

Contract Design and Simplification – is this now a must-do?

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Introduction

“Design adds value faster than it adds costs.”

Joel Spolsky, web programmer, writer, and creator of Trello

Is the pendulum shifting? In a fast, technology-driven world, business stakeholders are keen to move away from dense walls of text in contracts. Increasingly, they understand that contracts are a valuable tool for communication and doing business. They are literally the lifeblood of industry and wider society!

So why has it taken so long to rethink contracts when the world around us has changed at pace? Is there still a problem? The answer is a resounding “Yes”! An analysis of more than 7,000 signed contracts undertaken by World Commerce & Contracting published in the 2018 Most Negotiated Terms report showed that 56% were based on the wrong template as a starting point. 88% of business users revealed that they find contracts “difficult or impossible to understand.”

So much has changed over the last twenty years. Technology has advanced beyond recognition, with robotics and artificial intelligence being used in a way that was completely unimaginable two decades ago. The universe is using the Cloud despite the first public cloud only being launched by Amazon in 2006. Yet, until recently, contracts, a vital business resource, remained largely static. They were drafted by lawyers for lawyers. The year is 2021, and so much about how business is conducted globally has moved on. Business is keen to create greater efficiencies in the end-to-end contracting process. Post pandemic, there is a focus on increased digitization. Are contracts finally reaching their hour of reckoning?

So, what is contract design?

Among academics¹, contract design is a synonym for planning contracts, safeguard mechanisms or individual terms. Many practitioners instead still think of contract design as simply making terms and conditions look pretty. That is a factor but, it is much, much more. Real contract design begins at inception and is a process as much as it is an outcome.

¹ Robert E Scott and George G Triantis, ‘Incomplete Contracts and the Theory of Contract Design’ (2005) 56 Case Western Reserve Law Review 187; Robert E Scott and George G Triantis, ‘Anticipating Litigation in Contract Design’ (2006) 115 Yale Law Journal 814; Albert Choi and George Triantis, ‘Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions’ (2010) 119 Yale Law Journal 848; Victor Goldberg, Framing Contract Law: An Economic Perspective (Harvard University Press 2012)

It looks at satisfying business goals, it balances risk and reward, and ultimately makes contracts easier and clearer for users (not just for the courts in case of a dispute).

This article will examine the benefits of user-centered contracts. We will demonstrate how they can be powerful instruments for creating and maintaining collaborative business relationships while still protecting vital interests. We will show how well-designed contracts increase stakeholder understanding and engagement, reduce friction, increase deal velocity, enhance brand, and reduce contract value leakage.

In addition to our general research-led observations, we will conduct a deeper dive into three specific case studies. The purpose of using these case studies is to afford the reader the opportunity to take a close look at some end-to-end design projects. The approach and techniques used are transferable and can be applied across multiple projects.

Through the case studies, we will bring to life the important steps to take along the way. We hope to allow you, the reader, a glimpse from the inside. This should enable you to understand and “experience” the benefits of better contract design and perhaps spur you to embark on your own initiative.

We will conclude with a “call to action.” The road to simplification and better contract design is still untraveled by many. The case for starting now is compelling.

The Case Studies

Case 1: EcoVadis and the “Great Green Contract”

The challenge

EcoVadis is a sustainability ratings platform operating globally and providing major corporations with leading-edge ESG capability. In recent years it has focused on expanding its US market share.

Despite having its own standard template, US customers typically insisted on using their terms and conditions when signing up for the EcoVadis services. This process resulted in lengthy negotiations (fitting a round peg into a square hole), adding time and cost to sales cycles.

So, what were the characteristics of the EcoVadis template, and why were customers not prepared to use it? Well, for a start, it consisted of three narrow columns of legalese that even the EcoVadis sales teams did not understand!

The sticking points in negotiations were always the same – key issues such as confidentiality, personal data protection, limitation of liability, and indemnification – and invariably, both sides had to engage legal counsel to work through the terms.

Extended sales cycles had a cascade of negative effects:

- Losing business traction
- Missing project start dates
- Inaccurate forecasting
- Decreased opportunity for upselling
- Demotivated salespeople
- Buyer fatigue
- Starting new business relationships in an adversarial manner
- Opening doors for the competition

The solution

EcoVadis was familiar with WorldCC's contract design work. Their Head of Sales wanted to re-design their sales template and create a user-friendly structure, something to help engage his customers. His ask was that the terms become a part of the buying process at the beginning and not just a necessary evil at the end.

WorldCC's design and analytics team worked together with EcoVadis' Heads of Legal and Sales to develop a new fit-for-purpose, concise, appealing set of terms that all stakeholders could understand and engage with.

An important part of the transformation journey was to benchmark the existing EcoVadis terms using analytics technology against a wide range of other software as a service (SaaS) agreements. Using the benchmarked data to update the terms to make them "fairer" and more customer-friendly, jargon and redundancy were then eliminated. The contract was also modularized into three parts: business terms upfront (order form), the general terms, and lastly, the technical details put into schedules. Redesigning the layout, making it more organized, visual, and easy to read, added the necessary finishing touches.

Very quickly, EcoVadis began to see a shift in customer engagement with its terms. The sales team also used them to simplify their pitch and value proposition but more on that later!

The business case

The initial business case was very straightforward – EcoVadis wanted to reduce friction in the sales process. As discussed, negotiations had historically taken far too long, constraining the growth trajectory of the business. They also led to strained relationships with customers before the actual delivery of services began. The Head of Sales' initial target was to increase the use of the EcoVadis template with customers by just 10%. Many of the WorldCC members who had already started their simplification journeys had concrete evidence of how win rates increased, and cycle times decreased when using simplified terms.

It was EcoVadis' plan to pilot the redesigned terms in the US, the toughest market for them. If the "New Green Contract" (so-called internally because of its colorful aspect) would successfully solve their issues there, it could be confidently rolled out globally.

The impact

The hypotheses proved correct, and the result far exceeded initial expectations. In the US, sales increased by 39% and the duration of sales cycles reduced by 50% on average. These positive results continue for the company and are captured and monitored through Salesforce.

Although surely all the positive numbers could not be attributed solely to the redesigned terms, feedback from customers and other metrics provided EcoVadis with evidence that they played a significant part. Almost immediately, there were palpable financial benefits from using the reworked terms:

- Reduced processing and negotiation times saw savings of between \$6k and \$10k per contract;
- Sales cycles became much faster, estimated at contributing as much as \$2-3m annually to the bottom line;
- External legal fees reduced by 60%;
- The number of deals closed using EcoVadis' paper increased by approximately 50%; and
- The sales teams engaged significantly more with the terms before calling in the lawyers!

Such was the success of the “Green New Contract” in the US, it is now being rolled out in EMEA and APAC. Local sales teams have embraced the terms enthusiastically, and the organization has observed the same positive results wherever the contract is being used.

In the words of the EcoVadis’ CEO, Pierre Francois Thaler, “this has been, without a doubt, the highest ROI of any investment we previously made in contracting.”

Case 2: GDS’ user-centered approach to improving public procurement worldwide

Contracts can be very a very powerful tool to effect change. This is particularly true where governments are involved in the contracting process. The UK’s Government Digital Service (GDS) is a leader in technology procurement processes, and during 2020 it developed the *Global Digital Marketplace Programme* (GDMP) with a view to working with governments in developing economies to improve their procurement practices. One of the goals for this programme was to add greater uniformity of process across jurisdictions with the knock-on effect of increasing transparency and reducing corruption. The geographical focus for the project was Latin America, South Africa, and SE Asia.

The challenge

Governments globally spend an estimated \$13 trillion annually on the procurement of products and services. Through their use of these products and services, they can improve the lives of their citizens. To ensure that monies are spent wisely and in the best interests of citizens, it is important that procedures are easy to understand and transparent. This includes using documentation and templates that are clear, concise, and understood by all.

However, governments the world over have a reputation for bureaucracy. Their contracts and tender documents tend to be:

- VERY long, full of legalese and commercial jargon;
- presented in ways that are not accessible or inclusive; and
- focused more on relationship breakdown than building collaborative partnerships.

This approach can make it difficult to attract diverse pools of suppliers, particularly small and medium-sized enterprises (SMEs). Having a wide range of suppliers to call upon helps to encourage more competitive tenders, greater transparency, and consequently better value for citizens.

GDS, through the GDMP, is committed to helping governments in developing countries tackle corruption. The global cost of corruption is estimated at more than US\$2.6 trillion every year.

The adoption of simplified, user-centered processes and contracts is an important step towards greater transparency. WorldCC advocates for better contracts, better business, better society. The partnership with WorldCC in helping the GDMP to achieve its strategic goals was a logical next step.

Project 1 – Simplifying tender documents in Indonesia

The problem

GDS’ goal for this project was to help the Indonesian Government’s National Public Procurement Agency, LKPP, to simplify its *Standar Dokumen Pengadaan* (SDP – Standard Bidding Document), the template used for all procurement using government funds.

The SDP had been issued in 2018 and comprised of one hundred and eleven pages in its template form. This could increase to 500 pages when all procurement-related elements were included. Feedback from LKPP’s suppliers was the length and complexity of the documentation presented a real barrier to participation in Indonesia’s public procurement processes, particularly for SMEs. GDS was encouraging LKPP towards greater simplification.

The approach

Together GDS and WorldCC wanted LKPP to take a proactive, co-design approach to this project and to challenge traditional practices and conventions for drafting contracts. The overarching principles agreed in advance were to create documentation and contracts that are:

- drafted with all key stakeholders in mind, i.e., they needed to be easily understood by suppliers and procurement practitioners;
- focused on the desired outcomes, taking into account the needs of both counterparties;
- focused on minimizing problems, disputes, losses, claims;
- developed by lawyers as designers, facilitators, strategists, working in cross-functional multidisciplinary teams; and
- management tools and ‘blueprints for collaboration.’

The team opted to start the project with a design sprint, a series of time-constrained, collaborative, hands-on workshops to cover all the key steps in the design process (discovery, user journey mapping, problem framing, ideation, prototyping, and testing). The design sprint format represents one full “quick and dirty” iteration of the design process and is crucial to generating a collaborative knowledge exchange between participants.

This knowledge exchange was an essential component for success: on the one hand, the procurement experts were not familiar with the basics of human-centered design and contract design and had to become familiar with the mindset and tools; on the other hand, GDS and the WorldCC designers needed to conduct a deep dive into the specific context (public procurement processes, Indonesian culture, stakeholders, users) in order to be equipped to propose meaningful solutions.

The original plan was to conduct the design sprint through face-to-face meetings, but COVID-19 forced a rethink. It was decided to proceed to do the workshops virtually. This presented several challenges (sustaining participants’ engagement; ensuring a safe and productive space for experimentation, creativity, and collaboration; the immediacy of working together around a whiteboard or a large canvas). While many digital tools are now available for remote collaborative work, it was important to strike a balance between powerful features and ease of use, as most of the tools were new to participants. One powerful example of keeping things simple was that the team ended up using paper and pen to sketch design ideas and shared them as pictures via WhatsApp.

During two weeks in August 2020, the GDS/WorldCC team delivered six virtual workshops to a group of procurement experts from LKPP and West Java Province. These workshops were used to understand requirements, map user journeys, explore contract design patterns, create a prototype, and test it with users to gather feedback.

The team also engaged four of LKPP’s suppliers, who participated in user journey mapping exercises and shared the areas of pain and frustration that they had experienced first-hand when engaging in the LKPP procurement processes. Examples of these pain points were: lack of clarity around technical and qualification requirements; lack of clarity in the documentation structure; and understanding the process guidance.

During the workshops, LKPP civil servants worked in smaller teams to create three initial testable prototypes. These prototypes incorporated the following:

- A new, simpler introduction section to help bidders understand the process, the basic prerequisites, and rules, and how to navigate the SDP documentation;
- Clearer descriptions of the procurement opportunity and of the evaluation/qualification criteria; and
Content editing to remove all redundancy and exhibits that could be made available online (e.g., draft of general terms, examples of forms to be submitted, etc.)

The suppliers were interviewed again at the end of the sprint and helped to validate the initial prototypes. User research is a powerful tool when embarking on any redesign exercise and is strongly recommended.

Following the sprint, the WorldCC designers refined and improved the prototypes producing a significantly reduced set of documentation that was further tested with suppliers and procurement practitioners.

The collective feedback was that the redesigned documentation was well structured, clear, and easy to use. Suppliers liked that they got all the relevant information upfront, and irrelevant references and exhibits were eliminated. At the same time, procurement officials appreciated that they could easily identify what sections they needed to complete and found that clearer drafting notes and selectable options were helpful.

Most importantly, the project resulted in a mindset shift at LKPP. Conducting interviews and hearing suppliers' feedback first-hand was a completely new approach for many participants. The team was inspired by this collaborative and iterative approach and determined to use this simpler, more transparent approach to developing new simpler processes and documents.

Project 2 – Creating a simple global framework agreement for IT procurement

The challenge

Several countries participating in the *Global Digital Marketplace Programme* do not have any experience of developing government frameworks, and most of their procurement is carried out through one-off contracts. GDS was looking for a best-of-breed framework for the procurement of technology products and services to modernize and simplify government procurement globally. It was a requirement from GDS that the end-result was user-friendly and easy to navigate.

A framework structure allows suitable applicants to pre-qualify as government suppliers by joining the framework so that buyers can purchase services more easily from pre-vetted vendors. The streamlined process for suppliers to join a framework encourages participation from SMEs, greater transparency, and helps to build in end-to-end efficiencies. As the qualification criteria for suppliers is evaluated centrally (for instance, on crucial requirements such as financial security, reputation, data security, and privacy), there is consequently less room for local buyers to exercise discretion, reducing the risk of corrupt practices. These collective features make frameworks highly appealing to the GDMF participant countries, who look to the UK as a best practice jurisdiction.

Historically, the UK, through the work of GDS and the Crown Commercial Service, has developed considerable experience in building and deploying successful framework programs for the purchase of IT services and technology. For instance, its G-Cloud framework, through which public bodies can buy around 31,000 cloud services (hosting, software, support), is now in its 12th edition. G-Cloud has been incredibly successful in its goal to include SMEs and stimulate competition: by the end of 2018, 45% of total sales by value (71% by volume) had been awarded to SMEs.

The approach

GDS and WorldCC, supported by RadiantLaw, set about developing a “Global Framework” template, using some best practices already in use in the UK, but with a focus on further simplifying documentation and the overall structure.

The aim was to create a highly modularized suite of documents that could easily be adapted by a GDMP partner organization in any jurisdiction to create its own framework with minimum localization effort.

The Global Framework was conceived as a toolkit comprising the following parts:

- Documents to create a framework agreement between suppliers and a central government procurement agency, setting out all the governance mechanisms and requirements to maintain a pre-vetted supplier status;
- Documents to create call-off agreements between pre-vetted suppliers and local public buyers, setting out the specifics of each transaction. For this purpose, a set of general terms were developed that apply across the board to all transactions, and six different sets of special terms to be used interchangeably for the specifics of each transaction (i.e., terms to cover the procurement of cloud services, software development, off the shelf software, hardware, maintenance and support, and professional services); and
- A playbook that provides guidance on different options for using the framework architecture, alternative clauses, localization of documentation, and keeping the documents clear and user-friendly.

The work carried out on the language and the structure of the documents was aimed at keeping them linear and intuitive (despite the complex subject matter), ensuring a reading grade of 12, which means the text is understandable by a high schooler in their senior year (the measure used to calculate reading grade is the well-known Flesch Kincaid Readability Grade). This is impressive if you consider that most online *consumer contracts* score on average a grade of 14 or higher. Business-to-Business (and government) contracts are typically more complex and score even higher still.

There was also a focus on creating a readable and easily skimmable layout, with generous white margins, prominent section dividers, highlighted guidance notes, and a readable font size. Simple and accurate headings and sub-headings were used to chunk down and “label” the content, as well as hyperlinks in cross-references, so that users could more easily navigate and search the documents.

Finally, explanatory diagrams were added to the contractual documents and the playbook, aiding the explanation of the trickier concepts. These diagrams have been made easily translatable and updateable by choosing suitable file formats for the master files and embedding them in editable formats within the textual documents.

Through iterative feedback from a broad range of “users” including procurement experts, lawyers, civil servants, and suppliers, the design team was able to update and improve the documents on the go.

The project is now in its next phase, that of a limited pilot. Firstly, GDS will test the Global Framework “in action” supporting selected local public bodies in Mexico and Cyprus to develop their framework agreements based on the Global Framework toolkit. It has also published the Global Framework as part of the resources of its Digital Buying Guide, a tool collating modern approaches to public procurement that are fair, open, transparent, effective, multidisciplinary, and focused on meeting users’ needs.

Conclusion

This article has taken us on a journey through contract design and simplification. We started with the value proposition: making contracts easier for all stakeholders to navigate, understand and engage with makes for better, more transparent, and collaborative business relationships.

The case studies have built upon this proposition, articulating the many benefits of taking a design-led approach to contracts. These benefits are more than merely financial, although the experience of EcoVadis is a powerful example of how great contracts can contribute to an organization's bottom line.

The rewards of good contract design, however, go deeper and longer. We saw how the UK Government Digital Service uses design-led simplification to encourage the use of best practices in developing economies. Where processes and contracts are simple and transparent, there is less scope to hide corrupt practices and greater scope to build in efficiencies.

For too long, contracts have been the domain of lawyers with little real engagement from business. They have been negotiated with the purpose of shutting them in drawers, only to be taken out if there is a problem. But the revolution has slowly begun. The time for real change is upon us. The age of technology has helped to breathe new life into our contracts. There are many tools available that engage with the content to effect better outcomes. The use of simplified, user-centered contracts is growing for a reason. It makes sense. It makes for better business and trading relationships. Join World Commerce & Contracting's call to action: to change the world for the better, one contract at a time!

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Before World Commerce & Contracting, Paula headed up the European Cloud and Solutions legal team at IBM. Prior to joining IBM, she worked for leading New York law firm Weil Gotshal and ex Silicon Valley-based start-up Micromuse.

Paula is also a member of the Board of Trustees of the Quintin Hogg Trust, a charity dedicated to the advancement of education. She has been working tirelessly for greater equality and has successfully lobbied the UK government to agree changes in the law to help vulnerable children access education.

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Stefania is an all-rounder, backing her design expertise with a solid academic background. She is currently an Assistant Professor at the University of Vaasa, Department of Business Law, and has earned her doctoral degree from Aalto University School of Science. She has guest lectured at prestigious institutions such as Stanford University, Bucerius Center on

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She is a co-founder of the Legal Design Alliance, a co-author of the Legal Design Manifesto, and the creator of Legal Design Jam. In 2020, she has received the European Women of Legal Tech Award.

Passera Design is a small studio specialized in contract design and legal information design. Founded by legal design pioneer Stefania Passera, we apply user-centered information design to create clear, visual, usable contracts and other legal documents that work better for people and businesses. Located in Finland, we have been working with organizations of all types, verticals, and sizes all around the world.

World Commerce & Contracting (previously IACCM). Established in 1999, is a not for profit association that supports private and public sector organizations and professionals in achieving world-class standards in their procurement, contracting and relationship management process and skills, through training, research, benchmarking and analytics services, and contract design and simplification.

WorldCC is a recognized global leader for driving innovation in trading relationships and thought leadership in commercial competencies and commercial models. Today WorldCC represents over 70,000 members within more than 18,000 cross-industry organizations across 183 countries. Since its inception, WorldCC has led the way in responding to the challenges of global networked markets and has therefore been of particular relevance to organizations with a need to operate multi-nationally. This explains why leading global corporations are among the most active members.

WorldCC is unique in its coverage of both buy-side and sell-side perspectives. We work with our members on ground-breaking research and analytics, contract design and simplification, developing new frameworks and best-in-class methodologies, in addition to providing extensive training and continuing professional development programs.

As a non-profit, we are also highly selective in where we apply our resources, being driven especially by projects that contribute to the wider good of society.