

# **CONTRACTS AND LAWYERS – FRIENDS OF THE PROJECT: PROACTIVE CONTRACTING FOR PROJECT SUCCESS**

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## **1. ABSTRACT**

Much of the discussion about contracts is being carried out in a framework of the seller versus the buyer, or the contractor versus the employer. When lawyers are mentioned in the discussion, many people immediately think of a dispute and lawyers as fighters or hired guns.

These views are no longer accurate. Many contract terms and contracting professionals – even lawyers – are out there representing a different approach: one seeking to do what is best for the project. They are concerned about how to benefit the project, promote sound business practices, and prevent problems. One of their common elements is the desire to aid in the prevention and prompt resolution of issues that can adversely impact a project. Whether working on the sell-side or the buy-side, they are not just interested in what is favorable in a short term view. They care about a balance, and a commercially justifiable allocation of risks. They seek to secure successful project completion through incentives for good performance and arrangements where rights, responsibilities and risks are identified, assessed, priced and managed.

Most projects involve contracts, often a portfolio of contracts, and almost every major contract is simultaneously a project. Like projects, contracts must be managed effectively to be successful. As organizations both in the private and in the public sector continue to streamline and outsource operations, more people need contracting skills, and contract managers and lawyers need project management skills. The lines between contract management and project management blur. Clear communication and a working knowledge of each discipline's core elements and competencies are vital to the success of contracts and projects. Unnecessary problems should be prevented at source, and they can be. As the solution, this article introduces Proactive Contracting: multifunctional teamwork towards the integration of good project, contract, quality and risk management with proactive preventive law.

## **2. KEYWORDS**

contract management, contracting process, dispute avoidance, incentives for good performance, preventive law, proactive law, problem prevention

## **3. INTRODUCTION**

Few aspects of project business are unrelated to contracts. Bidding, selling, procurement, finance, invoicing, scope change control and many other fields operate within the framework of contracts. Major business decisions often crystallize into a contractual form. Projects can range from construction or railway electrification to IT acquisition or outsourcing and from shipbuilding or facilities management to equipment supply with installation or mobile network operations. All involve contracts, both on the sell-side and on the buy-side. Why is it then that thus far, relatively little executive attention has been devoted to the role of contracts in projects and project business?

Contracts are known as providing rights, responsibilities and remedies. Only recently have they also become known as providing tools for managing performance, uncertainty and risk, and for building incentives and metrics for success. While many project, contract and legal professionals deal with similar aspects of business, there seems to have been relatively little cross-professional collaboration. One of the reasons may be the lack of common understanding of each other's roles.

This article seeks to establish common ground for different professions involved in projects and contracting. It is based on the Author's long-term experience as international contracts counsel and workshop leader.<sup>1</sup> The article has been inspired by discussions with professional project and contract managers and colleagues from both business and the academia, particularly with the pioneers of preventive law<sup>2</sup> and proactive contracting<sup>3</sup>.

## **4. PROJECTS, CONTRACTS AND LAWYERS: REMOVING THE ROADBLOCKS**

Many projects involve the use of external suppliers, and projects are heavily dependent on their timely participation. Project managers rely on and work with subcontractors and suppliers to accomplish key objectives. They may orient suppliers to the project, review deliverables and invoices, track performance, issue purchase orders, and work with changes and notifications. They may have to make price adjustments and settle claims in connection with taking-over tests and completion. The project may be dealing with several types of contracts at the same time.

While there is substantial commonality around what many project, contracts and legal professionals do, there has not been much cross-professional collaboration or understanding of each other's roles – or of the roles, risks and opportunities of contracts. A common lexicon seems to be lacking also.

### **4.1 Why do people make contracts? What exactly is a contract?**

If you ask your co-workers why contracts are made, you are likely to get different answers depending on where the people work and come from. The answers may vary from “to get things done”, “to do and document deals”, or “to obtain goods and services needed” to “because it's required before we can proceed”, “to control and manage transactions”, “to manage risks and promote understanding between the parties”, or “to protect ourselves if something goes wrong”.

Underlying the differences in the replies is often a different perception of what a contract is. The word “contract” has two basic meanings: (i) an agreement between two or more parties, especially one that is written and enforceable by law; and (ii) the writing or document containing such an agreement.<sup>4</sup> The former refers to a bargain, a deal, or a relationship; the latter to a document recording it.

When hearing the word “contract”, some people have a tendency to think of legal documents and “fine print” that create rights, responsibilities, and remedies. The perception of a contract as a legal document only – a piece of paper with the heading “contract” and terms and conditions (Ts and Cs) on it – is too narrow and can be dangerous. It may lead people to overlook project plans, schedules, work scope definitions, technical specifications, drawings, etc., all of which are typically part of contracts. As they are not perceived to be “legal” documents, people may believe – incorrectly – that they are unrelated to contracts and can be managed or changed without reading the contract. Others may forget – incorrectly – that bids, purchase or change orders, order confirmations, memoranda, letters of intent, and the like, even email messages, can create contracts.

The Project Management Institute's Guide to the Project Management Body of Knowledge (PMBOK<sup>®</sup> Guide)<sup>5</sup> seems to have a rather narrow and legalistic view of contracts, with emphasis on the contract's legally binding function, defining a contract as “a legal relationship subject to remedy in the courts”. Adding to the confusion is the fact that the PMBOK<sup>®</sup> Guide seems to deal with buy-side contracts only, not with sell-side contracts. Still today, many project managers work on the sell-side. While managing their project they are at the same time taking part in the management of a contract or a portfolio of contracts.

### **4.2 What is contract management? Is it contract administration?**

Contract management seems to mean different things for different people. If one has a narrow view on contracts, it is only natural to have a narrow view on everything related to contracts. In this article, a broader view is called for. In today's complex projects, contracting is no longer a craft activity conducted by an expert at a desk, and contract management concerns a lot more than Ts and Cs. While the development and negotiation of contracts and Ts and Cs – including provisions for scope of work, price, time for completion, payments, milestones, change management, acceptance criteria, warranties, intellectual property rights, etc. – is an important aspect of contract management, it is certainly not the only important aspect.

Leading project management resources, including the PMBOK<sup>®</sup> Guide, do not recognize *contract management*. While they cover project procurement management and some aspects of related *contract administration*, they seem to discuss these on a rather general level. This can be confusing – even dangerous: in complex projects, contracts are unique, each different from the next. The PMBOK<sup>®</sup> Guide lacks the sell-side view altogether. In addition, it seems to lack an understanding of the need of

project managers on both the buy-side and the sell-side to be able to make informed contractual choices and to read and understand the contract(s) they work with. If they don't, how can they ensure or track compliance and do what is required of them?

For the purposes of this article, contract management and contract administration are seen to be two different but related things: contract administration is seen as part of contract management. This approach follows that presented by the National Contract Management Association (NCMA), which in its Guide to Contract Management Body of Knowledge (CMBOK)<sup>6</sup> defines contract administration as “management of issues that arise during the performance of a contract”. Contract management, again, is defined by NCMA as “a strategic management discipline employed by both buyers and sellers whose objectives are to manage customer and supplier expectations and relationships, control risk and cost, and contribute to organizational profitability/success”.<sup>7</sup>

For managing contracts as projects, it is useful to break down the contract management process into three phases: 1) planning, solicitation and bidding (preaward); 2) negotiation and signing (award); and 3) implementation (postaward). According to *Garrett*<sup>8</sup>, these phases comprise six major steps for the buyer and six major activities for the seller as summarized in Figure 1 (the Contract Management Process).

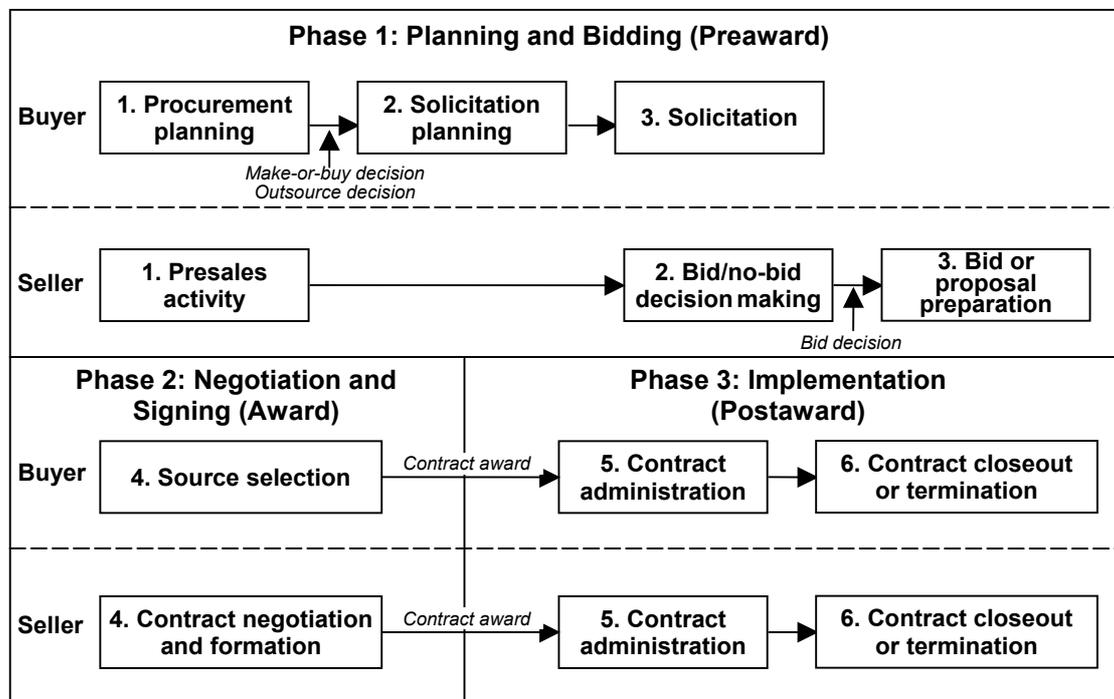


Figure 1. The Contract Management Process<sup>9</sup>

For buyers and sellers alike, the planning, solicitation and bidding (preaward) phase is vital in creating the basis for successful projects, contracts and relationships. Buyers' solicitations can take different forms, such as invitations to bid or requests for proposals. They should communicate the buyer's needs and requirements clearly to all potential sellers. Submitting a high-quality solicitation is vital to the project's success from the buyer's point of view. Better solicitations from the buyer generally result in better bids, while poorly communicated solicitations often result in delays, confusion, fewer bids and lower-quality responses. Based on the solicitation, the buyer evaluates offers (also known as bids, proposals, tenders, and quotes), selects a seller, negotiates the scope, schedule, Ts and Cs, etc., and awards the contract. Seller selection is one of the most important decisions a buyer will make, as contract and project success and failure will depend on the competence and reliability of the key sellers and their subcontractors.

For the seller, making the bid/no bid decision includes evaluating the buyer's solicitation – including the Ts and Cs – and the competitive environment, and assessing the risks against the opportunities for a

prospective contract. This step is crucial for the contract management process. Still, many companies devote too little time and attention to it before they leap into preparing their bids. Bid preparation can range from one person writing a one page proposal to a team of people developing a multivolume proposal of thousands of pages that take months to prepare.<sup>10</sup>

After the negotiation and signing of the contract (award), both parties must follow their agreement. The contract documentation becomes the “bible” of the project. Those in charge of contract implementation must be *Contractually Literate*: able to read and understand what is agreed, and sometimes also able to read and understand what is *not* agreed but still forms part of the deal.<sup>11</sup> They must be aware of their responsibilities and do what is required of them, and avoid doing what they have agreed not to do. *Contractual Literacy* involves contract reading skills, but it is not limited to these: as stated above, contracts must be recognised and properly dealt with even when there is no piece of paper with the word 'contract' written on it. First and foremost, the people working with contracts must understand that not all contracts and Ts and Cs are the same: they must read the contract in order to know how to establish and maintain required documentation and handle reports, change orders, variations, claims and notifications under their specific contract.<sup>12</sup>

Both on the sell-side and on the buy-side, the roles of project managers and contract professionals can overlap. Coordination is needed, also with sales managers, financial managers, legal professionals, and others. Some of their contract-related activities and the varying extent of their authority can even cause conflict. Some managers may have authority to sign, modify, or cancel contracts, while others may not. It is often useful to map out what the organization’s current contracting processes, roles and responsibilities are. It may become apparent that no one really has ownership and is accountable for the process, end-to-end. While new technology and a contract management system may help, each organization must make its own determination as to who is in charge. What matters most is that it is clear to everybody involved.

Teamwork, communication, and clearly stated roles and responsibilities are called for. A well thought-out contract and the early involvement of the project manager in the contracting process set the stage for successful project completion. All team members – from the very early stages onwards – must commit to making it happen.<sup>13</sup>

#### **4.3 What is preventive law? What is proactive contracting?**

*“When you "sign on the dotted line," you obligate yourself;  
before you sign, you have a freedom of choice not available later.”  
(Louis M. Brown<sup>14</sup>)*

As experienced project professionals know, people’s expectations are not always fulfilled. People may not get what they wanted. The delivery may be late, or the deliverables may be damaged or defective. Customers may be asked to pay more than they expected to pay. Disappointed and angry, people start to think of methods to receive the performance they expected at the price they were willing to pay. They look for their contract and ask their lawyer for help. For preventive law, that is too late.

In the practice of medicine, the emphasis is on preventing illnesses before they occur. Even in other professions, prevention has long been known to be the most successful treatment. The legal profession is no exception. A growing number of lawyers have learned to think in terms other than court victories, winners and losers. Hindsight is no longer the only way for lawyers to look at things. Many lawyers are now helping their clients to understand the benefits of proactive legal thinking and foresight.

Law practice can be divided into two categories. In *litigation law*, a dispute has arisen out of past facts and the lawyer represents one of the parties to that dispute. In the practice of *preventive law*, the lawyer assists clients in planning a future course of conduct. Preventive law seeks ways to identify legal opportunities in time to take advantage of them. It provides tools and techniques for the early detection and avoidance of legal problems and the prevention of negative surprises. If problems do arise, preventive law seeks to resolve them quickly and minimize the losses.

In the context of contracting, traditional law is mostly about legislation, the language of contracts, and what the courts have done. Here, contracts represent the basis for evaluating the parties’ position when something has gone wrong. For proactive preventive law and proactive contracting, court cases may

represent a learning opportunity about how *not* to do deals. Here, contracts not only represent a way of allocating risks and remedies. They also represent a source of opportunities for a strong foundation for project success, and for incentives to improve performance.

Proactive contracting works towards integrating best practices in project, contract, quality and risk management with proactive preventive law. It helps make decisions in a sound manner that is consistent with corporate priorities and is good for the bottom line. The goal is early action to maximize project success and opportunities – and simultaneously minimize potential pitfalls, claims and litigation. At its best, a proactive contracting process produces successful projects and trouble-free transactions and relationships on an ongoing basis, even when people in the process change. This requires multifunctional teamwork and a systematic approach to managing the contracting process and documents – before, during and after contract negotiation and signing.

#### 4.4 What is the lawyers' role in the whole?

*“A lawyer’s role is to protect clients from other members of the profession.”*  
(Anonymous)

Some business people may agree with the old saying cited above. Much of the work of a corporate lawyer is “protective” – and reactive: A major problem occurs, a ‘fire’ breaks out, and the lawyer is asked to help. Many business and project managers think of lawyers only when approached – or threatened – by other lawyers.

Proactive contracting takes a different approach. It represents the view that legal knowledge is most valuable when it is used *before* things go wrong. Instead of putting out ‘fires’, proactive legal professionals help anticipate and resolve potential issues early on, so that no avoidable ‘fires’ will be encountered. The role played by proactive lawyers is totally different from the traditional role of a “Fighter” His or her work is not about what movies and television series show: defending or prosecuting a court action, pleadings, interrogating witnesses. – Instead, proactive lawyers work as legal designers, advisors, facilitators, coaches, problem preventers and problem solvers: in essence, as friends of the project. (see Figure 2. The Roles of Lawyers in Project Business)

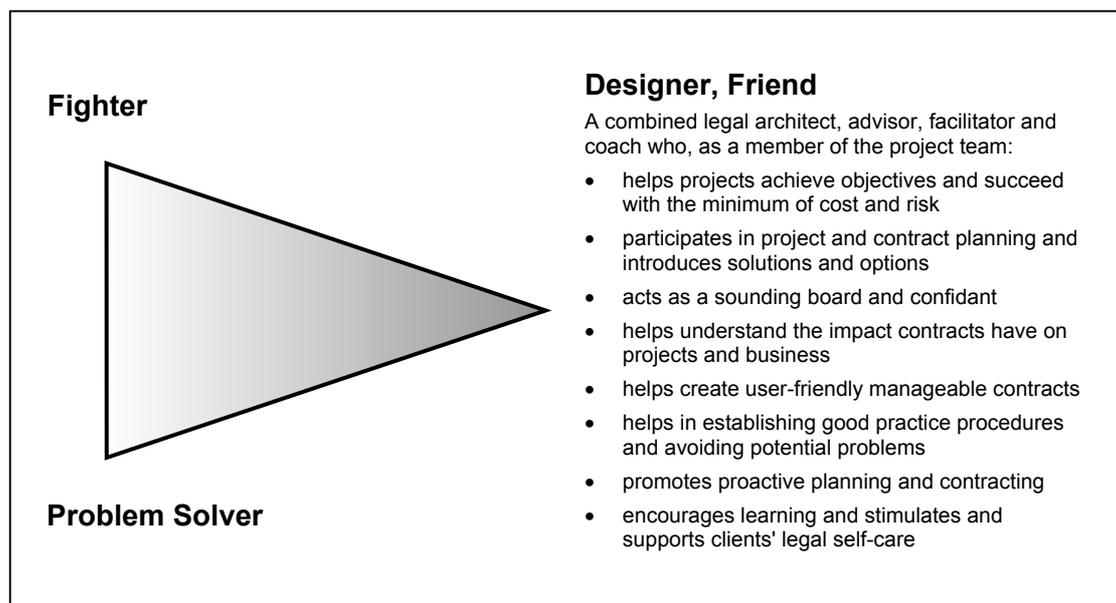


Figure 2. The Roles of Lawyers in Project Business<sup>15</sup>

A growing number of organizations recognize that well-written contracts and well managed contracting processes play a critical role in minimizing risks and ensuring that commitments are implemented correctly. They also recognize that a wide range of business performance issues are attributable to failure to negotiate and understand appropriate contracts, including Ts and Cs.<sup>16</sup> In business dealings, where the parties have the power to arrange and determine their rights and responsibilities, a contract

creates a “private body of law” between its parties. Lawyers practicing proactive law can help management make informed contractual choices. On top of their legal and drafting skills, they understand business reality: contracts are not just legal documents. People do not enter into a contract just to have a contract. A large portion of what goes into a project contract has very little to do with the “law” taught in law school. Contracts are made with the aim of achieving project and business goals, and an appropriate balance must be struck between *responding to project and business needs* and *risk management* on one hand, and between *enabling* and *control* on the other.

Proactive lawyers, through training and experience, are skillful at spotting issues that have economic and practical significance for the project. It is one of the lawyer’s most important functions. Others include to propose solutions, to help identify workable compromises, and to put it all in words that clearly express the parties’ intent. Careful contract planning and formation help the parties understand what they must give up to get what they want. This process results in more realistic expectations as to the risks and rewards of the project and related transactions. Although there is an initial expenditure and of time and effort in creating the contract, the reduction in negotiation and disputes over the term of a well-written contract outweighs these initial costs.<sup>17</sup>

For proactive contracting to succeed, it is essential for business and project managers to invite proactive lawyers to be members of the team and, together, look at the ways contracts are formed and performed, how changes are managed, and how claims and disputes are handled. An experienced business lawyer has seen many projects – successes as well as failures – and can provide the project with useful, objective views and information. The cost for the early contribution of a lawyer can be controlled and budgeted for, whereas the cost of litigation or arbitration cannot.

In future, corporate governance and accountability will require improved tracking and control of contracts, obligations and risks. Fortunately, new tools are now available. Contract management best practices enabled by new software simplify document creation as well as information sharing, collaboration, and real-time reporting.<sup>18</sup>

## 5. CONCLUSION

Projects take place in an increasingly complex, networked and regulated environment. On large projects with multiple suppliers and subcontractors, managing the interfaces among the various providers is a must. Required actions must be taken at the right time and in the right place, both by one’s own organization and by the other parties. Communication, control and contracts are crucial.

Most of those in charge of projects work with contracts and purchase orders. Contracts to obtain supplies and services are essential to project implementation. If the project is under a contract, project management and contract administration overlap considerably. Project plans, schedules, work scope definitions and technical specifications are typically parts of contracts, and the project team must be aware of the applicable requirements and legal implications when administering or changing them. A solid understanding of contracts is critical for a growing number of people, both on the buy-side and on the sell-side. With today’s technology, a project team with a proactive lawyer on board can provide the people who need to know with controlled access to the information they require. At the same time, people working in projects – including site personnel – can be provided with the ABCs of *Contractual Literacy* and with easy access to tools, templates and checklists that help them read and understand their contracts and work well with them.

The time has come for project, contract and legal professionals to work more closely together. When used proactively, contracts and lawyers not only help allocate risks and remedies but also establish a solid foundation for project success. With a proactive lawyer working as a legal designer and a friend, the project team can create and implement contracts that set incentives to good performance and help reach desired outcomes with the minimum of cost and risk. The goal, first time and every time: successful projects where rules and procedures are clear and evenhanded, the contract assigns risk to the party best able to bear it, and facilitates performance and completion so the customer receives the required facility, supplies or services timely and within budget, and the supplier can perform its part efficiently and at a reasonable, predictable profit.

*“It usually costs less to avoid getting into trouble than to pay for getting out of trouble.”*  
(Louis M. Brown<sup>19</sup>)

## 6. ADDITIONAL RESOURCES

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<sup>1</sup> The Author is based in Helsinki, Finland, and works mainly with large corporations that market industrial goods, services and projects worldwide, business-to-business. As part of this work, the Author has designed and conducted public and in-house training workshops on topics such as Proactive Contract Management, Proactive Procurement, Contractual Risk Management and Safe Sales, in Europe, Americas, the Persian Gulf Region and Southeast Asia. The ideas presented have developed through discussions with corporate colleagues, clients and workshop participants in various parts of the world. – The Author is indebted to Anette Kavaleff for her thoughtful comments and suggestions and to Leila Hamhoun for her research and assistance in editing this article.

<sup>2</sup> Preventive law is a branch of law that endeavors to minimize the risk of litigation and to secure more certainty as to legal rights and duties. The term was first used in the late 1940s by Louis M. Brown, a Law Professor and legal practitioner who, in an effort to help people minimize the risk of legal trouble and maximize legal benefits, published "Preventive Law" in 1950. – For more information about Preventive Law, see Section 4.3 and, e.g., Dauer, Edward A. Developing Preventive Law: From Lawyering to Quality. *Law Practice Quarterly*. The Newsletter, Law Practice Management Section, American Bar Association (ABA), Summer 1998, <[http://www.abanet.org/lpm/newsletters/articles/newsarticle11142\\_front.shtml](http://www.abanet.org/lpm/newsletters/articles/newsarticle11142_front.shtml)> [3.6.2004]. Further information can be found at the web pages of the San Diego based National Center for Preventive Law at the California Western School of Law, <<http://www.preventivelawyer.org>> [3.6.2004].

<sup>3</sup> The proactive contracting approach was initiated by a group of Finnish lawyers from both business and the academia. It has its origins in the work of Professor Louis M. Brown, known as the father of preventive law. The early members of the proactive contracting research and development group were, along with the Author, Päivi Nygren, If P & C Insurance Company Ltd, Soili Nysten-Haarala, University of Lapland Faculty of Law, Soile Pohjonen, University of Helsinki Faculty of Law, and Matti Rudanko, Helsinki School of Economics Department of Business Law. The group has devoted considerable efforts to the research and practice of ways to integrate contract, project, quality and risk management with preventive law. Its accomplishments include international conferences, such as "Future Law, Lawyering and Language: Helping People and Business Succeed" held in

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Helsinki in May 2003, <<http://www.ulapland.fi/contentparser.asp?deptid=13095>> [3.6.2004], and several publications, with new ones in the works. The first Finnish language book on proactive contracting: *Ennakoiva sopiminen – liiketoimien suunnittelu, toteuttaminen ja riskien hallinta*. Pohjonen, Soile (Ed.). WSOY Lakitieto Helsinki 2002, is in the process of being translated into English. – The group has later joined forces with professionals and researchers in other countries and other fields. Its law-related aspects have become known as the Proactive Law movement and, more recently, as the Nordic School of Proactive Law.

<sup>4</sup> “Contract.” *The American Heritage® Dictionary of the English Language*. 4th ed. Boston: Houghton Mifflin, 2000. <<http://www.bartleby.com/61/53/C0605300.html>>. [3.6.2004]

<sup>5</sup> *A Guide to the Project Management Body of Knowledge. (PMBOK® Guide)*. 2000 Edition. Project Management Institute (PMI), Pennsylvania, USA.

<sup>6</sup> Norby, Marlys – Smith, Emmalyn – Smith, Ronald. *Guide to Contract Management Body of Knowledge (CMBOK)*. 2<sup>nd</sup> ed. National Contract Management Association (NCMA), April 2004.

<sup>7</sup> *About NCMA*. National Contract Management Association (NCMA). <<http://www.ncmahq.org/membership/about.asp>>. [3.6.2004]

<sup>8</sup> Garrett, Gregory A. *World-Class Contracting – How Winning Companies Build Successful Partnerships in the e-Business Age*. CCH Incorporated, Chicago, 2003, p. 18 - 29. According to Garrett, contract management is “the art and science of managing a contractual agreement throughout the contracting process”, whereas contract administration is “the process of ensuring compliance with contractual Ts and Cs during contract performance and up to contract closeout or termination”.

<sup>9</sup> Adapted from Garrett 2003, p. 20.

<sup>10</sup> Garrett 2003, p. 25 - 27.

<sup>11</sup> Haapio, Helena. Securing Contracting Success: Invisible Terms in International Contracts and What to Do about Them. National Contract Management Association (NCMA), *Contract Management*, July 2004, and Haapio, Helena. Contractual Literacy in International Business: The Fine Art that has to be mastered by Lawyers and Clients – together! *Turku Law Journal*, Vol. 5, No. 1/2003, p. 35 - 57.

<sup>12</sup> For a closer look at the important topic of change control and the differences between certain Ts and Cs, see Kavaleff, Anette – Koskelainen, Katja – Kousa, Marjaana. *Contractual Changes – Control Value and Manage Risks*. Presentation at the Nordnet 2004 International PM Conference where this article is originally presented as well.

<sup>13</sup> Similarly, Garrett 2003, p. 29.

<sup>14</sup> Brown, Louis M. *How to Negotiate a Successful Contract*. Beverly Hills 1955, p. vii.

<sup>15</sup> Adapted from the Introduction to Barton & Cooper at <<http://preventivelawyer.org/main/default.asp?pid=multi-dimensional.htm>>. [3.6.2004]

<sup>16</sup> Cummins, Tim. *Contracting as a Strategic Competence*. International Association of Contract and Commercial Managers (IACCM) 2003. <<http://www.iaccm.com/contracting.pdf>>. [3.6.2004]

<sup>17</sup> Fox, Charles M. *Working with Contracts. What Law School Doesn't Teach You*. Practising Law Institute (PLI), New York 2002, p. 3 and 33 - 37.

<sup>18</sup> For an overview of the topic, outlining best practice and with illustrative case studies, see Cummins 2003.

<sup>19</sup> Brown, Louis M. *Preventive Law*. Prentice-Hall Inc. New York 1950, p. 3.

## **Bio Summary**

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Helena Haapio is International Contract Counsel with Lexpert Ltd based in Helsinki, Finland, where she works mainly with large companies that market industrial goods, services and projects worldwide, business-to-business. Most of her work relates to combining quality and risk management with proactive planning and careful contracting in cross-border deals. She works with corporate management teams to merge business and legal

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foresight in the contracting process so as to promote business success, produce predictable results, avoid misunderstandings, and prevent problems. Her goal is to develop skills, practices and procedures that secure a strong legal foundation for business and help business people help themselves (rather than having to rely on lawyers alone). She has started and currently is one of the coordinators of the IACCM Finland group.

Before founding Lexpert Ltd, Helena served for seven years as in-house counsel for Wärtsilä Group companies in Finland, Norway, Sweden and the United States. During this time, she served three years as General Counsel for one of the Group's Divisions. Her responsibilities included drafting and negotiating contracts for international transactions such as acquisitions, joint ventures, distributorships, sales, purchasing and licensing deals. She also arranged in-house training in related fields. In 1985, she was nominated "Export Trainer of the Year" by Fintra, the Finnish Institute for International Trade. She has since designed and conducted public and in-house workshops on topics related to international supply chains, Proactive Contracting, Safe Sales, and Contractual Risk Management in Europe, Americas, the Arabian Gulf Region and Southeast Asia. She is currently Page Leader for the International Trade web pages of the National Center for Preventive Law at <http://www.preventivelawyer.org>. She also acts as arbitrator.

**Memberships:**

Advisory Board Member of the International Association of Contract and Commercial Managers (IACCM); Coordinator of IACCM Finland and the Contract Management Special Interest Group of the Finnish Project Management Association

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