

DYSFUNCTION IN CONTRACT DRAFTING: THE CAUSES AND A CURE

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Reviewing Mitu Gulati & Robert E. Scott,
*The Three and a Half Minute Transaction:
Boilerplate and the Limits of Contract Design* (2013)

The primary task in empirical research is describing the characteristics of whatever it is you're researching, but usually you also attempt to explain your findings. The skills required for the former task differ from those required for the latter, so it's not unusual that explanations offered by those who undertake research are superseded by better explanations subsequently offered by others.

That comes to mind on reading *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design*,¹ by Mitu Gulati, a professor at Duke Law School, and Robert E. Scott, a professor at Columbia Law School. It offers a case study of dysfunction in contract drafting, and then it suggests the causes of that dysfunction and how to eliminate it. This article points out the shortcomings in that causes-and-cure analysis and offers its own.

THE PARI PASSU CLAUSE

Here, in brief, is the story that *The Three and a Half Minute Transaction* tells:²

A provision known as the *pari passu* clause was introduced over a hundred years ago into contracts providing for issuance of sovereign debt securities, which offer a way for sovereign states to borrow money. (The phrase *pari passu* is Latin, meaning "equally, at the same time.")³ Subsequently, the *pari passu* clause became a standard component of such contracts. But there's no contemporaneous evidence to show what purpose the clause was initially intended to serve. When asked about the function of the *pari passu* clause, lawyers interviewed by Gulati and Scott offered, at best, various unsubstantiated explanations.

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¹ MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (2013).

² *See id.* at 13-17.

³ BRYAN A. GARNER, *GARNER'S DICTIONARY OF LEGAL USAGE* 654 (3d ed. 2011).

In 2000, relying on a novel interpretation of the *pari passu* clause, a judge in the *Elliott Associates* litigation issued a ruling that roiled the sovereign-debt world. Nevertheless, in a large majority of sovereign-debt deals entered into after the ruling, no attempt was made to revise the *pari passu* clause to preclude that novel interpretation. The lawyers interviewed by Gulati and Scott offered unconvincing explanations for that inaction.

What explains lawyer reluctance to address the problem posed by the *pari passu* clause? Gulati and Scott summarize their conclusions as follows:

Many complementary factors point in a single direction: the lack of investment in R&D, herd behavior and the culture of not giving (or taking) credit for innovations or background research if not immediately billable to a client, the separation between litigation and transactional practice, and the residual embarrassment of having to explain contract revisions in new contracts to clients who are bound by the older, risky language all impel lawyers to resist revising standardized language.⁴

Gulati and Scott also suggest changes that law firms could make that would allow them to perform transactional work more effectively. Specifically, they recommend that litigators become more involved in transactional work, and that law firms devise new forms of governance to overcome obstacles to innovation.⁵

BROADER CONTEXT

Gulati and Scott have provided a detailed case study of dysfunctional contract drafting. But when it comes to considering the causes of that dysfunction and suggesting how similar dysfunction could be averted, anyone can join in the discussion.

This article offers a different take on those topics, but from a broader perspective. A single provision in a specific kind of contract is a slim basis for drawing conclusions regarding transactional drafting as a whole. Indeed, Gulati and Scott acknowledge that the “sheer number of complicating factors that distinguish the sovereign debt case study from other areas of transactional practice suggests caution in offering lessons for the future.”⁶ So in addressing the

⁴ *Id.* at 151.

⁵ *Id.* at 164.

⁶ *Id.* at 163.

causes of contract-language dysfunction and how to remedy it, this article considers that dysfunction more generally.

For one thing, there's no need to limit the discussion to "boilerplate," the term Gulati and Scott use to describe the *pari passu* clause.⁷

The word "boilerplate" is increasingly used to refer to provisions that address interpretation of the contract and other general matters typically relevant to contracts,⁸ but Gulati and Scott use it instead to mean "standardized" provisions.⁹ But "standardized" shouldn't be understood to refer to contract language that is used verbatim throughout the transactional world. That's not how Gulati and Scott use the term, given that they state that a variety of wording has been used in the *pari passu* clause.¹⁰

Instead, by "standardized" provisions, Gulati and Scott seem to be referring to provisions that are a standard component of contracts, although the exact wording can vary from contract to contract. That definition encompasses the vast majority of contract language—in most contracts, there is little that is bespoke. So instead of "boilerplate," it would be clearer to refer to "standard contract provisions."

But a more fundamental reason for not limiting the inquiry to Gulati and Scott's notion of "boilerplate" is that it makes sense to consider not just entire provisions, but also smaller building blocks of contract language.

One standard contract provision that is as lacking in utility as the *pari passu* clause is the "successors and assigns" provision.¹¹ And there are doubtless others. But the dysfunction exhibited by such provisions—their failure to contribute clear and useful meaning to a contract—also infects smaller building blocks of contract language.

⁷ *Id.* at 2.

⁸ See NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 5 (Tina L. Stark ed. 2003) ("Traditionally, lawyers use the term 'boilerplate' to refer to any standardized, 'one size fits all' provision. This text takes a more focused view and limits the term's reach to those provisions that generally appear towards the end of a contract.").

⁹ GULATI & SCOTT, *supra* note 1, at 10.

¹⁰ *Id.* at 79 (noting that "significant variation in the language appears across sovereigns").

¹¹ See Kenneth A. Adams, *It's Time to Get Rid of the "Successors and Assigns" Provision*, ADVOCATE, June/July 2013, at 30 (suggesting that the provision "performs no useful function; you should delete it from your contracts").

Consider just three of countless examples:

- Widespread acceptance by drafters of the notion that the phrase *best efforts* imposes a more onerous standard than does the phrase *reasonable efforts*—an unworkable notion that U.S. courts have rejected.¹²
- Confusion, and thus potential for dispute, created by the phrase *indemnify and hold harmless*, which is a standard feature of traditional contract language.¹³
- Confusion caused by the failure of drafters to distinguish clearly between obligations and conditions.¹⁴

Such smaller building blocks are used in all contract language, whether standard or bespoke, so nothing is gained by restricting analysis of contract-language dysfunction to Gulati and Scott’s notion of “boilerplate.”

There’s a wealth of caselaw that illustrates the dangers of mishandling the building blocks of contract language. Most such cases don’t create as much of a stir as did the *Elliott Associates* litigation, but they demonstrate the risks of dysfunctional contract language just as effectively.

Gulati and Scott suggest that the confusion created by the *pari passu* clause might be unique: “[L]awyers working in areas such as mergers and acquisitions, tax, and private equity have suggested that our findings are idiosyncratic, that their clients demand contract provisions that are carefully negotiated and that every term is well understood by both client and lawyer.”¹⁵ But that becomes untenable once you consider the *pari passu* clause in a broader context. Instead of being a notorious but potentially anomalous example of problematic contract language, the *pari passu* clause is simply one instance of dysfunction amid endemic dysfunction. Any contract drafted by a law firm, no matter how exalted, is overwhelmingly likely to be permeated with archaisms, redundancy, chaotic verb structures, misconceptions, and other shortcomings of traditional contract language.¹⁶

¹² See KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING ¶¶ 8.21–40 (3d ed. 2013).

¹³ See *id.* at ¶¶ 13.323–28.

¹⁴ See *id.* at ¶¶ 3.263–69.

¹⁵ GULATI & SCOTT, *supra* note 1, at 160–61.

¹⁶ See, e.g., Kenneth A. Adams, *Shortcomings in the Drafting of the Google–Motorola Merger Agreement*, ADAMS ON CONTRACT DRAFTING (Aug. 22, 2011),

GULATI AND SCOTT'S EXPLANATION

Let's revisit the factors that Gulati and Scott see as being responsible for contract-drafting dysfunction:

- Law firms don't invest in innovation.
- Lawyers in law firms have an incentive to stick with the herd, so as to avoid the risk of standing out because of a bad decision.
- Elite lawyers are inclined to refuse to take credit for innovations.
- Litigation practice groups rarely get involved in transactional work.
- Lawyers are reluctant to have to explain contract revisions to clients still bound by the original language.¹⁷

Gulati and Scott also suggest a sixth factor—commoditization of contract drafting through use of information technology, to speed drafting for transactions in which only a few key terms are adjusted. They found that concept sufficiently significant that they made use of it in the title of their book. Gulati and Scott explain:

“Three and a half minutes” is one explanation that was candidly offered to us by a lawyer who sought to explain the trade-off between the time it took to “draft a new contract” and the effort costs of redesigning boilerplate that was widely used and had been part of the standard-form contract for many years. But “three and a half minutes” is also a metaphor for a business model that relies on herd behavior, fails to produce incentives for innovation and thus rises and falls on volume-based, cookie-cutter transactions.¹⁸

They also note that “the trend toward commoditization of standard-form contracting and the ideals of rational contract design that are at the core of the transactional lawyer's self-image appear to be in tension with each other.”¹⁹

<http://www.adamsdrafting.com/shortcomings-in-the-drafting-of-the-google-motorola-merger-agreement/>; Kenneth A. Adams, *Dubious Contract Drafting: An Extract from a Model Confidentiality Agreement*, ADAMS ON CONTRACT DRAFTING (May 5, 2011), <http://www.adamsdrafting.com/an-extract-from-a-model-confidentiality-agreement>.

¹⁷ See GULATI & SCOTT, *supra* note 1, at 151.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 108.

But it doesn't make sense to blame commoditized contract drafting for either the *pari passu* clause or contract-language dysfunction generally.

Commoditized contract drafting is an alternative to creating contracts by copying and pasting from templates or precedent contracts. Instead, you complete an online document-assembly questionnaire, selecting from among the alternatives offered those deal terms that are relevant for the contract you're creating. The system then pulls together and adjusts appropriately the preloaded language.

Such systems make it easier to control what's in an organization's contracts. Gulati and Scott acknowledge as much, stating that "[i]f anything, firm-wide standardization and centralization should make changes easier to implement than in systems where contract drafting is done in the offices of individual partners."²⁰ It's hard to see how allowing individual lawyers to revert to cobbling together contracts as they see fit, with all the reinventing of the wheel and room for error that that allows, would improve contract language.

That's why after highlighting commoditization as a factor, Gulati and Scott ultimately do not in fact make a case that commoditization played a significant role in how the *pari passu* clause was handled. That element of their analysis simply fizzles out.

As for the other five factors, they're too narrow to offer a convincing explanation of contract-drafting dysfunction. In articulating those factors, Gulati and Scott focus solely on practices at law firms of the sort that handle sovereign-debt transactions—in other words, the larger law firms, informally referred to as "Big Law." But in 2005, only 16% of lawyers in private practice in the United States worked at law firms with over 100 lawyers.²¹ It follows that many more lawyers drafting contracts in the United States work at smaller law firms or in company law departments.

Furthermore, all contracts using traditional contract language, whether created at large law firms, smaller law firms, or company law departments, exhibit the same basic characteristics. In fact, contracts drafted in English use broadly comparable language the world over.²²

²⁰ *Id.* at 92.

²¹ *Lanier Demographics*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf (last visited Mar. 9, 2014).

²² ADAMS, *supra* note 18, at xxxiii–xxxiv.

It follows that to explain the shortcomings in traditional contract language, one must look beyond just Big Law. That broader perspective renders Gulati and Scott's five factors irrelevant, so this article doesn't examine them, except to the extent they feature in Gulati and Scott's proposed cure for contract-language dysfunction.

AN ALTERNATIVE EXPLANATION

So this article offers a different explanation, one that applies to all contract drafting in any part of the legal ecosystem, and not only in the United States:

Because any transaction is very likely to resemble other transactions, no one drafts contracts from scratch. Instead, drafters generally rely on templates or precedent contracts, adjusting the language to reflect the new transaction. Most lawyers don't have the time or expertise to revisit the bulk of the language they copy. Instead, they work on the assumption that what apparently worked for previous transactions will work for the new transaction.

Because contract drafting has long relied on this sort of wholesale copying, the legal profession has done without comprehensive guidelines for the smaller building blocks of contract language, leading to the endemic confusion discussed above. Presumably, the thinking has been, why worry unduly about the intricacies of constructing clear and effective contract language when a vast abundance of the stuff is available to be copied? In the absence of comprehensive guidelines, lawyers have been willing to rely on the flimsiest conventional wisdom to justify their drafting usages. Consider, for example, how the notion of "double materiality" is routinely incorporated in mergers-and-acquisitions contracts and routinely features in negotiations, even though it's based on flawed logic and is unworkable.²³

Another result of relying on wholesale copying is that although courses in contract drafting have in recent years become more popular at law schools,²⁴ junior lawyers have traditionally not been provided rigorous training in contract

²³ See ADAMS, *supra* note 18, at ¶¶ 9.52–57; Kenneth A. Adams, *Double Materiality Is a Figment of Practitioner Imagination: Quod Erat Demonstrandum*, ADAMS ON CONTRACT DRAFTING (July 17, 2013), <http://www.adamsdrafting.com/double-materiality-is-a-figment-of-practitioner-imagination-qed/>.

²⁴ See Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N LEGAL WRITING DIRECTORS 118, 121 (2008).

drafting.²⁵ Instead, they have been expected to learn by osmosis, and they come to embrace the dysfunctional language they're required to regurgitate.

So whereas Gulati and Scott treat contract-drafting dysfunction as an aberration, it has in fact always been integral to contract drafting. Lawyers have been able to get away with this dysfunction for two reasons: First, nonlawyers have learned to expect obscurantism from lawyers.²⁶ And second, the consequences of bad drafting are often sufficiently remote, in likelihood and time, that the potential for problems caused by poor drafting doesn't act as much of an incentive to draft clearly. By contrast, companies that produce goods are generally better able to assess the quality of those goods, and it's likely that they will also hear from customers relatively quickly about any defects.

It's not surprising that the lessons of caselaw—for example, that using the word *willful* in contracts invites confusion²⁷—are incorporated only sporadically in contracts, if at all. Actively monitoring contract language is inconsistent with the passivity inherent in regurgitating the language of templates and precedent contracts. Lawyers are free to copy from any contracts that suit their fancy, so there's endless potential for using, obviously, for tomorrow's transactions yesterday's dysfunctional language (whether entire provisions or smaller building blocks).

This explanation of contract-language dysfunction is grounded in the reality of traditional transactional practice—reliance on copying, absence of rigorous guidelines, and lack of training. Because the process of drafting contracts hasn't been the subject of detailed case studies, much of the evidence for this explanation is necessarily anecdotal. But it's also overwhelming.

GULATI AND SCOTT'S CURE

After considering what factors might have contributed to how lawyers have handled the *pari passu* clause, Gulati and Scott propose possible fixes. More specifically, they recommend “focusing on two features: (1) the link between

²⁵ REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 1 (2d ed. 1986) (“In the United States there is little training in draftsmanship; of that, little is being provided by the law schools.”).

²⁶ DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 24 (1963) (stating that the language of the law has a strong tendency to be wordy, unclear, pompous, and dull).

²⁷ See ADAMS, *supra* note 18, at ¶¶ 13.761–62.

contract design and litigation, and (2) innovative contract design.”²⁸ Those recommendations echo the first and fourth of Gulati and Scott’s five causes.

It would be hard to argue with Gulati and Scott’s anecdotal assertion that “litigators and transactional lawyers rarely combine their specialized skills at the level of the individual transaction.”²⁹ And one could imagine litigators helping structure dispute-resolution provisions or alerting transactional lawyers to caselaw that relates to contract language. But otherwise, litigators are an unlikely source of improvements in contract language.

One reason for skepticism is that litigators deal with contracts primarily in the context of contract disputes, when each party is trying to wrest favorable meaning from unclear contract language. That skill is very different from what’s involved in compiling optimal contract language, so you can’t count on litigators to understand how much more limited and specialized the prose of contracts is compared to litigation writing. That’s why analysis offered by commentators with a background in litigation tends to be unreliable for purposes of contract drafting.³⁰

More specifically, litigators (but not only litigators) are prone to drawing from caselaw exactly the wrong lessons about contract language. Just because a court attributes a particular meaning to a bit of confusing contract language doesn’t mean that drafters should stick with that confusing contract language. It would make better sense for drafters to convey the intended meaning in a way that isn’t confusing. Nevertheless, litigators counterproductively prize what is often referred to as “tested” contract language—confusing language that courts have had occasion to scrutinize.³¹

²⁸ GULATI & SCOTT, *supra* note 1, at 164.

²⁹ *Id.*

³⁰ See, e.g., ADAMS, *supra* note 18, at ¶¶ 3.67–69 (critiquing Bryan Garner’s analysis of how to express contract obligations); Kenneth A. Adams, *Revisiting “Represents and Warrants”: Bryan Garner’s View*, ADAMS ON CONTRACT DRAFTING (Dec. 14, 2011), <http://www.adamsdrafting.com/revisiting-represents-and-warrants-bryan-garners-view/>.

³¹ See Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 561 (1985) (describing flaws in the argument for the significance of “tested” contract language); Vincent A. Wellman, *Hindsight Isn’t So Reliable After All*, MICH. BAR. J., June 2013, at 40, 41 (stating that a court’s decision is “treated as a kind of benediction, and the clause in question is thereafter deemed to have been blessed”).

For example, in one recent article, the authors—all litigators—recommended, based on their analysis of caselaw, that drafters use the “magic words” *arising out of or related to*.³² This author has offered a different analysis and a different recommendation, one aimed at eliminating confusion rather than winning an avoidable dispute.³³

In this context, release provisions in contracts can serve as a rough test.³⁴ They’re among the provisions most likely to reflect litigator comments, yet they tend to be particularly bloated, featuring oddities such as the phrase *from the beginning of the world*.³⁵ As such, these provisions bode ill for the notion that litigators might help improve contract language.

As for Gulati and Scott’s second recommendation, it’s hard to see what “innovative contract design” has to do with contract-drafting dysfunction. It’s not clear what the term “contract design” refers to,³⁶ but by innovation, Gulati and Scott have in mind, for example, Wachtell Lipton’s development of the “poison pill” in the 1980s.³⁷ But novel deal strategies have no bearing on clarifying confusing contract language, whether entire provisions or smaller building blocks. Instead, they can simply involve grafting new provisions onto otherwise traditional contract language.

So just as Gulati and Scott’s proposed causes of contract-language dysfunction are unconvincing, so too is their proposed cure.

AN ALTERNATIVE CURE

In addition to offering what this author believes to be an explanation of contract-language dysfunction that is better supported than that offered by Gulati

³² John Calandra, Michael Dillon & Lisa Gerson, *3 Pitfalls in Contractual Choice-of-Law Provisions*, CORP. COUNSEL (Oct. 22, 2013, 3:55 PM), <http://www.corpcounsel.com/id=1202624523583/3-Pitfalls-of-Contractual-Choice-of-Law-Provisions?slreturn=20140112132017>.

³³ See Kenneth A. Adams, *“Arising Out Of or Related To”? No Thank You*, ADAMS ON CONTRACT DRAFTING (Oct. 22, 2013), <http://www.adamsdrafting.com/arising-out-of-or-related-to-no-thank-you/>.

³⁴ See, e.g., Subcomm. on Ltd. Liab. Cos., Comm. On P’ships and Unincorporated Bus. Orgs., A.B.A. Section of Bus. Law, *Model Limited Liability Company Membership Interest Redemption Agreement*, 61 BUS. LAW. 1197, 1217–18 (2006) (containing a representative example of a release provision).

³⁵ See ADAMS, *supra* note 18, at ¶ 13.237–38.

³⁶ See Kenneth A. Adams, *What Does “Contract Design” Mean?*, ADAMS ON CONTRACT DRAFTING (Jan. 1, 2014), <http://www.adamsdrafting.com/what-does-contract-design-mean/>.

³⁷ GULATI & SCOTT, *supra* note 1, at 148.

and Scott, this article now offers what this author believes to be the only plausible remedy: the key to clearer, more effective contracts is to fix both contract language and the contract process.

Fixing traditional contract language would require that lawyers stop relying uncritically on handed-down content and the associated conventional wisdom and instead adopt a rigorous and comprehensive set of guidelines for the building blocks of contract language. *A Manual of Style for Contract Drafting*,³⁸ by this author, is currently the only work that attempts to offer such a set of guidelines. (It was the absence of any such guidelines that prompted this author to write *A Manual of Style for Contract Drafting*.)

Similarly, as regards substance, lawyers would have to stop assuming (absent unimpeachable reasons for confidence) that everything in a template or precedent contract was put there for good reason and instead scrutinize every provision to make sure that it serves a useful function and does so as clearly and concisely as possible. That sort of scrutiny would have led drafters to acknowledge that the *pari passu* clause was pointless (before the *Elliott Associates* litigation) and potentially pernicious (after).

But exhorting all lawyers to fix traditional contract language isn't realistic. For one thing, most lawyers lack the expertise required to retool traditional contract language. Furthermore, lawyers have at hand a vast supply of suboptimal templates and precedent contracts from which to copy language, and it would be unrealistic to expect them to have the time to (or, in the case of law-firm lawyers, that clients would be willing to pay them to) overhaul all language that they copy, even if they had the necessary expertise.

So a complete fix requires abandoning copy-and-pasting in favor of document assembly, which allows users to create a contract by completing an annotated online questionnaire. One benefit is control: once the questionnaire is completed, the system pulls together and adjusts preloaded contract language, so that users of the system create a contract without tinkering with contract language, absent explicit authorization. A second benefit is the quality that comes with specialization, as it would make sense for a limited number of "knowledge engineers"³⁹ to do the work of compiling that language.

³⁸ ADAMS, *supra* note 18.

³⁹ See RICHARD SUSSKIND, THE END OF LAWYERS: RETHINKING THE NATURE OF LEGAL SERVICES 272 (2008) (discussing the role of "legal knowledge engineers").

So rather than being a cause of dysfunction, as Gulati and Scott imply, commoditizing contract drafting by means of document assembly is essential if contract drafting is to be put on a more coherent footing.

Furthermore, although Gulati and Scott quote an interviewee who suggests that moving from “mentorship” to commoditization can result in lawyers who don’t understand what’s in the contracts they draft,⁴⁰ nothing about document assembly requires that outcome. In fact, compared with traditional training sessions, annotations in a document-assembly system can provide very detailed and effective training. The user is provided guidance at the ideal time—when deciding what provisions to include in the contract.⁴¹

RESISTANCE TO CHANGE

The inertia that perpetuates the current dysfunction will surely prompt resistance to change. For one thing, most people prefer the dysfunction they know.⁴²

Furthermore, autonomy has long been regarded as a hallmark of being a lawyer. That helps explain why standardization has largely bypassed the legal profession, with lawyers continuing to perform inefficiently and inconsistently what could be commodity services.⁴³

Another obstacle to change in contract drafting is that it pertains to writing. The delusion that one writes well is hard to shake, and lawyers are afflicted by a particularly virulent form of that delusion.⁴⁴ It follows that one can expect many lawyers to bridle at any suggestion that they either overhaul their contract drafting or leave the task to others.

But traditional contract drafting comes at a steep cost. Dysfunctional contract language creates confusion and delay, with companies wasting

⁴⁰ See GULATI & SCOTT, *supra* note 1, at 156.

⁴¹ For an example of a document-assembly template with extensive annotations, see the free confidentiality-agreement template prepared by this author and located at <http://www.business-integrity.com/test-drive/>.

⁴² See Jessica Olien, *Inside the Box: People Don't Actually Like Creativity*, SLATE (Dec. 6, 2013), http://www.slate.com/articles/health_and_science/science/2013/12/creativity_is_rejected_teachers_and_bosses_don_t_value_out_of_the_box_thinking.html (“People are biased against creative thinking, despite all of their insistence otherwise.”).

⁴³ See William H. Simon, *Where Is the “Quality Movement” in Law Practice?*, 2012 WIS. L. REV. 387.

⁴⁴ See Bryan Garner, *Why Lawyers Can't Write*, A.B.A. J. 24 (Mar. 2013).

considerable amounts of time and money at every stage of the contract process (drafting, negotiation, and enforcement) and potentially losing business to more nimble competitors. It also causes companies to assume unnecessary risk—contract parties routinely get into avoidable disputes over the meaning of contract language, with a proportion of those disputes resulting in costly and time-consuming litigation or arbitration.

In the absence of detailed studies of the drafting process and the causes of litigation, the evidence here, too, is anecdotal but undeniable.

EFFECTING CHANGE

A rational organization would compare the costs and benefits of its current approach with the costs and benefits of change.

Determining the extent of any delay due to using traditional contract language and the traditional drafting process requires analyzing over a given period the steps involved in creating and negotiating the contracts in question, the personnel involved, and the time taken. By contrast, the costs of disputes that might arise due to dysfunctional contract language are harder to predict. They should be assessed the way one assesses risk of theft, fire, or any other calamity when taking out insurance coverage.

As for the costs of overhauling an organization's contract process, they're relatively modest. The following steps are required:

First, adopt a style guide for contract language, to ensure that those drafting or reviewing contracts for the organization employ only recommended usages. An organization could elect to create its own style guide from scratch, but it probably wouldn't have the expertise and resources to create something sufficiently comprehensive. Even if it did, the cause of clearer drafting wouldn't be advanced by lots of dueling style guides. A sensible alternative would be to state, in a short document adopted by the organization, that its style guide is based on *A Manual of Style for Contract Drafting*.⁴⁵

Second, train the organization's personnel in drafting and reviewing contracts in accordance with the style guide.

Third, revise the organization's templates so that they're consistent with the style guide. This task need not be overwhelming or expensive if you (1) enlist

⁴⁵ See ADAMS, *supra* note 18, at ¶ xxxi; Kenneth A. Adams, *Model Statement of Style*, ADAMS ON CONTRACT DRAFTING, <http://www.adamsdrafting.com/resources/model-statement-of-style/>.

a specialist in contract language, (2) avoid endless drafting by committee (with those involved championing their favorite usages based on inadequate information or no information at all), and (3) think carefully before asking a law firm to draft your commercial templates (usually an expensive proposition yielding suboptimal results). To get a sense of the merits of overhauling an organization's templates, it can be helpful to compare a representative template that uses traditional language with that template redrafted using clearer, more modern language.⁴⁶

And fourth, if the organization creates enough contracts that require enough customization and involve enough value, implement and maintain a document-assembly system. (It would make sense for trade groups, bar associations, or publishers serving the legal profession to implement and maintain document-assembly templates of widely used kinds of contracts.)

Those making the decisions for an organization might, even unconsciously, put their own autonomy or job security over the needs of the organization. Or they might value their necessarily limited understanding of contract language above true expertise. Either reaction would preclude the organization from performing a reliable cost-benefit analysis of the health of its contracts. It follows that those responsible for an organization's contract process should generally not be put in charge of assessing that process.

For those company law departments and those law firms that value saving time and money and managing risk, there is much to be gained from overhauling contract language and the contract process.

But company law departments and law firms are under different constraints. Companies can achieve economies of scale when working on their contracts, in that they generally use a limited number of templates repeatedly. By contrast, law firms face a greater challenge, in terms of the broad and unpredictable range of documents they are required to draft, the fragmented power structure of law firms, and the way the billable hour acts as a disincentive to efficiency and centralized initiatives.⁴⁷

⁴⁶ See ADAMS, *supra* note 18, at 425–50 (containing in appendix 1 three versions of a “golden parachute” mergers-and-acquisitions termination agreement—the “before” version, the “before” version annotated to show its shortcomings, and the “after” version, redrafted consistent with the recommendations in *A Manual of Style for Contract Drafting*).

⁴⁷ See Kenneth A. Adams, *The New Associate and the Future of Contract Drafting*, N.Y.L.J., Apr. 1, 2011, at 2.

Nevertheless, the experience of the Australian law firm Mallesons Stephen Jaques (now King & Wood Mallesons) shows that if a law firm can countenance change, it can overhaul its contract language and its contract process.⁴⁸ On the other hand, there's plenty of evidence suggesting that although company law departments have the more manageable task, many of them approach it with less than total rigor.⁴⁹ So when it comes to improving contract language and the contract process, perhaps less separates law firms and company law departments than one might think.

CONCLUSION

The Three and a Half Minute Transaction provides a valuable case study of contract-drafting dysfunction. But Gulati and Scott apply an unduly narrow frame of reference, and it leads them up a blind alley in their analysis of causes and a cure.

Waste and confusion are hallmarks of traditional contract language and the traditional contract process. An organization can reduce that waste and confusion by taking one or both of two steps: First, instead of taking contract language on faith and relying on conventional wisdom, adopt a comprehensive style guide for contract language and scrutinize the substance to make sure that it's optimal. And second, if the volume of contracts warrants it, implement and maintain a document-assembly system, so that users create contracts by answering an online questionnaire, with the task of coming up with the underlying contract language being left to specialists.

Perhaps many lawyers are too invested in the way contracts are currently created to address its drastic shortcomings. But a saving grace of contract drafting is that effecting change doesn't require unanimity. Instead, clarity and efficiency can be achieved one organization at a time.

⁴⁸ See Edward Kerr, *Using Plain Language in Law Firms*, 73 MICH. BAR. J. 48 (1994).

⁴⁹ See, e.g., Kenneth A. Adams, *Google's Services Agreement? Lots of Room for Improvement*, ADAMS ON CONTRACT DRAFTING (Mar. 4, 2014), <http://www.adamsdrafting.com/googles-services-agreement-lots-of-room-for-improvement/> (offering a critique of a Google services agreement).