FLEXIBILITY IN CONTRACTING: INTRODUCTION©

By Thomas D. Barton*

"Flexibility" in contracting is typically conceived from two quite different, and seemingly opposed, perspectives. For those who approach contracts from a legal perspective, flexibility is regarded suspiciously: It threatens to undermine some foundational assumptions about why contracts are made and the role of the law in safeguarding those purposes. But for those who approach contracts from a more business-oriented perspective, especially the longer term agreements that typify modern supply contracts and complex projects, flexibility is viewed as an essential ingredient for success. Modern business relationships can scarcely function without parties being able to accommodate themselves to inevitable changes during the lifetime of the contract.

The two groups have not always communicated well. Too often their dialogue may have resembled the imagined conversation that begins the first Chapter in this book (*Flexibility and Stability in Contracts,* by Thomas D. Barton, Helena Haapio, and Tatiana Borisova). In that fanciful conversation, the beginning assumptions of the two speakers diverge so powerfully concerning the purposes and functions of contracts that it is difficult for the speakers to find common ground. In reality, the stand-off between the two perspectives are contracts that are *drafted* by lawyers—largely attempting to suppress flexibility—but that are *implemented* by business parties, who attempt to find ways to smuggle in more flexible arrangements. The lawyer-drafted written agreement may contain a variety of conditions, promises, and stipulated remedies that seek predictability and control. But the implementing business parties routinely avoid resorting to formal legal procedures to enforce their rights; they prefer to negotiate an accommodation that continues the deal and the underlying commercial relationships.

This friction between the legal/certainty/control perspective and the business/flexibility/accommodation perspective has endured for many years. Parties routinely

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invest considerable time and money in creating a contract that seeks to specify precise legal rights, duties, and remedies, but then avoid using those rights—resorting to them as a last alternative.

Perhaps this syndrome of parties equipping themselves with legal rights, but then often behaving as though those rights do not exist, is economically efficient. Perhaps without the clarity of the legally-based contract provisions, the parties would not have a common platform from which even to begin negotiations in the event of a dispute. So the clash of the two perspectives toward flexibility in contracting may, paradoxically, contribute to a healthy, efficient system when the two perspectives are kept in reasonable balance. But we cannot help but wonder: how much *more* efficient and functional might contracts be if *both* perspectives were acknowledged and appropriately included in the written contract itself? And, if both perspectives *were* to be written into the agreement, what would such clauses say?

We cannot answer these questions without empirical investigation of specific contract and project applications, and without interviewing the lawyers and business parties involved in modern contracting. That need was the impetus for the formation of the multi-national, multi-disciplinary study group that was formed through the generous support of the Finnish Cultural Foundation and led by Professor Soili Nystén-Haarala. Over a two-year period, Professor Nystén-Haarala periodically convened a group of lawyers and scholars from several countries in Europe, the United Kingdom, Russia, Asia, and the USA. Their collective task was to consider and study the idea of flexibility of contracts. Participants from different countries were encouraged to collaborate, so as to open up the original perspectives from which they first approached the idea of contractual flexibility. Some undertook interview projects, some designed empirical surveys, and some approached the questions analytically rather than empirically.

The results were surprising, but highly enlightening and suggestive of the need for much more study of these issues. First, not everyone interpreted alike the meaning of the concept "flexibility." Second, some people reported on legal, economic, social, or psychological barriers to greater flexibility. But third, some found the opposite: ways in which the law or even language may actually promote flexibility in the operation or interpretation of contracts.

Perhaps these disparate meanings and findings were inevitable, given the reality of the long-standing struggle for supremacy between the two basic perspectives toward contract flexibility. Both perspectives reflect legitimate economic and psychological principles and needs. Furthermore, the work of the study group demonstrates that attitudes to flexibility in contracting reflect different cultural and professional backgrounds and values. Relatively informal contracting behavior emphasizing loyalty may be normative in Finland; re-interpreted and embraced as traditional *guanxi* in China; viewed as risky and idealistic in the individualistic U.S.A; and theoretically desirable but bureaucratically almost impossible in Russia.

In the end, each Chapter in this book may be viewed as contributing to an understanding of both flexibility and stability in contracts: why each is important, and how both may be achieved simultaneously. Solutions may be advanced in a number of different ways. They may appear inside the contracts themselves, through better design and through clauses that mandate stronger collaboration between the parties. Solutions may also be achieved through better communication between those who draft contracts and those who perform them, as in complex projects or supply contracts. Flexibility with stability may also be furthered through simplifying national or EU laws, so as to enable more party autonomy; or through its opposite: developing or liberalizing the infrastructure of contract law in countries like China or Russia. Different methods for packaging or transferring contracts can also help, as in movements toward marketing "branded" contracts or traditional assignment of contract rights to third parties. Finally, a blended combination of flexibility and stability has been found through interpreting the meanings of words themselves.

The first chapter, *Flexibility and Stability*, was introduced above. It imagines a dialogue between holders of the clashing perspectives about flexibility; the chapter then acknowledges the legitimacy of each perspective, and offers recommendations for promoting better communication and contract functionality through visualization and collaboration.

Following that overview, *Flexible Contracting in Software Project Business: What We Can Learn from Agile Methods in the Software Industry* by Jouko Nuottila, Jaakko Kujala, and Soili Nystén-Haarala offers a closer look at these tensions in the context of project management. Project management entails ongoing decision-making—sometimes hundreds of decisions—during the course of completing a substantial project. This chapter first introduces

the evolution of models that are used to understand the dynamics of successful project development. It then suggests the implications of that evolution for both project management and the legal contracts that accompany projects. A contract created at the outset of a complex project cannot realistically specify responses to the many contingencies that may arise. Successful contracts must create a framework that is stable enough to respect overall expectations, but flexible enough to work pragmatically. Employing interviews with software executives and technical personnel, this chapter examines how to achieve that balance, emphasizing the importance of trust and cooperation among project partners in implementing an agile approach to project development.

In the third chapter, *Flexibility in Contracts and Contractual Practice: Empirical Study in China,* Yanan Zhang and Riitta Ahtonen begin by pointing us toward economic theories that are useful in analyzing flexibility in contracting. That theory informs the design of an empirical study undertaken in China, through interviews of both lawyers and managers operating inside homegrown Chinese companies and also in China divisions of European companies. The collected results constitute a snapshot of one moment in the thoughtful commercial development of a nation. In that picture, we can find room for optimism: that most lawyers and business managers intuit the need for balancing clarity and legal rules with the maintenance of personal relationships. We see also a government exploring what practices may be best received within Chinese traditions, but simultaneously enable a future tied to international trade.

Not every legal initiative, however, constructively promotes either flexibility or stability. Sometimes either the laws themselves or the people administering those laws can stifle innovation or efforts to incorporate particular rules to guide particular commercial relationships. For example, Hans-Werner Moritz and Maximilian Kuhn in *Legal Implications of Flexibility in Business Contracting from the German Perspective* suggest that both German national laws and various EU initiatives actually constrain traditional freedom of contract and flexibility through limiting the use of choice of law clauses. And in *The Interplay of Flexibility and Rigidity in Russian Business Contracting: The Formal and Informal Framework in Contracting* by Soili Nystén-Haarala, Elena Bogdanova, Alexander Kondakov, and Olga Makarova, the authors remind us that regulations will always be enforced by judicial or executive branch officials who exercise discretion. Those officials may see their roles as facilitating business arrangements, using their discretion wisely to intervene where

one party may be unfairly exploitative of the other. But conversely, those same officials may come to see their discretion as an opportunity to wield power with ego-boosting arbitrariness. Even worse, enforcement officials may be corrupt, extracting bribes to overlook regulations that might otherwise stifle commercial dealings.

As *The Interplay of Flexibility and Rigidity in Russian Business Contracting* chapter underscores, contracting as well as the law in general will be influenced by the social environment in which it operates. Even more broadly, linguistic and cultural traditions frame basic understandings of the meanings of laws: both the words themselves and the nature of human interaction. Flexibility flows inherently from different languages—even where one might expect that legal professionals speak a certain common language, given their similar professional training and exposure to fundamental legal concepts. Not all lawyers mean the same thing when addressing the same words or concepts, which can introduce either a healthy flexibility, or confusion and mistrust. That point is expertly documented in the multi-national comparison of *Achieving Flexibility in Contracting by Using Vague Terms in International Business Contracts: A Comparative Approach from the Perspective of Common Law, German, Polish, and Chinese Law,* by Joanna Grzybek, Tina de Vries, and Yanan Zhang.

The inherent flexibility of language is complemented in international contracting by cultural differences that bring contrasting attitudes about trust, loyalty, and the importance of human relationships in commercial dealings. These underlying social and moral expectations about people are explored in two chapters: Petra Sund-Norrgård, Antti Kolehmainen, and Onerva-Aulikki Suhonen in *The Principle of Loyalty and Flexibility in Contracts;* and Taina Savolainen and Mirjami Ikonen, *Trust as Intellectual Capital in Pursuing Flexibility in Business Contracting. The Principle of Loyalty* suggests that if human relational norms are widely understood and accepted within a culture, the judiciary may override explicit contract language to the contrary. Doing so, paradoxically, may actually stabilize contracting relationships by bringing in tacitly understood norms that cannot be overridden by contract disclaimers. So also with *Trust as Intellectual Capital*: the authors explore the concept of trust among parties to a contract as a non-legal device to find a balance between the perspectives of control and flexibility.

Sometimes the parties to a transaction can find needed flexibility or system stability through third parties, rather than through their own interactions or contract language. The simple devices of extending credit instead of demanding immediate payment; or permitting a party to liquidate a long-term resource or periodic stream of income; or to delegate a duty that has become onerous to a third party, all can bring enormous flexibility into commercial dealings. In *Flexibility in Assignment of Contractual Rights: Assignment of Account Receivables*, Lingyun Gao reminds us of the rich history and usefulness of these devices. She describes legal vehicles for obtaining commercial financing through third parties, and analyzes their reception in modern Chinese law. Such third-party, post-contract devices must be taken into account when attempting to understand and assess the overall flexibility of a contracting system.

The book concludes with *Promoting Contract Flexibility through Trademarks: 'Branded' Intellectual Property Licensing Practices*, by Nari Lee and Thomas D. Barton. This chapter points toward a possible future source of flexibility: development of alternative contracts for licenses or other transactions that are created and sold under what may become familiar brand names, as one would buy soap powder. Flexibility in the contracting relationship would be through the marketplace itself—and the alternative substantive terms that could be represented in the competing brands of contracts. Such flexibility may also offer stability to the system, by democratizing contract formation. In a world of increasing standardization of contracts and decreasing comprehension of those agreements—especially by consumers who may "click through" the "I agree" buttons of a contract without reading a word of the terms—the ability to rely on, and demand, a trusted name in contracting may bring into better balance the bargaining power between one-off purchasing consumers and the far more sophisticated companies that draft and replicate standardized agreements for those consumers to sign.

This book arrives at a significant historical moment. As the importance of contracting grows in a globalized economy that relies increasingly on human connection rather than national power, designing a contracting system that is flexible, stable, and fair becomes paramount. The entire study group wishes to express our gratitude to the Finnish Cultural Foundation for enabling its work; to Soili Nystén-Haarala for her insight and effective leadership; and to Yanan Zhang for her competent and friendly style in organizing events and paper submission. We are delighted to share the results of our study and encourage the reader's communication

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