of traditional legal procedures, thus arguably eroding their effectiveness.

- And yet legal experts may not be able to cope with Information Age disruptions simply by creating more rules and procedures. It is not clear, in other words, that experts can, or should, create a yet “smarter” system.

OUTLINE

I. Three Dimensions of Contracts

II. The Detachment of Those Three Dimensions from One Another, and the Domination of the Legal Dimension

III. Disruptions of the Information Age, to Each Dimension

IV. Building “Simpler” Contract Systems

- A. Better Comprehensibility
- B. Stronger Functionality
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- The legal system needs new sorts of tools to boost its effectiveness, and our trust, for dealing with harder problems.
- Coping well with the challenges of the Information Age may instead require that we devise a strategy for Contracts that builds a “simpler” system—one that involves users more; is more flexible; and that harnesses stronger innovation and creativity.

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- Failing to find new, more powerful and adaptable tools risks more than the economic prosperity and organizational functioning of contracting:
 - it risks the vitality and social acceptance of the rule of law.

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- II. So what is to be done? What should be our strategy to Contracting in the Information Age?
 - As introduced above, I approach this as asking how can we re-invigorate and re-attach the economic exchange and personal relationship dimensions to restore better balance and effectiveness to Contracting.

Contract Design

Comprehensible

Functional

Scalable

- Essentially, “Contracts” should be re-conceptualized as a ***process***, rather than simply a document, and this process should be designed to engage lawyers, designers, business people, and users toward greater:
 - Comprehensibility;
 - Functionality; and
 - Modularity and Scalability.

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- The goal is to transform, or at least soften, the “smart network” qualities of Contracting and make its qualities more like a “*simple*” network.
- By making Contracts simpler--more participatory and accessible by its creators and users--Contracting may draw wider sources of creativity in its form and function from non-lawyers—business managers and simple users.

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- Freeing Contracts from their traditional containers inside lawyer-drafted documents may eventually affect how people think and feel, changes that are more consistent with Information Age attitudes to information packaging and delivery:
 - it may help people be more integrative, and less linear, in their thought process;
 - it may help people see patterns more easily;
 - it may greatly increase the use of Contracts by those who must implement complex terms of agreement;

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- and it almost certainly will generally facilitate people interacting more with one another, using graphic images to do so.

- This in turn suggests heightened emotionality, trust, loyalty, and mutual accommodation in Contracting—qualities that can powerfully extend the efficiency and effectiveness of human agreement, even in the most complex settings.

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- Can the legal system find ways to embrace and grow from the opportunities offered by Information Age technologies?
- To retain its effectiveness as well as cultural centrality, the law must explore methods for stronger social and informational connections, even while it retains the capability of separating itself when necessary.

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- Some recent work explores contract ***design***—simplification and visualization techniques as well as information flows.



- Other work addresses ***coding***—making contracts machine readable to enable self-executing “smart contracts” through blockchain and to enhance capabilities through Artificial Intelligence.



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- But these two streams of contract research rarely merge or analyze how design and coding techniques might be antagonistic or synergistic.

- Hence a recent book chapter authored by me, Helena Haapio, James G. Hazard, and Stefania Passera attempts to:

- integrate thoughts about both design and coding;
- and consider them inside the context of Proactive and Preventive Law (“PPL”), an approach that brings humanistic and systems dimensions to contracting and law.



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- In re-imagining what contracts could be and do, we emphasize contracts as a process of exchanging information and commitments that create value and spur innovation.



- We seek to ***transform each part*** of the traditional characterization of contracts, which sadly is that contracts are too often “**documents written *by lawyers, for lawyers.***”

“Documents written *by* lawyers, *for* lawyers”

Instead: searchable, configurable modules of information

Instead: visualization, hyperlinks, videos, and computer code

Instead: a group of builders including end-users, information designers, and coders

Instead: a broad set of potential users, each of which interfaces differently with the agreement across its life-cycle.

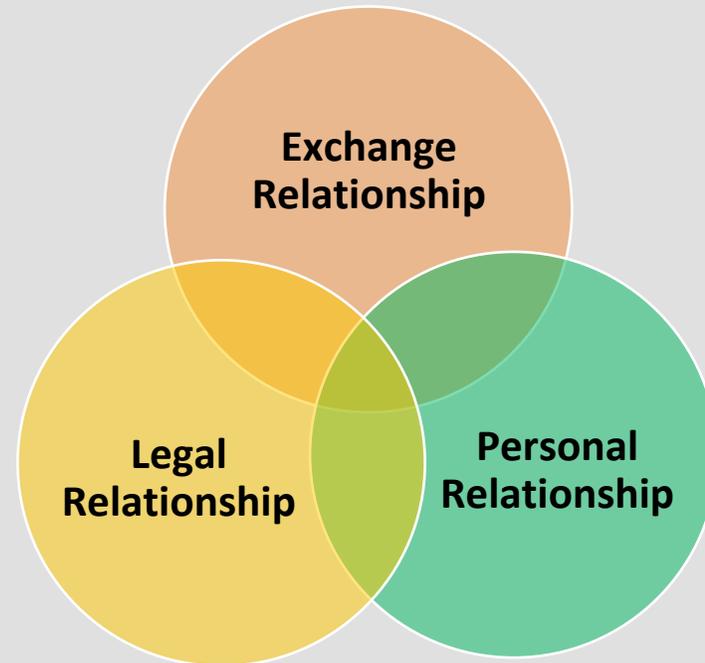
Contract Design

Comprehensible

Functional

Scalable

- The remainder of my talk will focus on this Design Strategy for the contracting process, seeking to make Contracts more comprehensible, functional, and scalable to restore vigor and balance to the three dimensions of Contracting:



Goal: Comprehensibility



- Any contract that is not comprehensible offends ideals humanistic ideals of access, transparency, and autonomy.



- In the long run, incomprehensible contracts also sacrifice “functionality:” they tend to become little more than risk-management devices (akin to insurance policies), or self-defensive linguistic weapons. In either case, their functionality is limited because these difficult contracts are used reluctantly, only when absolutely necessary, as almost a recognition of something having gone wrong.

Goal: Functionality

- Contracts should instead be broadly functional, for every party and organization involved with it. They should:



- enable the formation and implementation of a particular *transaction*;

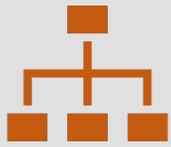


- advance the *relationship* of the joined parties, i.e., facilitate communication, trust, and planning for future collaborations;



- and finally, contracts should enhance the *internal governance* and operations of each party.

Goal: Scalability



- A contract, regardless of format, should be as replicable as possible—or at least made the foundation for later iterations.



- This is because a method for creating contracts which renders it entirely “bespoke” or customized will often be too costly, except for the most high value, strategic contracts—out of reach for many users.



- In contrast, formatting methods that can be standardized or modularized will attract more creativity and resources, making them more broadly accessible financially as well as intellectually.

Design Strategy: Visualization

Comprehensible

Functional

Scalable

- “Visualization”* as a Contract strategy strongly advances the goals of better comprehensibility, and functionality.
- As depicted in the graphic at left, its role in advancing “scalability” is more problematic.
- *Many of the ideas and images used in this “Visualization” portion of the talk are based on ideas and Images developed by Helena Haapio, Stefania Passera, Gerlinde Berger-Walliser, and myself.

Design Strategy: Visualization

Comprehensible

Functional

Scalable

- Depicting ideas graphically requires imagination.
- But images have the potential to communicate in ways that are different from words, potentials that are worthy of community-wide investigation and assessment.

Design Strategy: Visualization

Comprehensible

Functional

Scalable

- Making documents more easily understood by non-lawyers, and more easily usable throughout the life-cycle of the agreement could:
 - 1. improve communications among contracting relationships; AND
 - 2. help to re-balance the three dimensions of Contracts by reducing the prevailing domination of the purely legal realm.

Design Strategy: Visualization

Comprehensible

Functional

Scalable

- “Visualization” means incorporating graphic images into documents to explain and supplement words, **NOT** to displace or override words, with the purpose of making contract documents more accessible and comprehensible to non-experts.

Design Strategy: Visualization

Comprehensible

Functional

Scalable

- In general, graphic imagery uses graphical images to convey information, organize data, promote learning, or stimulate imagination and reflection. It can help to convey:
 - A clear *sequence of ideas or tasks* in an agreement;
 - The *relationships* of people and things, i.e., *how things fit together*;
 - And a sense of *overall purpose, goals, or aspirations* in creating the agreement.

Design Strategy: Visualization

Comprehensible

Functional

Scalable

- Depicting ideas graphically requires imagination.
- But images have the potential to communicate in ways that are different from words, potentials that are worthy of community-wide investigation and assessment.

Design Strategy: Visualization

Comprehensible

Functional

Scalable

- Sometimes images stand alone, as in art or in traffic signs.



Design Strategy: Visualization

Comprehensible

Functional

Scalable

- In other contexts, images accompany words to enliven the language and make underlying concepts more comprehensible. Ironically, the function of the images is to get people talking better.



Design Strategy: Visualization

Comprehensible

Functional

Scalable

- Some ideas are far easier portrayed graphically than others, like equipment and other physical objects of exchange, where simple photographs can be most useful in depicting what otherwise would require difficult language.



Design Strategy: Visualization

Comprehensible

Functional

Scalable

- More challenging are graphical portrayals of contract concepts like “breach,”



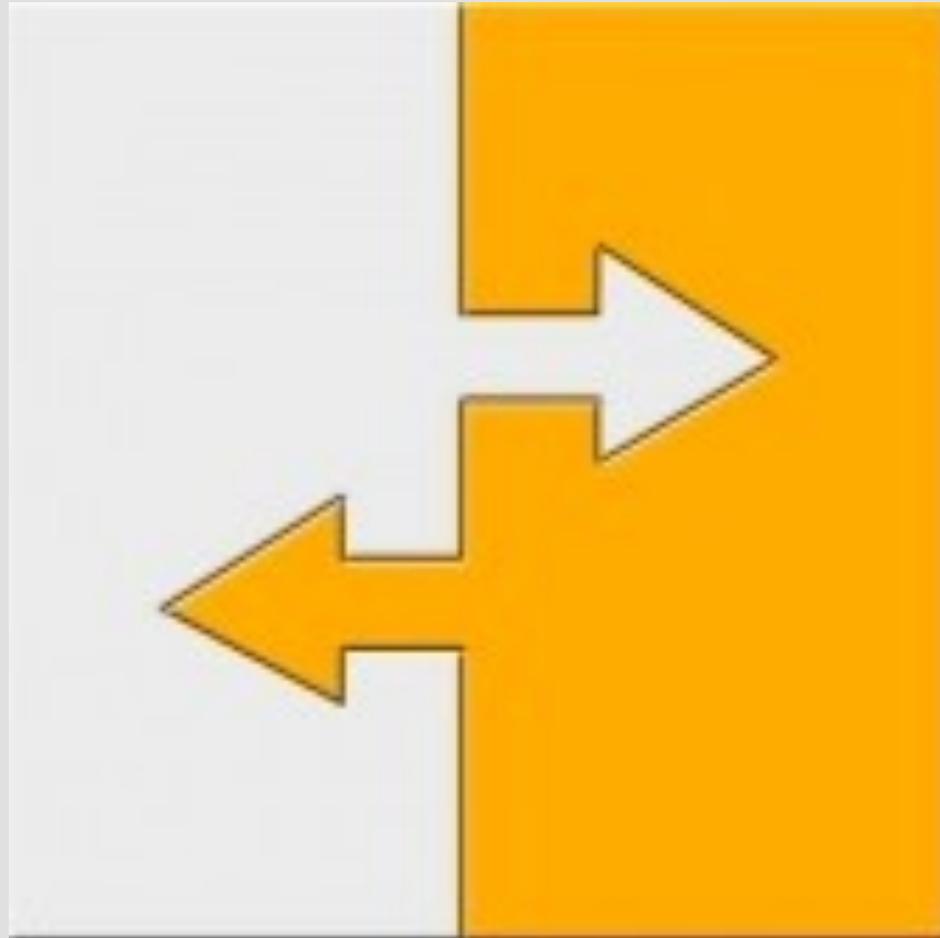
Design Strategy: Visualization

Comprehensible

Functional

Scalable

- or “reciprocal exchange,”



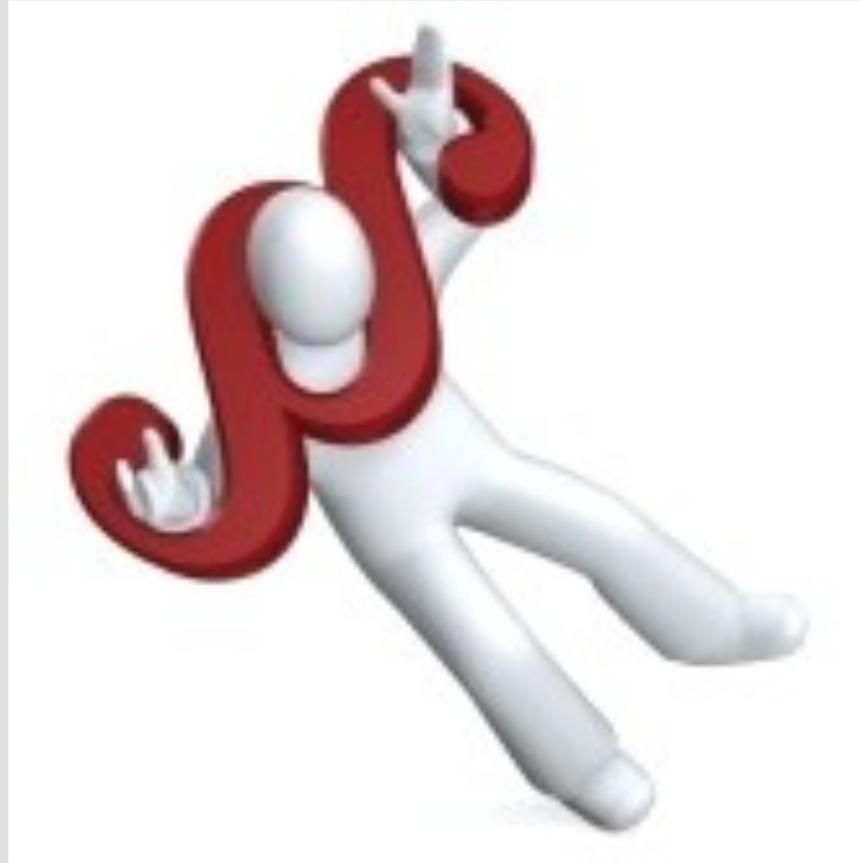
Design Strategy: Visualization

Comprehensible

Functional

Scalable

- or the “invisible terms” of default statutory contract provisions,



Design Strategy: Visualization

Comprehensible

Functional

Scalable

- or the purposes and relational expectations of the contract.



Design Strategy: Visualization

Comprehensible

Functional

Scalable

- Still,
 - **Legal responsibilities** like risk of loss;
 - **Sequences of events;** and
 - **Designated responsibilities**

often **can** be readily simplified through diagrams or images.

Design Strategy: Visualization

Comprehensible

Functional

Scalable

- Consider, for example, the following graphic image that illustrates the Incoterm “Free Alongside Ship,” “FAS,” that is fairly difficult to describe only using words (which is why it has turned into an acronym that incorporates many other words by reference).
- The image uses different colors and icons of ship, cranes and trucks to represent the passage of risk of loss from one party to another.

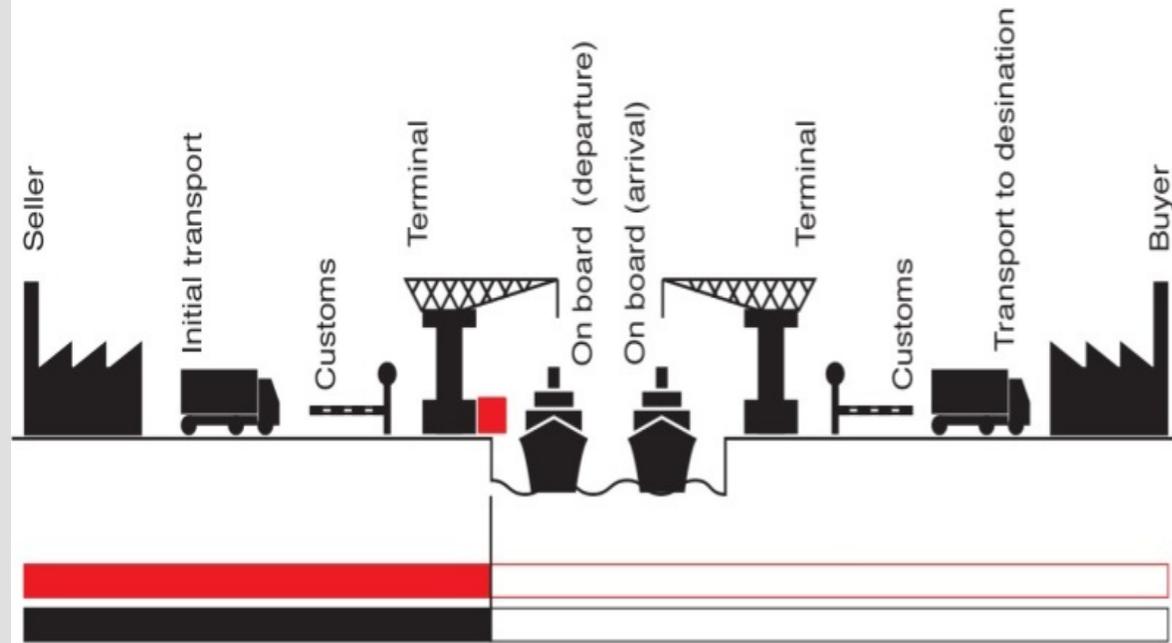
Design Strategy: Visualization

Comprehensible

Functional

Scalable

ONLY WATERWAY TRANSPORT



■ Seller's risks □ Buyer's risks
■ Seller's costs □ Buyer's costs

FAS

Free Alongside Ship
(at named port of shipment)

Seller delivers the goods by placing them alongside the vessel (e.g. on a quay or a barge) nominated by the buyer at the named port of shipment. **Buyer** is responsible for loading the goods. **Buyer** bears all risk of loss and damage of the goods, and pays for all the costs, involved in taking and transporting the goods from the agreed point of delivery. **Seller** is responsible for export and **buyer** for import customs clearance.

(Image developed by Stefania Passera, © 2012 Aalto University, used with permission)

Design Strategy: Visualization

Comprehensible

Functional

Scalable

- Or consider the following diagram, developed by the Scottish government, that is based on our familiarity with subway maps.
- It illustrates a sequence of events in a manner that is easily comprehended and that we could imagine people who are implementing a contract might refer to periodically:

Design Strategy: Visualization

Comprehensible

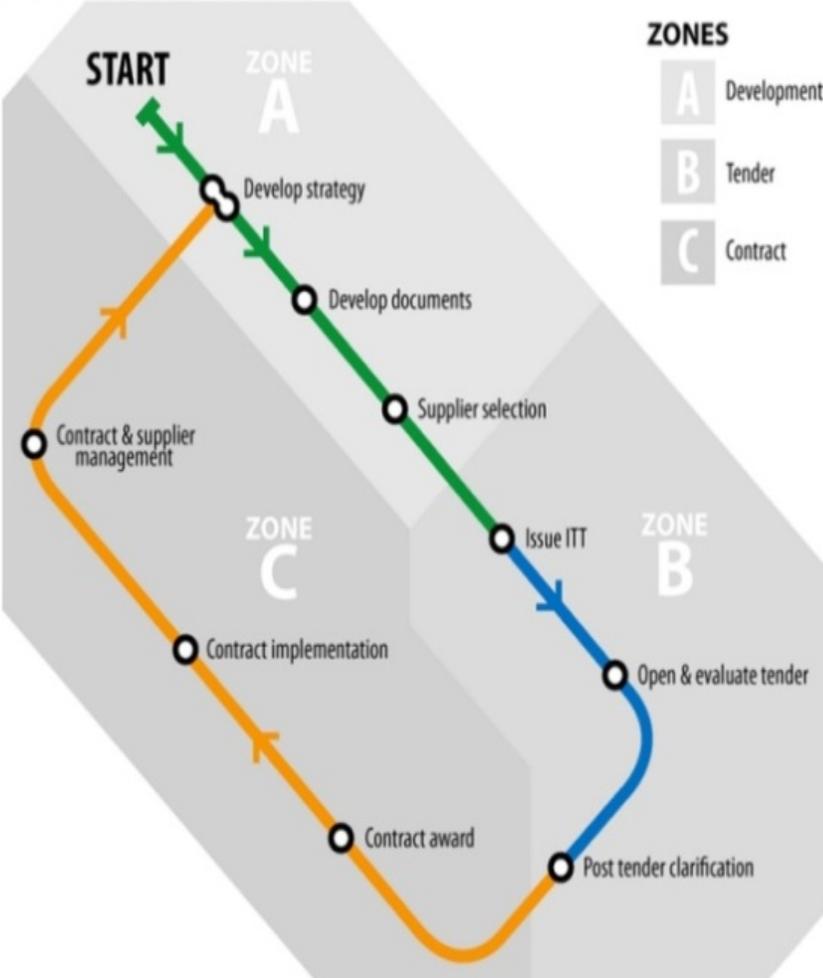
Functional

Scalable

Route One - Procurement Toolkit



Routes Two & Three - Procurement Toolkit



Design Strategy: Visualization

Comprehensible

Functional

Scalable

- When matters in an agreement are conditional rather than fixed, the alternative courses of action may well be illustrated through use of a “logic tree” or “algorithm.”
- The image in the next slide shows the framework through which a contracting party may propose a price change, and the right of that party in some circumstances to terminate the contract if such a price proposal is rejected:

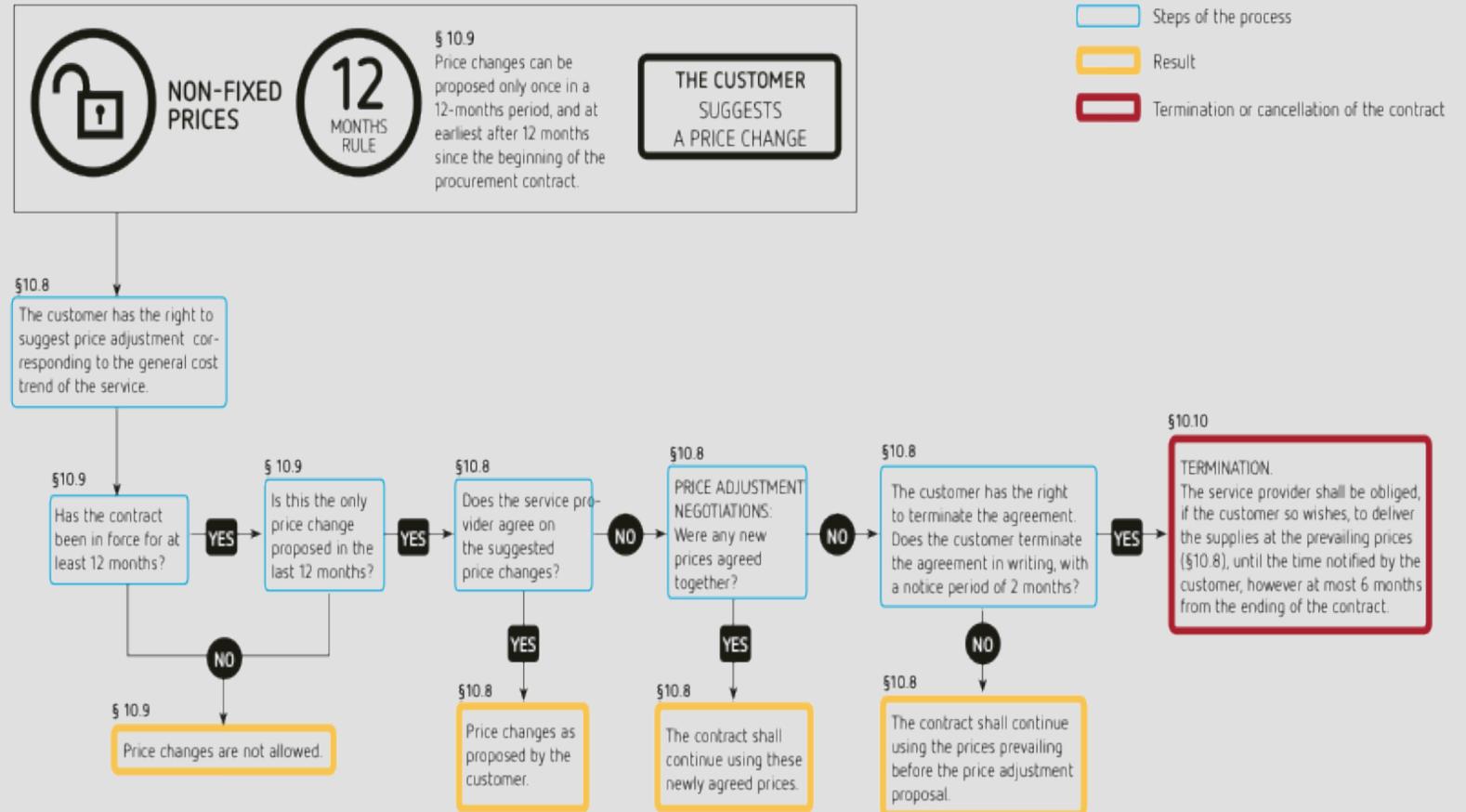
Design Strategy: Visualization

Comprehensible

Functional

Scalable

PRICE CHANGES proposed by the customer (when prices are non-fixed)



(Image developed by Stefania Passera, © 2012 Aalto University, used with permission)

Virtues & Challenges of Simplification/ Visualization

Comprehensible ✓

Functional ✓

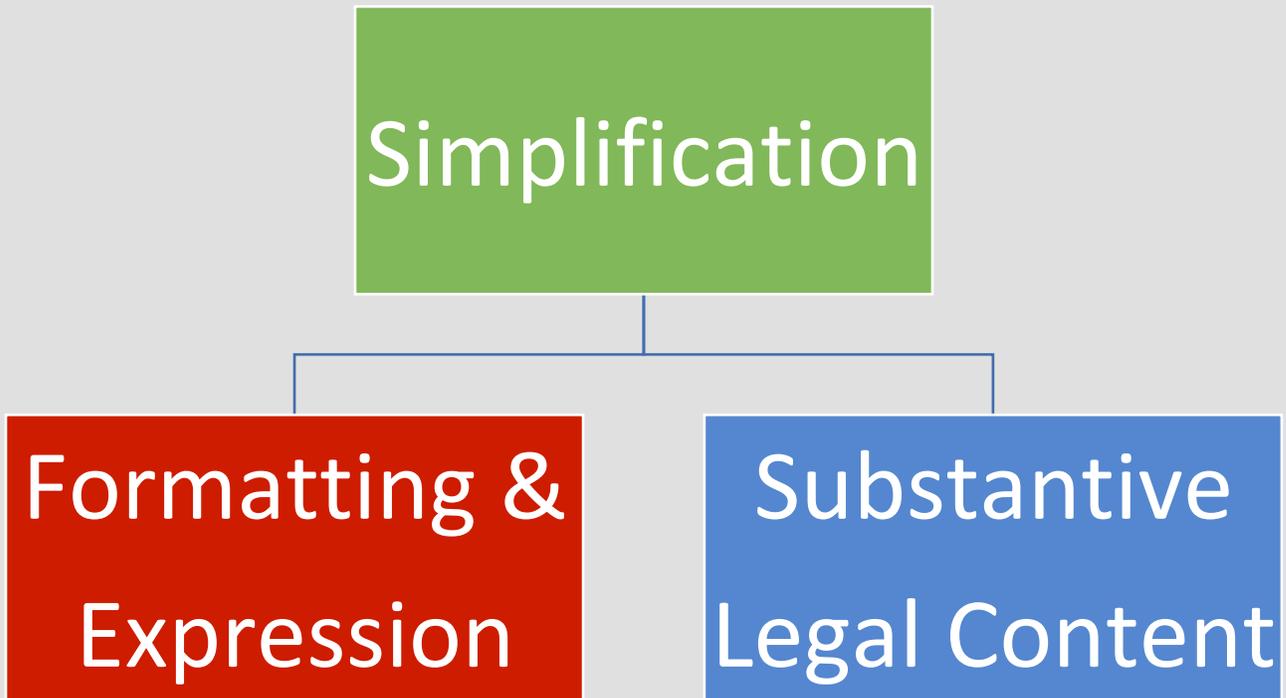
Scalable ?

- By “**simplifying**” contracts through the techniques of plain language and good information design, two of our three goals are clearly advanced:

comprehensibility and functionality

- As to “**scalability,**” however, it is not so clear how well either plain language efforts or visualization formats lend themselves to replicated usage. Finding efficiency in producing visualizations will be a challenge if any of the simplification techniques are to find widespread use.

Design Strategy: Simplification



- However, let's explore the idea of “simplification” a bit further to see whether we can find a different way to advance all three goals.
- We are accustomed to thinking about contract simplification in terms of ***formatting and expression***: i.e., language, layout, and visualization techniques.
- But what if we could also simplify the ***substantive content*** of contracts?

Design Strategy: Simplification

```
graph TD; A[Simplification] --> B[Formatting & Expression]; A --> C[Substantive Legal Content]
```

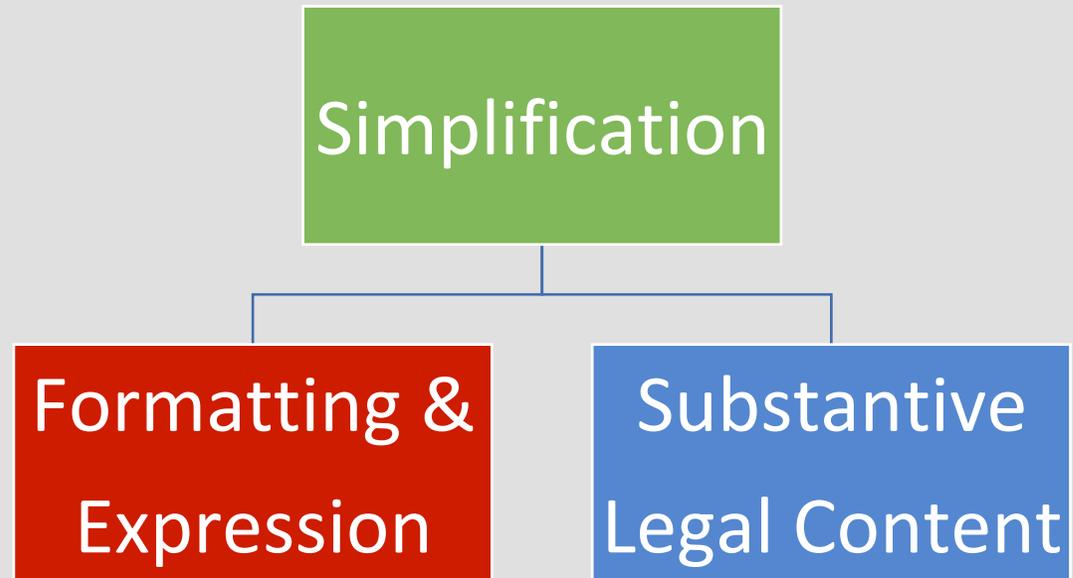
Simplification

Formatting &
Expression

Substantive
Legal Content

- If we could make the *substance* of the contract easier, then presenting agreements in *any* format—traditional words or visualizations--would *also* be easier, because the ideas and details to be presented or re-formulated would be less complex.
- Anyone who has tried to simplify traditional contract language with better language, charts, graphs, or comics **knows the following to be generally true:**

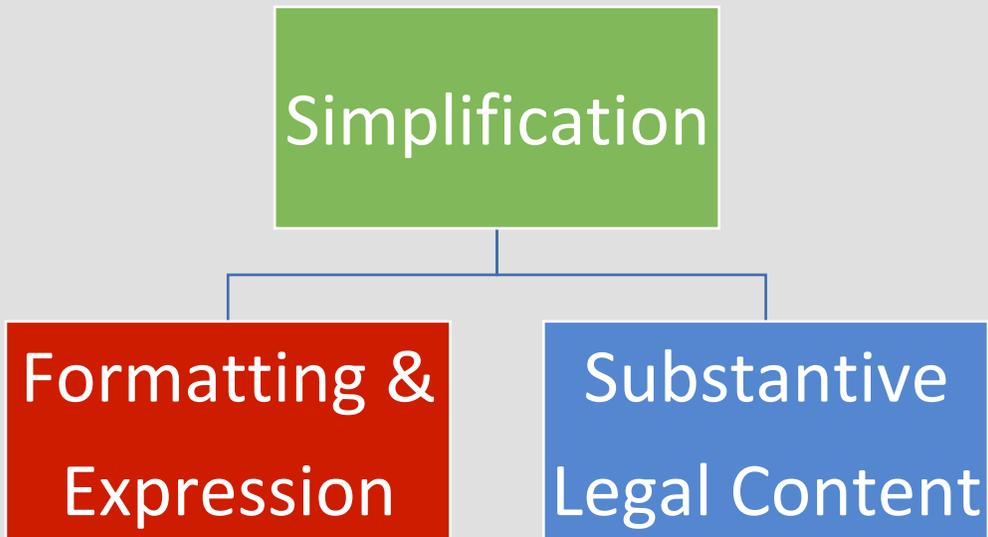
Design Strategy: Simplification



1. For almost any given contract clause, the more abstract the idea, and/or the more it is tied to contract law rules, the harder it is to make the idea vivid or accessible.

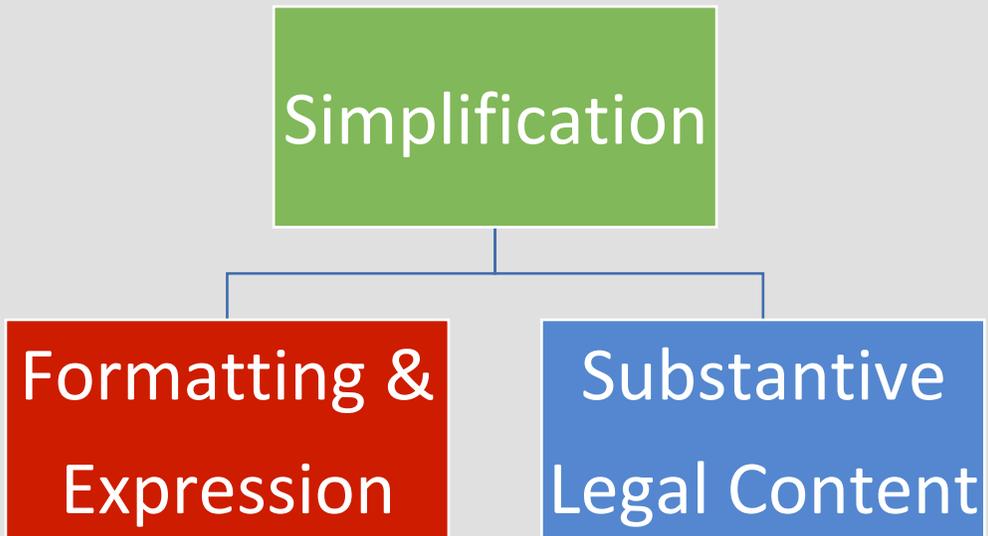
2. Conversely, the simpler the underlying ideas and content of the contract, the easier it is to render those ideas into plain language or images.

Design Strategy: Simplification



- The relationship between substance and form is thus **reciprocal**:
 - **Simplified *formats* make the substance of contracts more comprehensible and useable;**
 - **But so also does simplified *substance* enable better and less expensive formatting—in images, words, or otherwise.**
- This is important for the success of format simplification, because easier techniques should make them less costly, and thus more widely adopted.

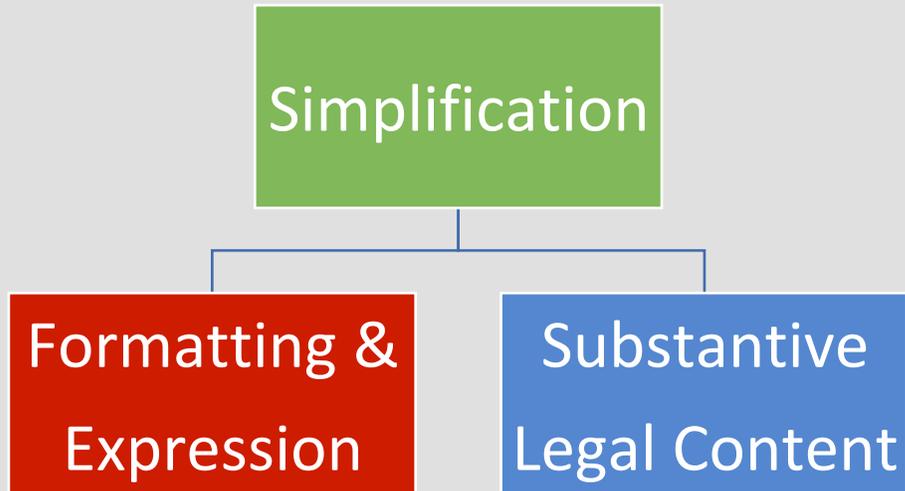
Design Strategy: Simplification



- It also follows that simplifying content as well as language will advance even more strongly the formatting reaching the goals of comprehensibility and functionality.
- AND, simpler contract content may raise ***dramatically*** its scalability by enabling “smart contract,” data analytics, and AI technology.

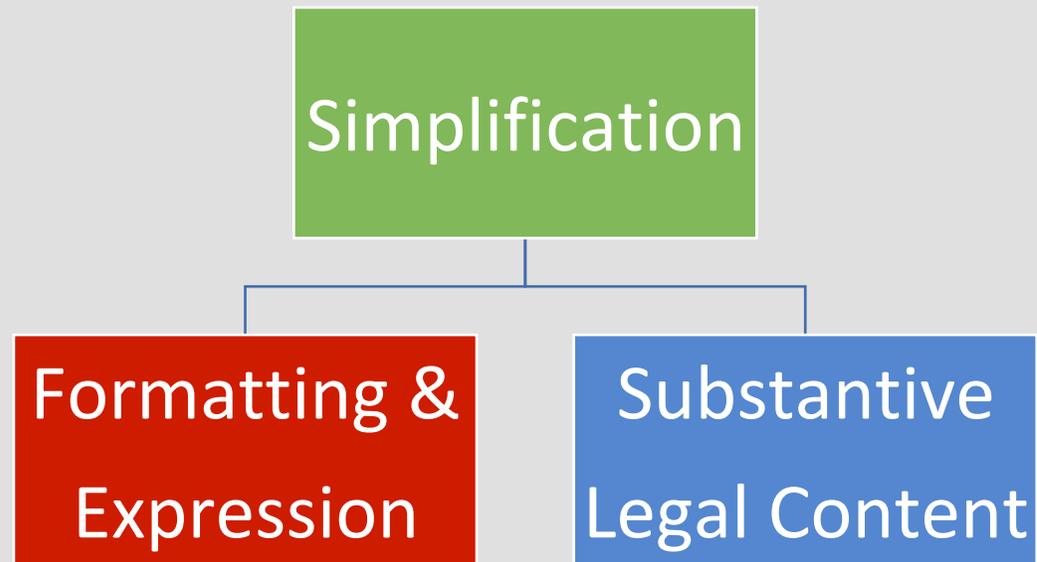
Two Ways to “Simplify”

- The conclusion:



- Perhaps we should engage two distinct reforms simultaneously—**simplification of *format*** and **simplification of *content***—because they potentially build on one another.

Two Ways to “Simplify”



- But how can we make the substantive content of contracts more simple?
- Isn't that beyond our control, a matter of the details of the underlying exchange, and thus non-manipulable?
- Not entirely!

Two Ways to “Simplify”

- **Substantive** contract complexity comes from two sources:

Simplification

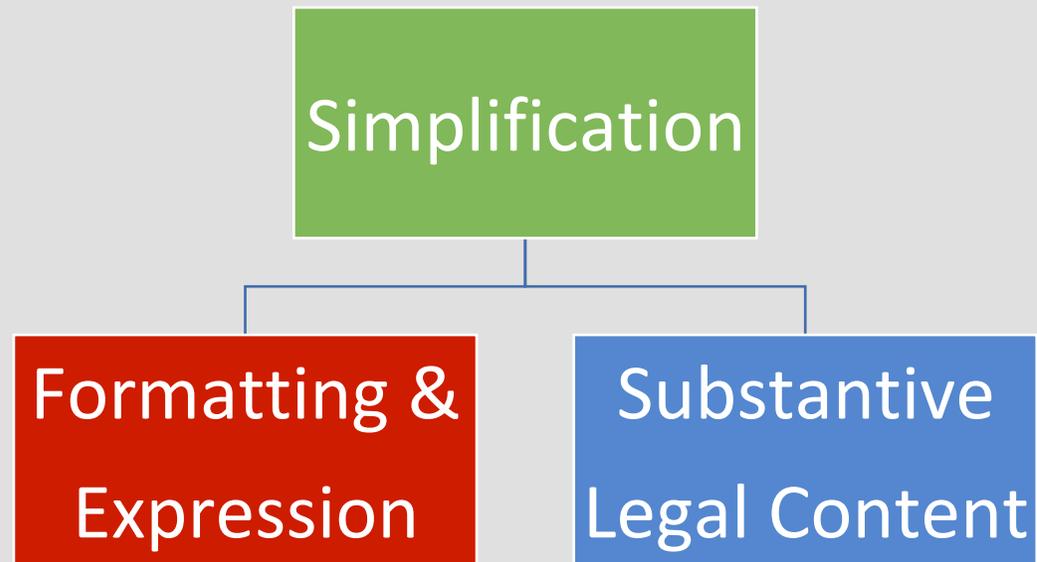
```
graph TD; A[Simplification] --> B[Formatting & Expression]; A --> C[Substantive Legal Content]
```

Formatting &
Expression

Substantive
Legal Content

- the economic and practical details of the underlying exchange;
- **but also the level of LEGAL detail—the level of engagement with contract law rules about modifications, warranties, disclaimers, indemnification, subrogation, force majeure, impracticability, unconscionability, mistake, liquidated damage clauses, etc.**

Two Ways to “Simplify”



- The more engagement with the intricacies of contract law in the agreement, the longer and more complex it becomes.
- That in itself makes visualization more difficult—there is simply more volume of material to “translate” or represent into images.

Two Ways to “Simplify”

- But even beyond the greater volume of detail, those additional clauses are of a *particularly difficult type to visualize*:

Simplification

```
graph TD; A[Simplification] --> B[Formatting & Expression]; A --> C[Substantive Legal Content]
```

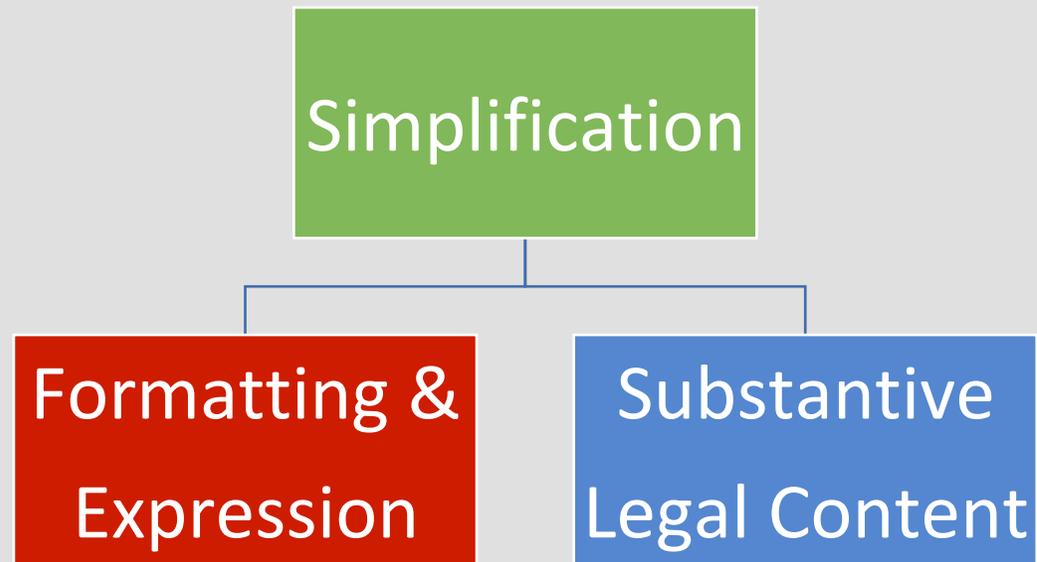
Formatting &
Expression

Substantive
Legal Content

- the abstract, but also closely analytical, provisions of contract law rules may be distinctly difficult to render in visualized formats.*

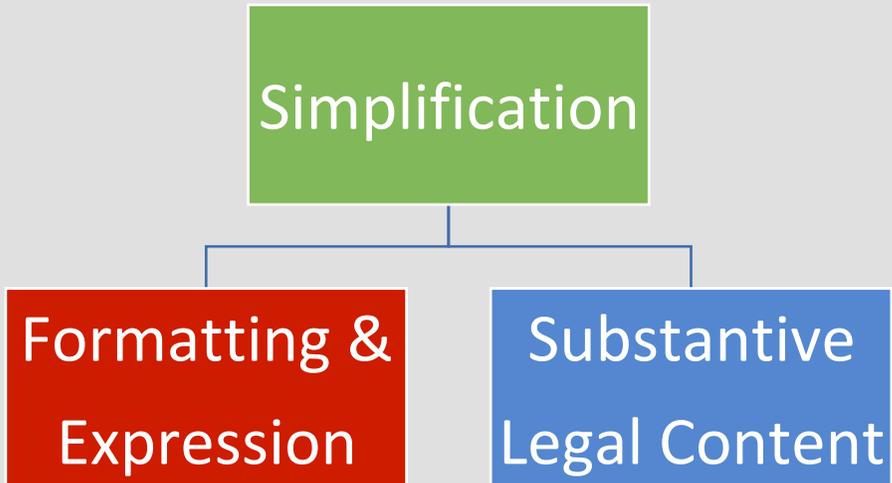
* Although I note Tobias Mahler has made a brilliant effort to create a vocabulary of icons portraying the logic of legal relationships.

Two Ways to “Simplify”



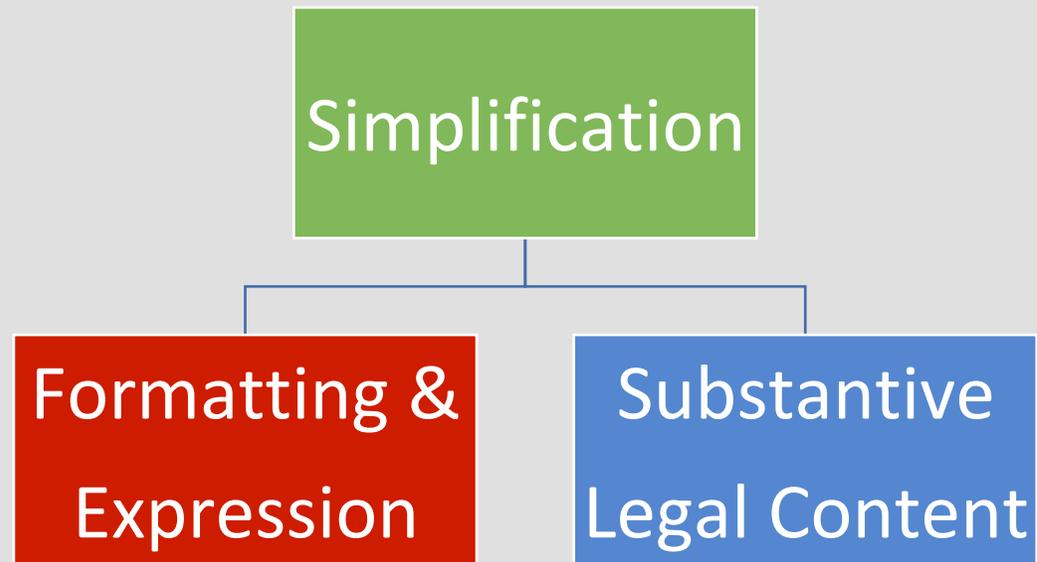
- It seems hard to put Contract Law concepts like “indemnification” or “subrogation” into visual formats; much harder, say, than illustrations surrounding the actual services or goods being exchanged.

Two Ways to “Simplify”



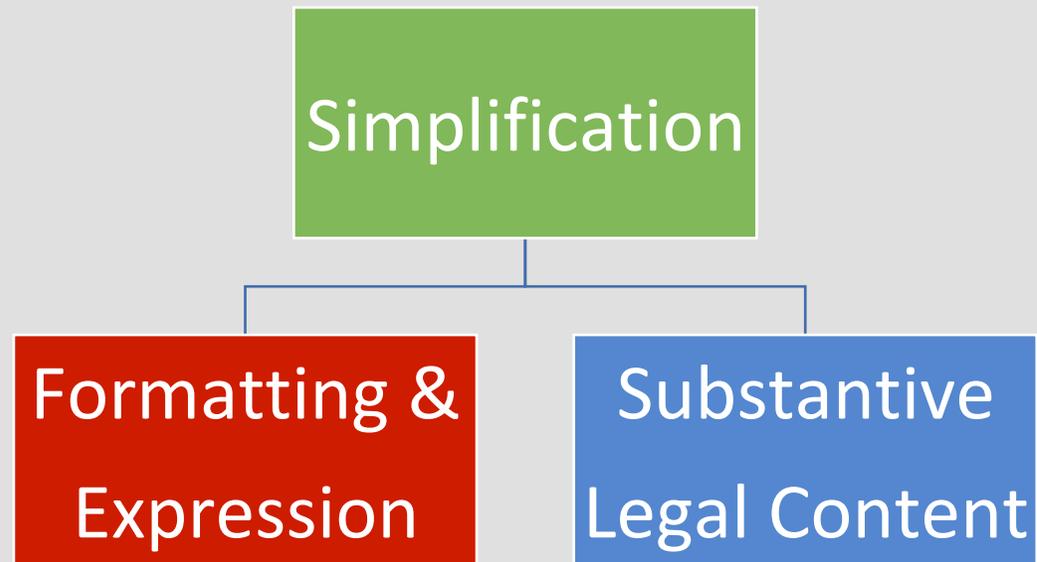
- Recognize, however, that most or all of those listed *legal* clauses about modifications, disclaimers, indemnification, etc. are *not* directly pertinent to the actual exchange between the parties—the business purposes of the Contract.

Two Ways to “Simplify”



- These clauses instead serve one or more *legal* needs. People need to be able to summon the power of the state to ***enforce their contract rights***, or to ***protect themselves from wrongly asserted duties***.

Two Ways to “Simplify”



- They (or the lawyers advising them) feel the need to be able to go to court to prove:
 - that they *elements* of a contract were made, or not;
 - that the *conditions* limiting those promises occurred, or not;
 - Or, under the particular circumstances that unfolded in the transaction, that they should be *excused* from their promises, because of fraud, excusable mistake, unconscionability, or intervening change of circumstances.

Two Ways to “Simplify”

- To give an example of how simplified *content* of an agreement can open the door to more imaginative, more free *formatting*, consider the following example of how an insurance company (AXA) and their flight insurance product called “Fizzy” is forming contracts with consumers to protect against flight delays.

```
graph TD; A[Simplification] --> B[Formatting & Expression]; A --> C[Substantive Legal Content];
```

Simplification

Formatting &
Expression

Substantive
Legal Content

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In watching this short video, notice how Fizzy has simplified the Contract-- its ***formation, terms, and enforcement***— through use of

- strongly visualized communication or formatting;
- “coded” or “parametric” expression of the contracts; and
- highly simplified legal content.

[https://www.youtube.com/watch?v=xJZulZ -CMI#action=share](https://www.youtube.com/watch?v=xJZulZ-CMI#action=share)

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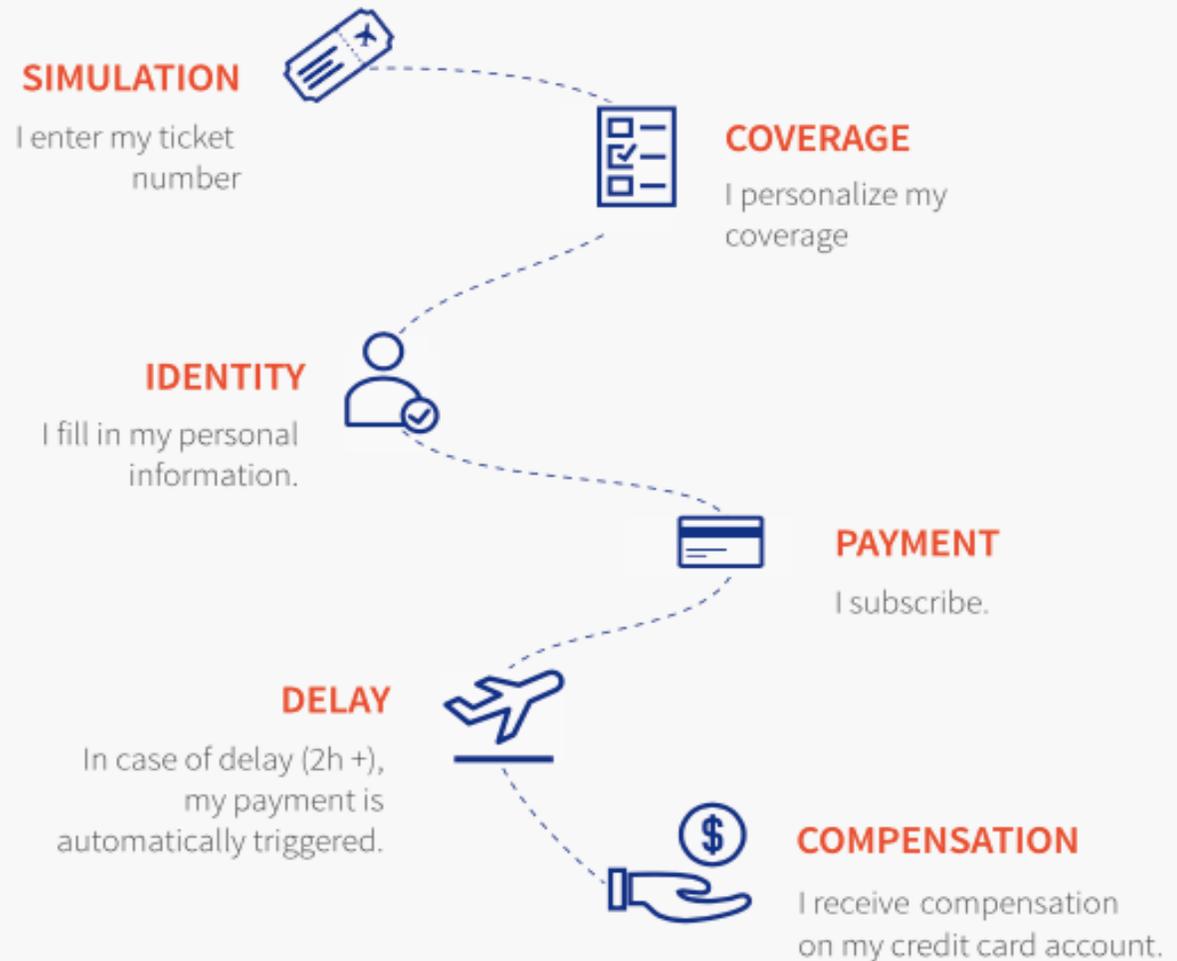
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B. Coding

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How it works

You can subscribe up to 15 days before departure



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- The Fizzy contract illustrates two distinct ways of simplifying the *substance* of contracts, and thus opening itself to animation and friendly user formatting:
 - 1. First, the Fizzy *product* is very simple: insurance is provided against a single risk (i.e. flight delay), in exchange for money.
 - That is all. But we should recognize that many purchases for goods are nearly as simple as this (with some implied warranties, for example, and more difficult delivery terms).

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- 2. Second, the Fizzy *legal* aspects are also very simple, because this is an example of a “**parametric**” contract— i.e., one that is governed by measuring compliance with “parameters” or conditions set up within the contract.

- The legal aspects are easy because the *promise is simple and nearly absolute: IF THE PARAMETERS ARE SATISFIED, THEN THE RETURN PERFORMANCE HAPPENS AUTOMATICALLY, BY A SELF-EXECUTING COMPUTER PROGRAM.*

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- Let’s examine this a bit more closely: Fizzy can create this animated user interface and simple contract formation “wizard,” and also dramatically reduce its costs of paying agents and claims adjusters, because of several features:

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- 1. This flight delay insurance is a very simple product: it protects against one very simply identifiable risk, i.e., delays in flights taking off.
- 2. But also, importantly, the incidence or “triggering event” of a flight delay can be determined ***automatically and reliably*** through aggregating a number of online sources of information about flight-times and departures.

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- 3. The seller (AXA) has much historical data so that the frequency of the trigger event can be measured accurately from a probabilistic standpoint. In other words, the *risks* can be confidently known statistically.

- 4. The payout in of a triggering event occurring is standardized. The *remedy*, in other words, of a “breach” is completely known and limited.

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- 5. Putting together points “3” and “4” means the AXA *can set a price for selling its product such that they can make their promise almost absolute or unqualified*—they can set a price that eliminates most needs to hedge their bets by inserting clauses that will put them in front of a judge.

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- 6. AXA has figured out, in other words, how over the long run regardless of any particular instance that might normally call for a court-based legal adjustment in rights or duties, to:
 - make a **very simple promise** of paying out a certain amount of money;

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- make it subject to only **one simple condition (or “parameter”**, i.e., delay in the plane departing), which is easily and reliably known (though information supplied by multiple third parties);
- And keep its promise with few exceptions or exclusions (thus saving labor; virtually eliminating disputes; and reducing dramatically its need to rely on contract law).

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- 7. By making its promise virtually absolute, AXA enables itself to:
 - communicate with possible customers in a clear, simple, animated way and to create a contract in an utterly new format.
 - The contract is comprised of the AXA promises on its website, and some “FAQ’s” that no doubt would become part of the contract if ever the agreement were challenged legally.

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- ***BUT that is not likely to happen, because AXA has accepted liability*** in the event the triggering event occurs. Both the duty or remedy are clear even if there were a lawsuit.
- From what is visible on the website, AXA is not relying on exclusions, careful limiting definitions, disclaimers, or excuses like “mistake,” “impracticability,” “fraud,” “duress,” etc.
- I was not able to access every aspect of this insurance because it does not operate in the U.S.A., but it *seems* that the parameter is satisfied, AXA pays out the money without any further communication or questions.

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- If my assumptions are correct, **AXA is basically eliminating much of the need to use contract law at all, apart from the basic “offer + acceptance” rule of contract formation.**
- By freeing itself from most contract LAW intricacies, it can dispense with contract format complexity.

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- The lack of the need for contract format complexity ALSO means that this transaction is ***scalable*** in an almost limitless way. The same website process, in other words, can be used for every agreement.
- The results are ***dramatic*** gains in efficiency. The entire process is essentially automated: from the offer and acceptance (formation); to the assessment of a claim based on the occurrence of the triggering condition; to the payout, which occurs through the Ethereum blockchain rather than resort to claim adjustment and possible litigation processes.

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- And yet this contract does not seem oppressive or uncommunicative to the consumer/buyers.
- AXA has put effort into transparency, clarity, and accessibility.
- Ordinary people would seem fully capable of understanding this entire agreement, and the personalized “Wizard” approach seems to ensure that they have genuinely assented—unlike scores of typical “click-through” agreements.

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- The Fizzy contract, if as simple as it appears, illustrates how the goals of comprehensibility, functionality, and scalability may all be facilitated by ***reducing the reliance on legal rules*** in the contract:
 - the more that the parties feel the need to talk about legal rules in their contract—or to advert to those rules as a failsafe against breach, exploitation, or the need to be excused from their promises—the harder and more expensive it will be to simplify the contract.

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- The self-executing assessment of the parameters or conditions on Fizzy’s promise, and its subsequent automatic payout using the Ethereum blockchain, shows the promise that these “smart contract” provisions have for modularizing and standardizing agreements—another important dimension of scalability.

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- James Hazard, a co-author of the chapter on which this talk is based and also founder of CommonAccord.org, has been working to convert a large number of contract provisions into standardized, coded “Prose Objects.”
- These CommonAccord Prose Objects are transparent, open modules that are designed to be rated by users using GitHub, and ultimately iteratively improved by a broad community of users.

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- Common Accord seeks to operationalize the “Ricardian Contract” paradigm which posits the three parts of contracts necessary for full automation and legal enforceability:
 - – parameters, code, and prose.
- Common Accord aims for contract drafters to be able to rely on the soundness and fairness of these standardized clauses, and import them into their contracts, wherever appropriate.

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- Modularizing these clauses will permit contracts to use these easily scalable clauses among a broad range of substantive transactions.
- They *also* should be able to facilitate the development of stronger visualization techniques, because of their standardization and their legal simplification—through lessened reliance on legal rules.

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- But not all contractual exchanges, or even particular aspects of contracts, may be possible to reduce to parameters and code.
- Matters that turn on strongly subjective human assessments, for example, would be challenging. So also would ongoing, dense contracts like franchises that may require almost constant tinkering with specifications.

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- For those contracts, how can one achieve legal simplification or lessened reliance on legal rules?
- One thought is to use a completely set of devices: to emphasize the “relational” qualities of the agreement, as pioneered by Ian MacNeill.

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- Contracts containing incentives and structures conducive to cooperative, voluntary mutual accommodations by the parties—techniques common to “relational contracts” -- will reduce the need to incorporate self-defensive, litigation-spawning and visualization-challenging clauses.

Design Strategy: Combining Visuals, Coding, and Collaboration

Comprehensible

Functional

Scalable

- In closing I will offer a final example of a Contract that combines design features of comprehensibility, greater functionality through simplicity, and scalability through coding and blockchain.
- Furthermore, however, it seeks to harness “personal relationship” qualities of trust—another way of enhancing this dimension of Contracting and restoring stronger balance with the legal and economic exchange dimensions.

Aligning Interests

Comprehensible

Functional

Scalable

- “Lemonade” is a Euro-based homeowners and renters insurance company that advances the “Fizzy” format and methods by additional steps.
- I am indebted to Rob Waller and Helena Haapio for bringing this company and their website to my attention.

Aligning Interests

Comprehensible

Functional

Scalable

- In addition to relying on a “Wizard” system of online Contract formation and an Ethereum blockchain system of pay-outs, Lemonade also seeks to harness the idea of mutual trust in contracting, to reduce transaction costs.

Aligning Interests

Comprehensible

Functional

Scalable

- Lemonade advances mutual trust between contracting partners by transparently acknowledging the inherent conflict of interests between an insurance company and the insured person regarding pay-out of claims.

Aligning Interests

Comprehensible

Functional

Scalable

- It then seeks to align those interests by taking only a flat fee for providing an insurance service and letting insured persons donate any surplus after annual pay-outs to the charity of their choice.
- Any incentive of the insured person to overstate (or even falsify) claims is reduced, since every pay-out of claim money means less money is available at the end of the year to support the insured's charity.

Aligning Interests

Comprehensible

Functional

Scalable

- Further, any incentive of the insurance company to cheat the insured person by denying valid claims is eliminated since the insurance company collects only a flat fee from each insured person.
- Its revenues do not change, regardless of claims payouts. So Lemonade has little need to pay for exhaustive, expensive investigations of claims.

Aligning Interests

Comprehensible

Functional

Scalable

- Lemonade has simplified its Contracts, methods, and transaction costs. By making their promises and revenue stream simpler, they induce trust and attract customers.
- By re-structuring its business model to, in a sense, collaborate better with the contracting partners, Lemonade is bolstering traditional contract enforcement methods by appealing to human impulses of trust and charity.

Aligning Interests

Comprehensible

Functional

Scalable

- Will their combined strategies of strong visualization, coding, blockchain, and collaboration be a model for business in the Information Age? It certainly seems a possibility.
- See <https://www.lemonade.com/>
- <https://www.lemonade.com/blog/social-impact-meets-insurance/>
- <https://www.lemonade.com/faq#service>
- <https://www.lemonade.com/faq#policy>