

Transitioning Your Contract Process

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Whether they enter into 10 or 10,000 contracts a year, many companies approach the contract process in the same manner—in other words, without making any real attempt to generate economies of scale. Smaller companies can indulge in an artisan's approach to the contract process, but in the case of bigger companies, that approach comes at a significant cost—the workload is too big for the process to be considered anything other than industrial.

Furthermore, as your contract transactions multiply, any inefficiencies accumulate and act as a drag on your business. Glitches in the contract process can result in any combination of unnecessary administration costs, delays in closing transactions, blown deals, unpleasant surprises after closing, disputes, and missed deadlines.

Steps in the Contract Process

The life cycle of a commercial contract involves a number of steps. If you are responsible for preparing the contract, your first task would have been to prepare the template, which you'd now revise to reflect the transaction in question. The parties would then negotiate the contract and, after any necessary changes have been made, sign it. It would then be archived, but out-of-sight would not be out-of-mind, as you'd need to monitor performance.

Note that the dynamic shifts part way through the process. In the case of the first step—preparing the template—quality is the biggest issue, whereas the remaining stages are primarily process-driven.

Preparing Templates

Preparing rigorous contract templates is the single most important step in the contract process. Besides laying out the legal relationship of the parties, a template contract acts as a blueprint for how the transaction in question is to be handled. By means of annotations and alternative language, templates can address the different permutations of any given kind of transaction and how to address them. Of all the steps in the contract process, preparing the template is the least susceptible to technology solutions. And it raises several concerns.

A template needs to accomplish your business goals, address any significant risks, and satisfy any legal, regulatory, or tax requirements. Making sure that it does so obviously requires the input of people intimately familiar with the business in question and the input of lawyers—whether in-house or outside counsel—who understand that business and have suitable experience in the kind of transaction involved.

You'd also need to make sure that your template is clear and efficient. Most business contracts fall short of that goal. No matter how exalted the law firm or law department that drafted it, it's a sure bet that any given contract contains all sorts of redundancies, archaisms, ambiguities, and other inefficiencies. As a result, it takes longer than it should to draft, review, and negotiate contracts. And when contract language isn't as clear and efficient as it could be, a problem is much more likely to surface sometime after signing. Furthermore, if unclear language in your template invites the other side to make changes, don't be surprised if that emboldens them to ask for additional changes that they might otherwise have hesitated to ask for.



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Your templates should also be consistent with each other, instead of looking as if they had been prepared independently of one another—inconsistency can send mixed signals to customers, not to mention courts, and makes you look disorganized. Your templates should share the same conventions of language and layout, and the “boilerplate” provisions they contain should be variations on the same model.

Finally, you'd want to ensure that your templates are prepared with a minimum of delay.

Improving Template Language and Substance

You can take steps to make it easier to address issues related to preparing templates. Consider adopting, and training your personnel to use a style guide—one that doesn't simply specify typographic conventions to follow and a few usages to avoid, but instead addresses more broadly the language and layout to be used in your templates. The result would be templates that are clear, concise, and consistent.

Maintaining a clause library, along with explanatory materials and annotations, would help ensure consistency of language and substance and would reduce the time spent reviewing any given template. An informal approach to this task is unlikely to prove satisfactory in the long run. The document automation tool QShift, produced by Ixio Legal, permits a more rigorous approach. It allows any team of lawyers to draw from, and freely edit, a centralized body of approved and annotated contract language. Using QShift, any authorized company person could efficiently and quickly build the

first draft of a template by collating approved language. An added advantage of using QShift is that you'd be sure that your templates are free of pernicious metadata.

When you're preparing a new template, a logical first place to start would be your company's current ones. But culling pertinent provisions from perhaps dozens of templates can be a daunting task. You might find of use Wordsensa Professional by Adsensa, a UK company.

Wordsensa Professional analyzes documents—it can handle thousands of pages at a time—and categorizes them according to their similarity. This allows users to quickly spot the common themes in a set of documents and to identify key groupings for further analysis. Analytical views can be selected according to the task at hand. Users can focus on what matters to them and navigate through document sets quickly, verifying the presence or

absence of particular language, regardless of how provisions are ordered in the different documents. Selected text can easily be saved as a Word document.

Collaborating on Templates

Preparing templates is a process that is conducive to both decentralization and centralization—decentralization because you need the input of people with relevant expertise, and centralization because someone should ensure that similar aspects of different transactions are handled consistently.

The need for different perspectives means that preparing templates requires company personnel to collaborate and offer comments on draft templates. Information technology has made available some tools to assist this part of the process.

One such tool is the wiki, a type of website that allows visitors to easily add, remove, and otherwise edit content. They're too anarchic to use for purposes of drafting templates, but they can serve a useful brainstorming function. Many companies host wikis relating to different aspects of their operations. Also, members of the International

Association for Contract and Commercial Management (IACCM) can participate in association wikis relating to different aspects of contracting.

In terms of how comments are handled, traditionally the lawyer receiving comments would have no choice but to plough through stacks of drafts bearing hand-written notations or typed changes, with each set of comments being sent independently of any other set. The more complex the document and the larger the group commenting on it, the longer this process drags on, costing enormous amounts of money and keeping people from other important matters. And the inefficiencies in the process also jeopardize document quality. You could improve on this system in a number of ways.

You could arrange real-time online document collaboration. Services such as WebEx's MeetMeNow allow people to meet online and over the phone to go over a draft. But that requires that everyone look at a screen at the same time, and there would be no way to track who made what change.

An alternative would be web-based change tracking. Using Microsoft SharePoint, you can put a document online, track who made what changes, then import all changes

Sources for Importing Your Contracts

<i>Technology</i>	<i>Vendor</i>	<i>Website</i>
The Numbering Assistant	Payne Consulting Group	www.payneconsulting.com
Ixio Legal QShift	Ixio Corporation	www.ixio.com
Wordsensa Professional	Adsensa	www.adsensa.com
MeetMeNow	WebEx	www.meetmenow.webex.com
Litera IDS	Litera Corp.	www.litera.com
DealBuilder	Business Integrity	www.business-integrity.com
Exari	Exari	www.exari.com
EchoSign	EchoSign	www.echosign.com
Emptoris Contract Management	Emptoris	www.emptoris.com
DocuSign	DocuSign	www.docusign.com
Upside Contract	Upside Software	www.upsidecontract.com
On-Demand Workspaces	Intralinks	www.intralinks.com

into a Word file and accept or reject any given change.

But if your documents are long or complex and you need to solicit comments from a broad group of people, you should consider Litera IDS. It's a collaboration platform that allows unlimited people to work on a document together, whether live or offline, from anywhere in the world, with the submitted comments and revisions being stored in a database. When the user views a given section of a document, the screen also displays the comments and revisions to that section offered by all reviewers. The user can then accept or act on some suggestions and ignore the rest. The user can also choose to allow all reviewers to see each other's comments and revisions.

Finally, you might want to bring in an outside expert to help you with the language of your templates. As a general matter, law firms aren't equipped to perform that task.

Preparing Deal Documents Based on Templates

For any given transaction, you'll need to convert a template into a contract containing any adjustments necessary to reflect the terms of that transaction. This raises its own set of problems:

- Your contract personnel might inadvertently use obsolete templates, leading to contracts that incorporate out-of-date business or legal terms. That in turn could put your company at a disadvantage or create confusion as to what your company's position is on any given issue.
- Your contract personnel might make unauthorized changes.
- If templates are accessible to all employees, unauthorized personnel would be in a position to create deal documents.

Furthermore, if you do it the traditional way, turning a template into a deal contract is subject to delays—changes are marked by hand, then input, and the document is then subject to review, with perhaps one or more further rounds of changes to follow. And this sort of low-level, repetitive work can be demoralizing for whoever performs it, and it also takes them away from higher-level work.

Using Automation to Prepare Deal Documents

One way to minimize inefficiencies in turning templates into deal documents would be to use document automation. You can choose between two approaches.



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In addition to using QShift to prepare your templates, you could also use it to prepare final contracts. This would likely work best if a small group of lawyers is responsible for producing deal documents, if the deal documents tend to vary from the templates in unpredictable ways, and if deal volume isn't prohibitively large.

The alternative is to use a logic-driven, web-based document-assembly engine to collate and supplement prepared contract text based how the user answers a questionnaire. Such a system offers speed and consistency

—in other words, a specially formed affiliate—or using a vendor such as Pangea3 and UnitedLex. Either way, efficient offshoring involves using a combination of lower costs and information technology to perform high-volume work of limited complexity. The potential advantages are reduced cost, faster turnaround times, and improved morale and productivity of company lawyers spared having to do that work themselves. But offshoring can be a sensitive issue, as it's often assumed that it results in job losses in the United States.

If negotiations involve **many different people** commenting on a **complex document**, you may find useful the solutions **discussed** in connection with **handling comments** on draft templates.

while permitting a considerable degree of customization. The questionnaire could be annotated with explanatory materials and links to authorities. And as with QShift, the centralized nature of such a system means that text and annotations could be updated, with the changes being replicated in any contracts that use that text. Also, access could be controlled.

Given the costs involved, such systems are best suited to high-volume documentation that requires relatively predictable customization.

It used to be that software was the biggest obstacle to viable logic-driven document assembly, but that's no longer the case—reliable and versatile software is now available off the shelf. Perhaps the leading product is DealBuilder Author, by the U.K. company Business Integrity. DealBuilder Author doesn't require time-consuming programming by technicians, unlike HotDocs, owned by the LexisNexis Group. And DealBuilder Author works with DealBuilder Process Manager, a system that allows a company to streamline and control the process of approving new contracts.

A relatively recent but increasingly visible entrant in the field is Exari, which is marketed by an Australian company of that name.

Outsourcing the Preparation of Deal Documents

In conjunction with using document automation, or as an alternative to it, you could have someone else handle preparing deal documents based on templates. An increasingly popular form of outsourcing is "offshoring," which involves having work performed outside the United States in locations that offer compelling cost advantages.

Having your deal documents prepared offshore would require you to choose between two options, using a "cap-

With respect to higher-level repetitive work or overflow work, services offered by Axiom Legal represent another outside solution—a compromise between the loss of control inherent in outsourcing and the expense involved in retaining regular outside counsel. Axiom styles itself as a new kind of law firm—you can engage its staff of experienced attorneys to work only a specific number of hours, and you can have them work either at your office or remotely. Such services could allow smaller companies to quickly meet new or increasing demands or handle specialized transactions.

Negotiation

Negotiating numerous transactions based on the same template can be another drain on the time of people who could otherwise be performing higher-value functions. Here, too, offshoring or some other form of outsourcing could ease the burden. It could conceivably save money, too. But usually the only negotiations that could conceivably be delegated are those that are so sufficiently routine that they could be handled according to a "script" established by the company, with any negotiations that don't follow the script being routed back to the company.

If negotiations involve many different people commenting on a complex document, you may find useful the solutions discussed in connection with handling comments on draft templates.

Signing

The most straightforward part of the contract process would seem to be getting other parties to sign your contracts. But it has tended to be something of a nuisance, as it has involved exchanging signatures by a variety of mech-

anisms—email, facsimile, the various forms of regular mail, courier service, personal delivery—and keeping track of the signature pages and who has and hasn't signed.

But comprehensive signature-automation solutions are now available. One is EchoSign. In addition to being a stand-alone product, EchoSign is also incorporated in the contract-lifecycle-management solutions offered by Upside Software and *Salesforce.com*.

EchoSign works as follows: You email a contract for signature through EchoSign. The recipient/signer opens the email and then does one of two things: e-signs it, in two clicks or less, or opts to sign by fax, in which case EchoSign automatically adds a machine-readable fax cover sheet bearing an EchoSign fax number and forwards the document to the recipient/signer. However the document is signed, EchoSign's servers receive the document and automatically route signed copies as PDFs to you, the other party, and anyone else you specify. There's no software to install.

What is particularly interesting is the tracking and filing component. EchoSign makes sure that you can easily find a signed copy later. A private copy of the signed contract is stored in your secure EchoSign account. You can, for example, send a copy to anyone or remind others to sign it if they haven't already. And you can automatically keep track of which contracts have been signed and which haven't. From the perspective of the organization rather than the individual user, the system offers various security and data-management features and allows managers to check on the status of all the organization's contracts.

Another signature-automation product is DocuSign. It offers more elaborate functionality than EchoSign, but users need to download DocuSign software. As opposed to appending an electronic signature to an entire document, DocuSign allows you to sign not only select pages of a given document, but also sign one or more locations on those pages. And it allows you to initial specific items on a given page. DocuSign also features a sophisticated security infrastructure and versatile transaction controls. And with DocuSign, a signatory can sign an opened file, can visit a website to sign, or can sign in person. Given these added features, DocuSign has attracted clients in the real estate, mortgage, and financial-services industries.

Archiving

Historically, the contract process leading up to signing has garnered most of the attention. Consider what might happen to any given sales contract once it has been signed: The sales department loses interest and moves on to the next prospect. Legal breathes a sigh of relief and starts putting out the next fire. A copy of the contract is put in someone's filing cabinet, and in due course it disappears

ACC Extras on... Contracts

InfoPAKsSM

- *Drafting and Interpreting Commercial Contracts* (2007). This InfoPAK provides the basics of drafting and interpreting contracts. www.acc.com/resource/v6023

Leading Practice Profiles

- *Contract Management for Small Law Departments* (2006). This profile examines contract management practices in small law departments by looking at file and database management initiatives, use of contract review and approval processes, and the use of boilerplate or form contracts within the department and by its clients. www.acc.com/resource/v6814

Program Materials

- *The Who, What, and Why of Contracts* (CCU 2007). In this paralegal track program, a panel of experts explored the legal issues involved with basic contract design and sample clauses to use, as well as the benefits of using templates and creating standard procedures to implement controlled, uniform review processes. www.acc.com/resource/v8463
- *International Distributor/Agency Commercial Contract Termination* (Annual Meeting 2005). This session's panel of international law specialists shows how to draft agreements to avoid termination headaches, and the steps required to terminate such agreements in various jurisdictions. www.acc.com/resource/v6863

Quick References

- *Sales Contract Checklist* (2006). www.acc.com/resource/v7903

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from the institutional memory as that person moves upward in the company or moves on. It's safe to assume that this sort of scenario plays out routinely.

It's certainly possible to rigorously maintain a complete set of paper copies of your contracts. But once your operations reach a certain size, maintaining only paper copies would be unrealistic. Many companies have their signed contracts scanned and digitally archived, but that can be a

slow and costly process that allows room for human error. Signature-automation and contract-lifecycle-management solutions offer an alternative, in that imaging is one of the features they offer.

Monitoring

Maintaining readily accessible copies of your contracts doesn't do much good if you don't keep track of what's in them. Relying on an improvised approach to contract monitoring is fraught with peril. Someone might compile an abstract of information from a given contract, but how accurate and pertinent it is depends entirely on the diligence and experience of the person doing the compiling. Furthermore, such an abstract probably wouldn't put contract information in the context of the broader relationship with the other party. And the abstract would likely be lost from sight in due course, at which point the contract might as well have ceased to exist, until such time as events in the outside world force the company to acknowledge its existence.

It's easy to imagine the unfortunate consequences that can arise from slapdash monitoring: You miss contract deadlines. You fail to enforce obligations imposed on the other party. You overcharge or undercharge for products or services, or someone overcharges or undercharges you. The lack of credible data regarding performance hampers your strategic planning. And your internal controls might fail to meet the standards imposed under the Sarbanes-Oxley Act of 2002.

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Solutions for Monitoring

The contract-lifecycle-management (CLM) industry has developed to offer companies an information-technology solution to the problems of monitoring contracts. After languishing somewhat in the 1990s, such solutions are now in greater favor, presumably due to developments in technology and due to the fierce competition, increasing workloads, increasing cost pressures, and tough compliance environment that businesses face.

Some companies, such as Upside Software and Emptoris, are pure-play CLM providers. Other CLM providers expanded into the area from enterprise resource planning (SAP, for example) or customer relationship management (*Salesforce.com*, for example).

CLM solutions come in many flavors, but the more comprehensive solutions aim to provide businesses with a tool that makes it much simpler to manage all aspects of the contract process, from cradle to grave. From the first step—for example, when a salesperson requests a term sheet from a customer—through contract creation, negotiation, performance, compliance, and risk management, the user can control and monitor the process and track all relevant data.

If the fit is good between a CLM solution and a user, the user should be able to better gauge performance—by it and the other parties—under its contracts. That should ensure that it doesn't, for example, miss important deadlines. The user should be able to shorten the time it takes to get to contract, and that in turn would reduce the likelihood of missing out on deals due to delay. The streamlining of processes and improved collaboration that come from using a CLM solution could significantly reduce operating expenses. And the user could ensure that for compliance and financial-reporting purposes, information is automatically channeled to the people who need it and is readily available for audit purposes.

Whether a CLM solution makes sense for your business would be a function primarily of scale—do you enter into enough contracts to warrant the time and expense involved in implementing a CLM solution? Beyond that,

it would be a question of the exact nature of your operations. Generally, CLM solutions are sufficiently scalable that implementing one can make sense for smaller companies as well as the largest. But users should assess how well a given CLM product handles each stage in the contract process. For example, the document-assembly component of a given CLM product is unlikely to offer the functionality of a pure-play document-assembly engine such as DealBuilder or Exari.

A Case Study **Cisco Systems**

A business might be at liberty to implement, in one fell swoop, systems that would put its contract process on an optimal footing. But because of their size and history, many companies would have to do so gradually, so as to keep costs under control and integrate new technologies with the less new.

Cisco Systems' experience with managing its contract process provides a case study in the value of these new approaches to contract management and how a substantial company has gone about implementing them incrementally.

Cisco, as the worldwide leader in networking, seeks to

transform how people "connect, communicate and collaborate." It stands to reason that its own operations would fall within the scope of this ambition, and Cisco's legal department has long been aware that its contract-management systems must be accessible at all times to its worldwide legal personnel. And Mark Chandler, Cisco's senior vice president and general counsel, has stated very publicly that lawyers would operate more effectively if they were to avail themselves of an array of information-technology tools that make it easier to communicate and share knowledge.

Applying this approach to Cisco's legal operations is the task of the "Legal Technology Solutions" group, which helps Cisco's legal department develop or capture knowledge and then share it. It works with contract negotiators and the relevant groups in the legal department to improve both the quality-driven and process-drive parts of the contract process.

The Cisco lawyers and contract negotiators serving a given business group have the lead role in drafting templates to be used by that business group—they know the business intimately so are best placed to give expression to a transaction and handle any issues that arise during negotiations. But to balance this decentralization, any given

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template is subjected to multiple levels of review, including by a content-management specialist, to ensure that the positions taken are consistent with Cisco policy and conform to guidelines regarding language and layout.

Cisco's content-management specialists consult style guidelines—including MSCD—and other resources specifying standards to be applied across Cisco's many templates. To speed up the review process, these resources are now being distributed to those responsible for the first draft of any template.

For purposes of the issue spotting and brainstorming that are a part of determining what to cover in a given template, Cisco's lawyers can make use of "Legal Exchange," a bulletin-board system hosted on Cisco's intranet. Cisco is currently developing wiki-style interactive tools to enhance this sort of information sharing. A further tool is "Legal OnRamp," an interactive online community established by leading law firms and major companies, including Cisco.

Cisco Document Automation

As the for process-driven part of contract management, Cisco has developed "NDA Central," an innovative system with DealBuilder at its core that non-legal Cisco personnel use to draft nondisclosure agreements and send them to customers for fully automated review and electronic signature. Over the past two years, more than 8,000 nondisclosure agreements have been created and signed using NDA Central. In addition, Cisco uses a "click to accept" format for a range of other agreements.

For its high-volume sales contracts, Cisco uses DealBuilder, which allows it to reap all the efficiencies offered by a logic-driven document-assembly engine. These have been dramatic—instead of having multiple templates for a particular type of transaction, Cisco now only needs one automated template.

Cisco has also used DealBuilder to develop libraries of provisions used across different kinds of contracts. Boilerplate, such as an assignment provision, can be drafted once and then inserted in different templates. If Cisco updates the clause, the change is reflected in all templates in which it appears.

For those parts of the contract process that follow drafting the contract, Cisco has developed its own contract-management system. Information required for review and approval is stored online. Once a given contract has been negotiated, the stored information and the draft contract are made available to the legal and finance departments and the affected business unit. Once they have given their "virtual" approval, the contract is signed, then scanned and stored in a search-enabled repository. Thereafter, the system can alert users to termination dates and other key compliance infor-

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mation. Although this system was developed before recent advancements in contract-lifecycle-management technology, it has allowed Cisco to handle the contract process much more efficiently than it would have otherwise.


Given the sophisticated contract-lifecycle-management solutions that are now available, Cisco has been investigating whether an off-the-shelf CLM solution could provide the seamless and comprehensive coverage that Cisco is looking for. In addition to operational efficiencies, such a solution would allow Cisco to get out of the business of designing and maintaining CLM solutions.

As part of this analysis, Cisco is continuing to scrutinize its own contract-management processes to determine how they could be made more efficient. Once complete, Cisco will attempt to automate these internally developed processes into the contract-management software of its chosen vendor, Emptoris, Inc.

Challenges and Rewards

Cisco has been aggressive in the steps that it has taken to gain greater control of the contract process. Cisco's experience demonstrates that it's a daunting challenge.

In terms of contract substance, controlling the contract process requires a rigorous grasp of the law and your company's business. In terms of contract language, it requires an unwillingness to be satisfied with recycling stale conventional wisdom. And in terms of process, it requires keeping track of an increasing number of information-technology solutions and determining which, if any, would provide you with efficiencies that significantly outweigh the cost and inconvenience.

But Cisco's experience also shows that if you bring to bear on the contract process a comprehensive and innovative approach, the rewards can be significant. 

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