



Open Library of Humanities



Part of the Ubiquity
Partner Network

THE COMICS GRID
Journal of comics scholarship

Research

How to Cite: Giancaspro, MA. 2020. Picture-Perfect or Potentially Perilous? Assessing the Validity of 'Comic Contracts'. *The Comics Grid: Journal of Comics Scholarship*, 10(1): 7, pp. 1–27. DOI: <https://doi.org/10.16995/cg.188>

Published: 16 July 2020

Peer Review:

This article has been peer reviewed through the double-blind process of *The Comics Grid: Journal of Comics Scholarship*, which is a journal published by the Open Library of Humanities.

Copyright:

© 2020 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.

Third-party content is included in articles for research and educational purposes only under Academic Fair Dealing/Fair Use. Unless otherwise stated all third-party content is copyright its original owners; all images of and references to characters and comic art presented on this site are ©, ® or ™ their respective owners.

Open Access:

The Comics Grid: Journal of Comics Scholarship is a peer-reviewed open access journal.

Digital Preservation:

The Open Library of Humanities and all its journals are digitally preserved in the CLOCKSS scholarly archive service.

RESEARCH

Picture-Perfect or Potentially Perilous? Assessing the Validity of 'Comic Contracts'

Mark Anthony Giancaspro

The University of Adelaide, AU

mark.giancaspro@adelaide.edu.au

This article considers whether 'comic contracts', which incorporate aspects of visualisation, are legally valid under Anglo-Australian contract law. Comic contracting has been put forward as one method which can address issues associated with traditional text-based contracting, including contractor apathy and illiteracy. Use cases across a variety of commercial and other contexts are arising in Australia and around the world. The literature has to date focussed upon the advantages and disadvantages of this novel method, however the broader question of whether comic contracts are legally valid in light of their potential uncertainties has gone unanswered. This article ultimately makes the case for validity and suggests there is ample authority supporting the notion that a comic contract can satisfy the legal test of contractual certainty.

Keywords: Anglo-Australian Law; Certainty; Comics; Contract; Validity

Introduction

In 2010, British video game retailer Gamestation carried out what is now a famous April Fools' Day prank on its customers. The company covertly inserted a bizarre clause into its online terms of service which read as follows (Fox News 2010):

By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamesation.co.uk or one of its duly authorised minions.

We reserve the right to serve such notice in 6 (six) foot high letters of fire, however we can accept no liability for any loss or damage caused by such an act.

The clause went on to say that users who either did not believe they had an immortal soul, had already given it to another party, or simply wished to retain it and deny Gamestation's claim over it, could click the subsequent link to 'nullify the subclause and proceed with the transaction'. An incredible 88 percent of users failed to notice the clause and did not opt out; the remainder that did received a £5 voucher (Brownlee 2010). Though done in jest, the prank proved to be an insightful experiment which highlighted the disturbing tendency for people to avoid reading the contract terms they agree to. Behavioural economists refer to this as 'rational apathy'; the costs (in time, money and effort) of gathering information to improve decision-making are generally perceived to outweigh the benefits of doing so, meaning people generally do not bother (Faure and Luth 2010: 340). Berger-Walliser, Bird and Haapio (2011: 56) note that 'the problem is seldom an actual inability to understand [contract terms], but instead a reluctance to make the effort'. Similar experiments in which users signing up for free public Wi-Fi access have unknowingly agreed to undertake public janitorial services (The Guardian 2017) or to give away their eldest child (The Guardian 2014) have consistently confirmed that no one likes reading contracts.

With little doubt, one of the principal reasons people do not read the terms of their agreements is because of the complex language they use. Law is a 'game of words' (Bhatia 2010: 31), and those words have been crafted since the High Middle Ages by judges, politicians and through the efforts of lawyers and industry.¹ Commercial lawyers endeavour to exhaustively spell out the rights and obligations of the parties using customary legal vernacular, to accommodate all possible contingencies and risks, and to eliminate any potential ambiguities. Consequently, legal

¹ For a useful account of the historical development of the English common law system and its effect upon the language of the law, see Tiersma 2000.

language of the kind commonly encountered in even the most basic of contracts is barely comprehensible to the layperson, making the thought of reading pages of it seem both agonising and futile. Words may well be 'the lawyer's tools of trade' (Denning 1979: 5), as Lord Denning once famously wrote, but they are a seemingly ineffective tool at communicating critically important information regarding parties' contractual commitments.

Even where the parties have properly considered the terms of their bargains, they can differ as to the meaning and grammatical construction of the words used. Many commercial lawyers will be familiar with the famous dispute between Canadian telecommunications companies Rogers Communications and Bell Aliant, which made global headlines. The dispute arose in 2005 and centred upon the parties' conflicting interpretations of the following clause in their contract for Rogers' use of Bell Aliant's utility poles (described as a 'Support Structure Agreement' or 'SSA'):

Subject to the termination provisions of [the SSA], [the SSA] shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

The parties debated the significance of the comma placed after the phrase 'five (5) year terms'. Rogers contended that the contract could only be terminated following one year's written notice at the *end* of the five-year term. This benefited them given the charges under the contract for the use of the utility poles remained fixed at a much lower rate of \$9.60 per pole; the price had nearly doubled within two years to \$18.91 per pole. Conversely, Bell Aliant interpreted the clause as meaning that either party could terminate the contract at *any* time after providing one year's prior notice. At first instance, the Canadian Radio-television and Telecommunications Commission (CRTC) found in favour of Bell Aliant, noting that the placement of the comma qualified the preceding two phrases and highlighting the absence of clear language

indicating an intention to limit termination to the end of the term.² The decision was overturned on appeal, the CRTC considering the French version of the same contract which was made concurrently and determining that it clearly indicated that termination could only occur upon notice one year prior to the end of the initial or any renewed term.³

The communicative inefficiencies of the orthodox textual method of contracting, as highlighted by these case studies, has in recent times inspired a new movement advocating for a reconsideration of how we draft legal agreements. The emerging concept of 'comic contracting' encourages the use of visualisation techniques in contracts to help make them more comprehensible and reduce the likelihood of misunderstandings and disputes. It is also said to reemphasise the utility of contracts as tools for communication and guidance. The method goes by many other labels – the most popular appearing to be 'contract visualisation' (Berger-Walliser, Bird and Haapio 2011; Barton, Berger-Walliser and Haapio 2013) – all describing the extensive use of pictures, diagrams or other visuals either substantially in place of, or in conjunction with, text within a written contract. The textual component is often minimal and confined to text within dialogue boxes accompanying the pictures, or speech bubbles (character narratives). Comic contracting essentially embodies former US President and legal scholar Thomas Jefferson's view that, in the context of legal writing, 'less is more'. Jefferson went so far as to describe the capacity to avoid using two words in legal writing where one will do as 'the most valuable of all talents' (Hayes 2008: 89).

Efforts to simplify complex legal language in all manner of documents have been ongoing since at least the early 1970s. The 'Plain Language Movement', which germinated in the United States at this time, was largely a response to ongoing litigation by banks against consumers bewildered by the convoluted language in their

² Telecom Decision CRTC 2006-45 (28 July 2006). See the Commission's discussion at paras [27]–[30].

³ Telecom Decision CRTC 2007-75 (20 August 2007). See the Commission's discussion at paras [58]–[65]. The finding was upheld by the New Brunswick Court of Queen's Bench: *Rogers Communications Partnership v Bell Aliant Regional Communications, Ltd* [2015] N.B.J. 294 at [35]–[38].

financial contracts (Phillips and Balmford 1995: 27). Much like the architects of the comic contracting method (who would surface much later), the banks appreciated that laypeople were likely confused by the jargon in their legal agreements. If parties were not able to comprehend the nature and scope of their obligations, they were more likely to infringe the same. Sure enough, following substantial simplification efforts, consumer disputation with lenders dramatically reduced (Asprey 2003: ch 4). The insurance and other industries enjoyed similar results. So successful was the experiment that it inspired legislation mandating the use of plain language in government documents, residential leases, consumer contracts and more.

Comic contracting appears to derive its impetus from the more recent 'proactive law' movement which emerged in the late 1990s (Berger-Walliser 2012: 13). Proactive law regards law not as a doctrinal constraint, cost, burden or protective mechanism, but rather as 'an enabling instrument to create success and foster sustainable relationships' (Berger-Walliser 2012: 16). It is 'proactive' in its pre-emptive, *ex ante* approach to regulating social or commercial conduct. In the context of contracting, proactive law views the contract not just as a charter of rights and obligations specifying the consequences of non-performance, but as a 'visible script for the parties to follow in their business relationship' (Berger-Walliser, Bird and Haapio 2011: 61). It becomes a management and communication device designed to help the parties enjoy the fruits of their bargain, and is drafted for them and not for judges.

The practical application of visualisation techniques in contracts seems to have been pioneered by the doctoral research work of Dr Collette Brunschwig at the University of Zurich, whose study in 2001 was one of the first to examine the efficacy of using images to convey legal concepts (Brunschwig 2001). Since then, several companies have reportedly commenced experimentation with comic contracts, the central aims being to reduce the likelihood of disputation and to foster an amicable and trustworthy relationship between the parties. These ideals are commensurate with those encouraged by proactive law. To use Brown's famous medical analogy, such methods prevent the spread (contagion) of large-scale legal trouble (disease) (Brown 1951: 47).

Comics as a Visual and Linguistic Art Form

What is intriguing about this growing body of legal literature addressing comic contracting is that it scarcely examines comics as a visual and linguistic art form. It often tends to evaluate the overall utility of applying comic art to commercial contracts to decrease complexity and increase comprehension with no regard to the functions the comic art itself is actually performing. The presumption appears to be that the comic form is appropriate to convey an inherently complex legal message and is perhaps more effective than words alone at doing so. As will be discussed shortly, many empirical assessments of comic contracts appear to support this view, but there is little (if any) critical analysis of *how* the comic form accomplishes this aim.

There is also a great deal of disagreement as to what is meant by 'comics' in the context of comic contracting. As mentioned earlier, in current legal literature, a 'comic contract' has been vaguely defined as any commercial agreement either substantially or wholly replacing text with various forms of visuals ranging from pictures and icons to diagrams and flowcharts. The intentional and considerable inclusion of any such visuals appears to qualify an orthodox contract as a 'comic contract'. In this context, the expression 'comic contract' appears to allude to the visual form as commonly recognised and understood. For example, Keating and Andersen (2016: 13) describe the development of a contract composed of 'comic strips'. Similarly, Botes (2017: 7–10) refers to the construction of a narrative using sequential comic imagery to express the contract terms.

At a more fundamental level, the term 'comics' loosely describes the juxtaposition of images in a sequence (Duncan and Smith 2009: 3). Most emerging examples of comic contracts appear to be modelled as archetypal 'comic books', which are essentially volumes in which 'all aspects of the narrative are represented by pictorial and linguistic images encapsulated in a sequence of juxtaposed panels and pages' (Duncan and Smith 2009: 4). The panels are generally arranged in grid form and follow the 'Z-path' i.e. left to right and downward reading order (Cohn 2013: 91). Take the following example from engineering company Aurecon's visual employment contract launched in May 2018 (**Figure 1**).

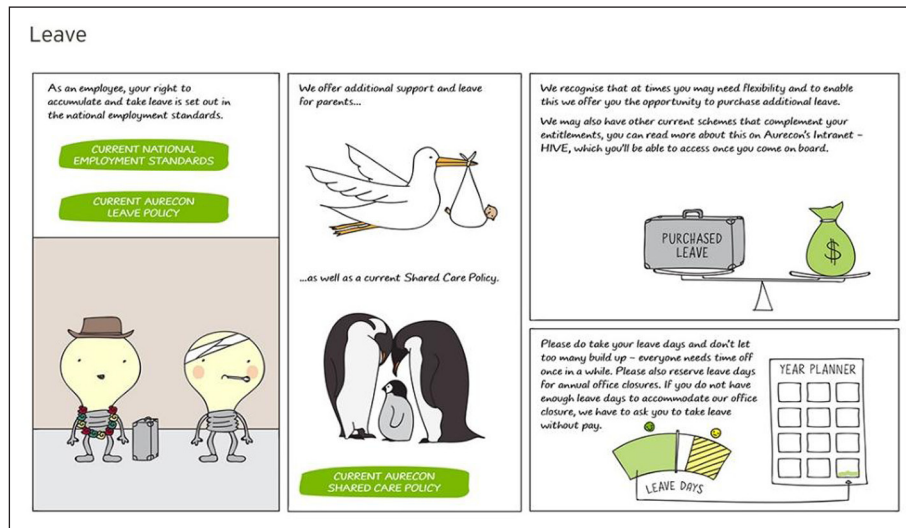


Figure 1: Aurecon (5 May 2018) *Australia's First Visual Employment Contracts Launched* [Online]. Available at <https://www.aurecongroup.com/about/latest-news/2018/may/visual-employment-contract>. © 2018 Aurecon.

The employee is here invited to read the panels from left to right and, despite two panels appearing in the same column and tier, they are naturally oriented so that the top panel is read before the second. Of course, other comic contracts, such as the fruit pickers contract utilised by South African company ClemenGold (**Figure 2**), utilise irregular layouts with guiding arrows which direct the reader in unorthodox directions across the page.

Both examples do not conform to the regular method of utilising consecutive lines of text. The comic form clearly resists coherence and offers a 'seductively visual and radically fragmented' means of conveying information to the reader (Hatfield 2005: xiii). Straying from simpler and more conventional linguistic structures urges readers to 'take up the constitutive act of interpretation' and engage critically with the narrative presented (Hatfield 2005: xiii–xiv). This is in stark contrast to the traditional, predictable and linear textual form that characterises commercial contracts. In theory, then, the comic form might be more capable of engaging the reader and facilitating processing and comprehension of the information threaded into the sequential narrative. But does the data corroborate the suspicion?

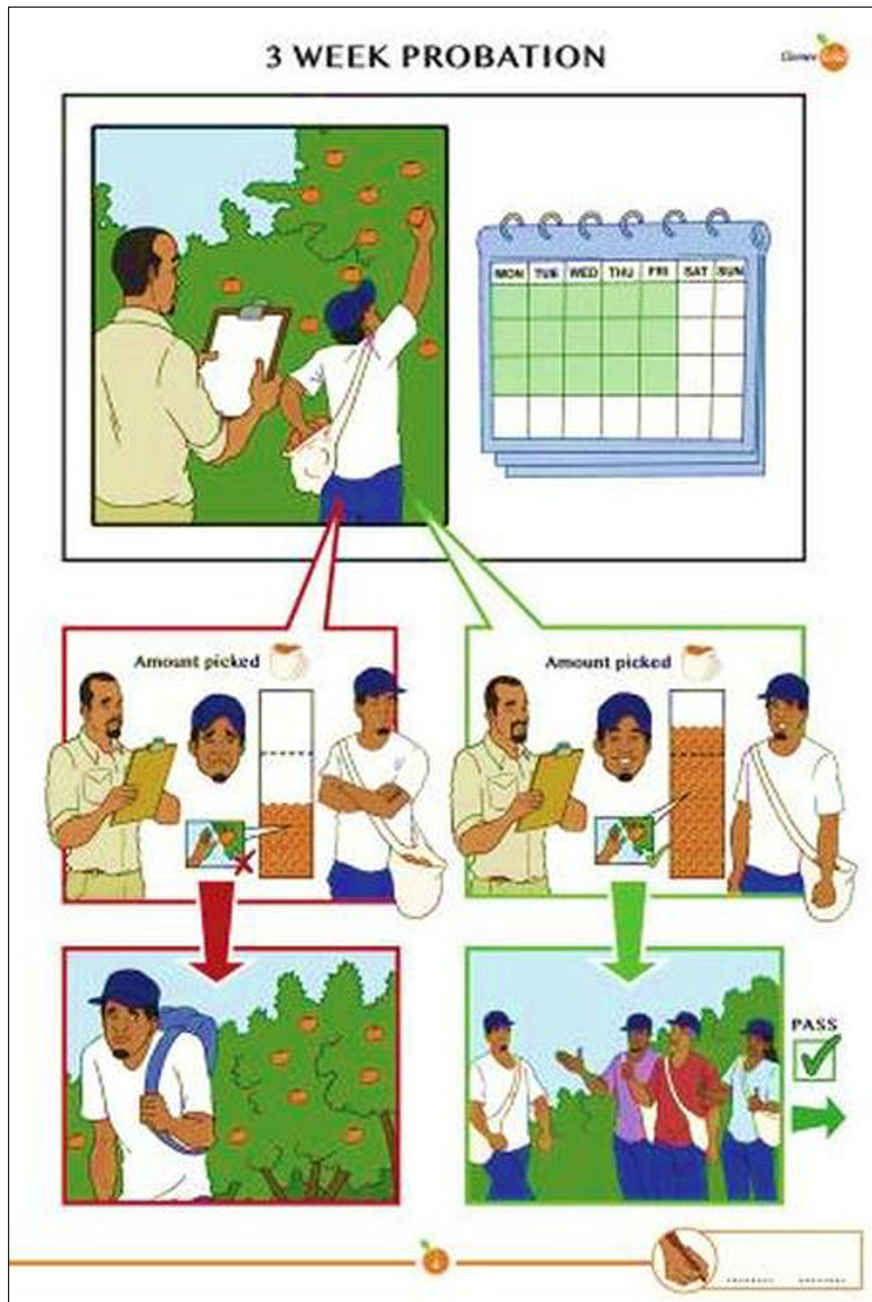


Figure 2: ClemenGold 2016 reproduced in Vitasek (14 February 2017) *Comic Contracts: A Novel Approach to Contract Clarity and Accessibility* [Online]. Available at <https://www.forbes.com/sites/katevitasek/2017/02/14/comic-contracts-a-novel-approach-to-contract-clarity-and-accessibility/#1e2f1e347635>. © 2016 ClemenGold; © 2017 Vitasek.

Does Comic Contracting Work?

Proponents of comic contracting often suggest many potential advantages of the method. The bulk of the literature addressing comic contracting debates such merits, and they are not the focus of this article. For context, however, it is often said that incorporating visual elements into contracts would improve user engagement, help users locate and process complex legal information more quickly and effectively, and improve the transparency of the contracting process (Barton, Berger-Walliser and Haapio 2013: 48–9; Passera, Smedlund and Liinasuo 2016: 74, 91). Improved levels of trust and efficiency would presumably follow, and the prospect of conflict would correspondingly decrease. Given the imprecision of language, and the fact that the ideas underlying a bargain are sometimes far more 'complex and nuanced than the words available to represent them' (Coyle and Weidemaier 2018: 1677), visuals may do a better job of capturing the terms intended by the parties. There is some empirical support for the argument that comic contracts are more likely to engage and be understood by the parties, generate higher levels of user satisfaction, and reduce disputation levels (Kay and Terry 2010; Rekola and Boucht 2011; Passera 2012).

Despite its allure, there are some probable disadvantages associated with comic contracting which should briefly be mentioned. First, pictures – like words – can be susceptible of multiple meanings and be misinterpreted by parties. Variables such as age, culture and education may drastically alter one's perception of an image, at least as much as they would with text. As such, we may simply be replacing one interpretative problem with another. Second, depicting contract terms into comic format will also take time and money which most contracting parties in business lack. Having to absorb and interpret the visuals and narratives through which the terms are contextualised is arguably more laborious and inefficient than merely writing the terms and explaining their effect through words alone. A final and significant shortfall of comic contracting is that it presupposes that all contract terms can be easily visualised when this is far from true. Some legal concepts would be extraordinarily difficult to reduce to pictorial form, and such visuals might be no more enlightening than plain words (Berger-Walliser, Bird and Haapio 2011: 67; Barton, Berger-Walliser and Haapio 2013: 53).

Again, whether or not comic contracting is beneficial as a practice is not the focus of this article. Instead, it attempts to answer the arguably more important question of whether comic contracts are legally enforceable at all. In this regard, validity is generally assumed, however doubt arises from the fact comic contracts are predominantly *visual* rather than textual, meaning it is inherently uncertain whether the relevant rules and principles as to contractual certainty will be satisfied. Those rules were for centuries fashioned upon the orthodox notion of the text-based contract. If a party disputes a comic contract's validity, the courts will be tasked with determining whether the elements of formation are present. If sufficient certainty is lacking, and remedial measures such as severance cannot assist, the contract will fail. The forthcoming analysis predicts how the courts might at a *general* level – one which does not account for the individual characteristics and qualities of a particular contract – appraise the legal 'certainty' of comic contracts.

The Certainty Requirement in Contract Law

Making a contract, much like making a cake, merely depends upon the right types and quantities of ingredients being present. Unlike cake, however, it is sometimes unclear whether a contract has been successfully created. The position under Anglo-Australian law is that the following four elements must be present in order for a contract to be validly created: (1) agreement, comprised of offer and acceptance; (2) consideration; (3) intention to create legal relations; and (4) certainty of terms (Giancaspro and Langos 2016: ch 2). Legal certainty requires that the terms (especially the essential terms) be comprehensible and clear, or at least capable of being attributed with meaning. If the terms cannot be understood at all, and the obligations of the parties discerned with accuracy, the contract will be void.⁴

The courts do not endorse a narrow or pedantic approach when interpreting contracts and assessing if they reach the requisite threshold of legal certainty. Indeed, they will do all possible to attribute meaning to the terms used by the parties and will cease only if the task becomes impossible. One of the leading

⁴ If the offending terms can be severed and the contract can capably function without them, the contract may survive: *Fitzgerald v Masters* (1956) 95 CLR 420.

authorities outlining the test of legal certainty and the court's process of evaluation is *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429. Chief Justice Barwick, with whom the other members of the High Court agreed, stated:

[A] contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts ... decide ... is its proper construction The question becomes one of construction, of ascertaining the intention of the parties, and of applying it. ... So long as the language employed by the parties ... is not 'so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention', the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved.

It is clear from this statement that a multiplicity of possible meanings does not mean that a particular contract term is uncertain. It is only if *no* precise meaning can be attributed to the term that it – and potentially the entire contract itself if the ambiguous term cannot be effectively severed – will fail for want of certainty. The courts endeavour to elucidate this meaning from the ostensible intentions of the parties.⁵ In line with the objective theory of contract, this means that the parties' *actual* subjective intentions or understandings with respect to the content of their

⁵ 'The function of a court of construction is to ascertain what the parties meant by the words which they have used': *Watson v Phipps* (1985) 63 ALR 321, 324 (Lord Brightman). See also *Cobram Laundry Services Pty Ltd v Murray Goulburn Co-operative Co Ltd* [2000] VSC 353, [36]; *Winslade Partners Pty Ltd v Steri-Flow Filtration Systems (Aust) Pty Ltd* [2011] SASC 157, [115]; *Commonwealth Steel Co Ltd v BHP Billiton Marine & General Insurance Ltd* [2017] NSWSC 1445, [48].

agreement are excluded from consideration.⁶ If utilising a comic contract, therefore, what the parties actually intended their visuals to convey is irrelevant to the court's assessment of how the reasonable businessperson would have actually interpreted them. The courts will, however, construe intent in a way that reflects the commercial purposes and objects of the transaction, by reference to the context in which it was made, the relevant background, and the market in which the parties are operating.⁷

There is no question that interpreting visuals, particularly those unaided by accompanying text, may be quite challenging. While all judges are trained in the art of linguistic analysis and expression, not all are necessarily capable of interpreting artistic forms. For most people, processing text and language and engaging in logical reasoning is a function of the brain's left hemisphere, whereas processing artistic imagery and spatial information is a function of the brain's right hemisphere (Cacioppo and Freberg 2018: 124–5). This matters because most lawyers and judges – the ones seeking to give meaning to disputed contracts – are notoriously 'left brain' thinkers and so they may not be as astute or effective at interpreting imagery (Mauet 2005: 2; Landrum 1992: 60–61). Precedent holds, however, that mere difficulty in interpretation does not necessarily translate to legal uncertainty.⁸ This principle would logically apply to pictures as it would to words. New interpretative principles specific to comic art could theoretically be developed by the courts, but these principles would still need to operate within the broader framework of existing general rules that govern the interpretation of contracts. This is particularly so for the lower courts, which would likely be first to hear a dispute concerning a comic contract and which would simultaneously be bound by the doctrine of precedent to follow the rulings of the courts above them.

⁶ *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 105-6; *Byrnes v Kendle* (2011) 243 CLR 253, 284; *Ho v Lau* [2019] NSWSC 1609, [70]; *Termite Resources NL (in liq) v Meadows (No 2)* (2019) 370 ALR 191, 221.

⁷ *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-7; *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85, 111; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551.

⁸ *McDermott v Black* (1940) 63 CLR 161, 175. 'Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted': *G. Scammell and Nephew Ltd v H C and J G Ouston* [1941] AC 251, 268 (Lord Wright). See also *Mineralogy Pty Ltd v Sino Iron* [2016] WASCA 105, [23].

Evaluating the Validity of Comic Contracts

Against the backdrop of the basic principles of contractual interpretation, the archetypal comic contract can now be assessed. Again, to conclusively determine the legal certainty of a given comic contract, it would need to be evaluated on its merits. It is important here to distinguish a comic contract's *content* from its *form*. Each contract will differ in terms of the types and quantities of visuals used, so it is clearly impossible to comment on the validity of comic contracts as a class by reference to substance or content alone. Instead, what follows is an analysis of the validity of comic contracts as a class by reference to their *form*, and how this class might generally be treated by the courts.⁹ The term 'form' here is used in the comic art sense to describe the medium or vessel in which the contract's content is held (McCloud 1993: 5–6). Commercial contracts, like comics, utilise different layouts and styles. Just as we can distinguish graphic novels from comic books, so too can we distinguish a land sale agreement from a contract of guarantee. The content of each class of comics or contracts will vary greatly, but the overall form will generally be similar. What follows is an evaluation of comic contracts as a *form of contractual agreement*, incorporating visual elements as they have been used in commerce.

To date, there is no known judicial statement speaking directly to the overall validity of comic contracts as a class. This follows from the fact no comic contract has yet been the subject of litigation. There have, however, been extrajudicial remarks. Speaking at the 'Comic and Creative Contracts Conference' hosted by the University of Western Australia in 2017, former High Court Chief Justice Robert French stated that there was 'no reason in principle why pictorial contracts explained orally or supplemented textually or contextually could not be enforceable in the same way as any other contract' (Marin-Guzman 2018). Some commentators even appear to

⁹ The law is not unfamiliar with doing this. For example, when determining if terms have been correctly incorporated through signature upon a document, regard will be had to the form of the document. If what was signed could not reasonably be regarded as contractual in nature, the 'signature rule' in *L'Estrange v Graucob* [1934] 2 KB 394 will not apply: *D J Hill & Co Pty Ltd v Walter H Wright Pty Ltd* [1971] VR 749. The 'signature rule' provides that a person who signs a contractual document will be bound by the terms expressed in the document, irrespective of whether or not they have read and understood them.

presume the validity of comic contracts (Barton et al 2019: 71–2).¹⁰ These comments are encouraging though, of course, have no binding legal effect. It is also worth noting that the former Chief Justice's remark implies that a comic contract may not be able to rely solely upon its visual elements. The reference to the contract being supplemented with text or other contextual elements may signify doubt as to the comic form's ability to effectively embody a contractual agreement.

Firmer comfort can be taken from the fact pictures are routinely used in court proceedings and judgments outlining the same. Visuals serve two roles in case reports, which I term *functional* and *communicative*. The functional role of visuals is to display evidence or other innately pictorial features of a case. For example, where the misleading or deceptive qualities of product packaging are in question, it is useful – if not *essential* – to include a visual in the judgment to help contextualise the court's reasoning. An example is *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181, where the court included numerous images of the types of packaging of the defendant's range of popular pain medication 'Nurofen'. These images were scrutinised carefully before being deemed to have misled and deceived consumers, contrary to s 18 of the Australian Consumer Law. The varieties of packaging claimed to target specific types of pain when each medication in fact contained the same formulation and active ingredients and was no more or less effective than the others in treating the symptoms shown on the packaging.

The communicative role of visuals, on the other hand, is to convey a message, either expressly or through implication. Some examples of the use of a visual to convey an express message include a diagram, timeline, flowchart or explanatory 'elements' document provided to a jury to clarify complex facts, processes or legal principles.¹¹ Judges might even use tables or the like to more clearly explain their

¹⁰ '[T]here's no reason why a court should not be able to derive a clear meaning from a contract in the form of a comic: interpreting pictures is very much a part of everyday life': Hutchison 2018; 'Contracts are about intention – and if it is actually made clearer and understandable by pictures then all the better': Andersen 2018.

¹¹ See, eg, *Curtis v R* [2016] NSWCCA 299, [17].

legal reasoning in case reports.¹² A Swedish appellate court won an award in 2010 for, among other features, its novel use of imagery in its judgment to simplify the facts of the case (Haapio 2012: 70). Visuals might also be used metaphorically, as in the American case of *Gonzalez-Servin v Ford Motor Co* 662 F.3d 931 (2011), where Posner J cryptically chastised the appellants' counsel for ignoring dispositive precedents referred to in the respondents' briefs. In describing this conduct as 'unacceptable', 'unprofessional' and 'pointless', his Honour included two pictures at Page 934 in the judgment: one of an ostrich with its head buried in sand (**Figure 3**), and another of a businessman doing the same (**Figure 4**). The clear message is that the ostrich-like tactic of pretending damaging authorities do not exist is an unwise advocacy tactic.



Figure 3: Image appearing in judgment of Posner J in *Gonzalez-Servin v Ford Motor Co* 662 F.3d 931 (2011). Case report on public record.

¹² See, eg, *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194, [224].



Figure 4: Image appearing in judgment of Posner J in *Gonzalez-Servin v Ford Motor Co* 662 F.3d 931 (2011). Case report on public record.

There is also some pertinent Australian case law which has gone unspoken in the debates surrounding the enforceability of comic contracts. *Aintree Holdings Pty Ltd v Ground & Foundation Supports Pty Ltd* [2008] WASCA 225 provides some of the strongest support yet for the idea that visuals can themselves acquire contractual status. In that case, building company Aintree requested that Ground, a geotechnical engineering firm, submit a tender for some construction works on one of Aintree's client's properties at Mount Pleasant, South Australia. The works involved the erection of lightweight sheet piling on two of the property's boundaries to act as a temporary retaining wall. Aintree's request for tender was accompanied by architectural

sketches indicating the height of the piling as Australian Height Datum (AHD) 7.70.¹³ Ground submitted a tender which Aintree accepted subject to Ground providing more detailed plans for the proposed work. Ground supplied three sketches to Aintree depicting the height of the piling as AHD 7.60, 100 millimetres lower than the required height. The sketches were accepted, and Ground commenced and completed construction to the specification it stated in its sketches. Aintree later paid only a portion of the contract price, arguing Ground's work was defective and not to specification. Ground sued for the balance owed.

The Supreme Court of Appeal for Western Australia found in favour of Ground. The court recognised the unorthodox tender process that had occurred whereby the tenderer was selected pending its provision of more detailed work plans. Aintree's unequivocal acceptance of Ground's sketches in response to its request for further detailed plans satisfied the condition that qualified Ground's selection. The court regarded there as being an implied term that upon providing the detailed plans, and those plans being accepted, Ground would complete the work in accordance with the sketches, which included the lower piling height. Most importantly, the court observed at Paragraph 52 of its judgment that, having been accepted in this manner, 'the sketches *acquired the status of a contractual document*'. It is clear from this statement that sketches, which are fundamentally technical drawings or pictures (Schank Smith 2008; Liebing 1999), can themselves be 'contracts'. By logical extension, a series of intelligible visuals threaded together to reflect the terms of a commercial agreement must be capable of being contractual.

Of course, such a simplistic comparison overlooks the inherent (and important) differences between sequential art such as comics with more focussed, technical visual forms such as architectural drawings. The former requires the reader to reconstruct the linear sequence of events from a series of arranged panels. The use of tiers and gutters helps shape the narrative for the reader, and the characters, events and dialogue provide the basis for the story. Technical drawings, on the other hand, do

¹³ AHD is a standard measurement to determine a particular height above sea level.

not invite subjective interpretation nor endorse a layout which requires anything other than a straightforward reading of the structures, materials and measurements detailed in the images and supporting text. Architectural sketches are meant to be read in a single, particular way; unlike comics, they are not engineered to be reconstructed from their own elements nor to encourage abstract exegesis. In contrast to comics, technical drawings also have no temporal or emotional dimensions requiring sequential form to elucidate their meaning. They cannot, therefore, be easily likened to forms of comic art.

Moreover, the court's remark in *Aintree Holdings* must be read in context. The architectural sketches were deemed to be contractual in nature against the backdrop of the facts and circumstances relevant to the dispute. Ground had already submitted a tender to Aintree, which involved a minimal amount of text elaborating on its detail. The three sketches sent afterwards were not considered in isolation but rather in the frame of the parties' earlier dealings. The court considered that the sketches should be regarded as contractual in order to make the parties' agreement commercially workable. They were regarded as part of the overall 'package' which comprised the legal contract in this case. The point here is that a drawing, or indeed any visual, may well be legally recognised as contractual in nature, but such a finding will be made with reference to the specific facts before the court.

Notwithstanding some lingering uncertainties, on the basis of practice, commentary, judicial authority, and logic, there seems to be support for the idea that comic contracts incorporating visuals can be legally enforceable. In line with the leading case law on contractual interpretation, provided the courts can attribute meaning to the visuals used (in the same way they would with words alone) and discern the parties' intentions, the contract should be regarded as valid and binding. The only obstacles to judicial recognition of the validity of comic contracts appear to be rooted in cultural resistance or misconception of the interpretative process. In the first case, judges might simply be dissuaded by the unconventional nature of comic contracts. After all, we are born into a 'writing culture' which emphasises the primacy of words; Western societies communicate primarily through reading and writing (Hibbitts 1992: 905). Artistic and visual forms of expression have traditionally been

regarded as secondary. This is certainly true of legal culture.¹⁴ The law's language is words, and it is deeply sceptical of visualisation (Boehme-Neßler 2010: ix; Keating and Andersen 2016: 11; Waller et al 2016: 53).

In the second case, judges may conflate the assessment of a contract's clarity with the appropriateness of its form. The role of the courts is to elucidate the manifest intentions of the parties irrespective of the mode through which the parties have captured the terms of their bargain. A comic contract may seem an unusual or in some cases nonsensical choice of contracting method, but the court's role is not to judge the aesthetic appeal or practical utility of the contract;¹⁵ it need only give it meaning wherever possible. If what the parties reasonably intended can be determined from considered construction of the visuals they have employed, there is no reason why those visuals cannot carry legal force the same way that equally clear words could. There is no obvious legal distinction (in the sense of the judge's role) between interpreting words and interpreting pictures, save for the effort that may be required in either process.

There is, however, a significant practical distinction: images are not interpreted in the same manner as words. To employ the language of the formalist contract theorists, the imagery involved in the comic form necessarily draws meaning from the reader's own reconstruction of its visual and verbal elements. Traditional prose is limited in that one can choose fonts and basic orientations, but it is otherwise presented in successive lines to be read in the typical Z-path sequence. It is more constrained and offers far less by which to deduce its meaning. The comic form, on

¹⁴ In the recent US case of *Fetch Interactive Television, LLC v Touchstream Technologies, Inc*, C.A. No. 2017-0637-SG (Del. Ch., 2019), the Delaware Court of Chancery interpreted a contractual provision which mistakenly included an incongruent word and number in a term by giving preference to the word. The term read '...shall cure such default within fifteen (30) days'. The court cited *Duvall v Clark* 158 S.W.2d 565, 567 (Tex. Civ. App. 1941), where the 'elementary common law rule' that 'the written words of an instrument control and prevail over figures' was restated. The decision emphasises the primacy of words over all other forms of expression in law.

¹⁵ If it were, then the dying farmer's will in *Estate of Harris* (1948) Can Bar Rev 1242, which the farmer wrote on his tractor fender while trapped beneath the vehicle, would have been invalid solely because of the fact it was not in conventional form. Though a will is not a contract per se, the courts are still tasked with determining whether the basic requirements of validity are present, irrespective of form. See also *In the Estate of Slavinskyj* (1988) 53 SASR 221, where the testator's scribbled note in Ukrainian on a plasterboard wall was deemed to constitute a valid will.

the other hand, is, as Hatfield notes, a tension-filled art: '[T]he fractured surface of the comics page, with its patchwork of different images, shapes, and symbols, presents the reader with a surfeit of interpretive options, creating an experience that is always decentred, unstable, and unfixable' (Hatfield 2005: xiii–xiv). Whether comic contracts can be interpreted with objective precision is therefore questionable given their meaning will very much depend not only upon how the contract is depicted but also how the imagery is subjectively construed. This also has ramifications for the integration of comic art into contract law. As mentioned earlier, contracts are interpreted objectively. The courts seek to establish the common intention of the parties by reference to what a reasonable person would have understood the terms of the agreement to mean. The parties' subjective interpretations are excluded from this assessment, whereas they are critical to the extraction of meaning from comic art. Accordingly, the concept of comic contracting requires a fusion of seemingly incompatible ideologies.

Moreover, construction of a sequential narrative in a comic contract is likely to be difficult. Unlike traditional comic narratives, a comic contract will typically consist of multiple categories of terms which, though broadly related, concern different (and sometimes entirely disconnected) aspects of the parties' legal relationship. As with all comic forms, judges would need to attempt to construct the comic contract's narrative to properly contextualise its terms and give it meaning. This will be close to impossible if no such narrative exists. Scholars such as Groensteen argue that visual elements throughout a comic narrative – or, in this case, a comic contract – should speak to one another as easily as those either side of a gutter on the same page (Groensteen, 2007: viii–ix, 6, 21–23). Creating this kind of coherence and ubiquity throughout a commercial contract, even one imbued with visual elements, however, is a daunting task.

Conclusion

It is a well-known fact that people do not read contracts, and even if they do read them, they scarcely understand them. Comic contracting has been touted as one potential solution, encouraging the use of visualisation in the generation of commercial agreements to make them more inviting, comprehensible and efficient. This method has many pros and cons, discussed extensively in the small body of litera-

ture. Surprisingly, what has not been considered in the literature is whether such contracts are legally valid. The benefits that comic contracts offer are moot if such agreements will not stand up in a court of law. This article has examined some of the commentary and authorities speaking to this issue and reasoned that comic contracts, though perhaps prone to difficulty in construction, are capable of satisfying the threshold of legal certainty under Anglo-Australian contract law. However, the interpretative role of the courts will be made especially difficult in light of the capacity for comic art to carry meanings exposed only through subjective construction of its elements. It will, of course, take a judicial decision to conclusively answer the question, but there seems no logical reason why comic contracts cannot pass muster. The courts need only resist the urge to judge a contract by its cover.

Competing Interests

The author has no competing interests to declare.

Editorial Note

This article belongs to the Graphic Justice collection, edited by Thomas Giddens and Ernesto Priego with support from the journal's editorial team. Our gratitude to our pool of peer reviewers. Though it is the journal's policy to limit footnotes and endnotes to a minimum, editorial exceptions have been made for domain-specific articles such as this one. Every effort has been made to trace copyright holders and to obtain their permission for the use of copyright material under educational fair use/ dealing for the purpose and criticism and review and full attribution and copyright information has been provided in the captions.

References

Cases

Aintree Holdings Pty Ltd v Ground & Foundation Supports Pty Ltd [2008] WASCA 225.

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181.

Byrnes v Kendle (2011) 243 CLR 253. DOI: <https://doi.org/10.1016/j.jag-ing.2011.03.011>

Cobram Laundry Services Pty Ltd v Murray Goulburn Co-operative Co Ltd [2000] VSC 353.

- Commonwealth Steel Co Ltd v BHP Billiton Marine & General Insurance Ltd* [2017] NSWSC 1445.
- Curtis v R* [2016] NSWCCA 299.
- D J Hill & Co Pty Ltd v Walter H Wright Pty Ltd* [1971] VR 749.
- Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194.
- Duvall v Clark* 158 S.W.2d 565 (Tex. Civ. App. 1941).
- Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544.
- Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640.
- Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.
- Estate of Harris* (1948) Can Bar Rev 1242.
- Fetch Interactive Television, LLC v Touchstream Technologies, Inc*, C.A. No. 2017-0637-SG (Del. Ch., 2019).
- Fitzgerald v Masters* (1956) 95 CLR 420.
- G Scammell and Nephew Ltd v H C and J G Ouston* [1941] AC 251.
- Gonzalez-Servin v Ford Motor Co* 662 F.3d 931 (2011). DOI: <https://doi.org/10.3917/itm.662.0387>
- Ho v Lau* [2019] NSWSC 1609.
- In the Estate of Slavinskyj* (1988) 53 SASR 221. DOI: [https://doi.org/10.1016/S0090-3752\(88\)80091-7](https://doi.org/10.1016/S0090-3752(88)80091-7)
- L'Estrange v Graucob* [1934] 2 KB 394.
- McDermott v Black* (1940) 63 CLR 161.
- Mineralogy Pty Ltd v Sino Iron* [2016] WASCA 105.
- Rogers Communications Partnership v Bell Aliant Regional Communications, Ltd* [2015] N.B.J. 294.
- Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85.
- Telecom Decision CRTC 2006-45 (28 July 2006).
- Telecom Decision CRTC 2007-75 (20 August 2007).
- Termite Resources NL (in liq) v Meadows (No 2)* (2019) 370 ALR 191.
- Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429.

Watson v Phipps (1985) 63 ALR 321. DOI: https://doi.org/10.1007/978-1-349-07406-8_10

Winslade Partners Pty Ltd v Steri-Flow Filtration Systems (Aust) Pty Ltd [2011] SASC 157.

Articles/Books/Reports

Asprey, M. 2003. *Plain Language for Lawyers*. Annandale: Federation Press.

Barton, TD, et al. 2019. Successful Contracts: Integrating Design and Technology. In Corrales, M, Fenwick, M and Haapio, H (eds.), *Legal Tech, Smart Contracts and Blockchain*. Singapore: Springer. DOI: https://doi.org/10.1007/978-981-13-6086-2_3

Barton, T, Berger-Walliser, G and Haapio, H. 2013. Visualization: Seeing Contracts for What They Are and What They Could Become. *Journal of Law, Business and Ethics*, 19: 47–63.

Berger-Walliser, G. 2012. The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement. In: Berger-Walliser, G and Østergaard, K (eds.), 2012. *Proactive Law in a Business Environment*. Kobenhavn: DJØF Publishing.

Berger-Walliser, G, Bird, RC and Haapio, H. 2011. Promoting Business Success through Contract Visualization. *Journal of Law, Business and Ethics*, 17: 55–75.

Bhatia, KL. 2010. *Textbook on Legal Language and Legal Writing*. New Delhi: Universal Law Publishing.

Boehme-Neßler, V. 2010. *Pictorial Law: Modern Law and the Power of Pictures*. London: Springer Science & Business Media. DOI: <https://doi.org/10.1007/978-3-642-11889-0>

Botes, M. 2017. Using Comics to Communicate Legal Contract Cancellation. *The Comics Grid: Journal of Contracts Scholarship*, 7: 1–21. DOI: <https://doi.org/10.16995/cg.100>

Brown, LM. 1951. The Practice of Preventive Law. *Journal of the American Judicature Society*, 33(2): 45–49.

- Brunschwig, C.** 2001. Visualisierung von rechtsnormen. In: Fögen, et al. (eds.) 2001. *Legal Design, Zürcher Studienzur Rechtsgeschichte*. Zurich: Schulthess Juristische Medien. vol. 45, p.1ff.
- Cohn, N.** 2013. *The Visual Language of Comics: Introduction to the Structure and Cognition of Sequential Images*. London: Bloomsbury.
- Coyle, JF** and **Weidemaier, WMC.** 2018. Interpreting Contracts without Context. *American University Law Review*, 67: 1673–1717.
- Denning, A.** 1979. *The Discipline of Law*. Boston: Butterworths.
- Duncan, R** and **Smith, MJ.** 2009. *The Power of Comics: History, Form, and Culture*. New York: Continuum.
- Duncan, R** and **Smith, MJ.** 2009. *The Power of Comics: History, Form, and Culture*. New York: Continuum.
- Faure, MG** and **Luth, HA.** 2010. Behavioural Economics in Unfair Contract Terms. *Journal of Consumer Policy*, 34(3): 337–58. DOI: <https://doi.org/10.1007/s10603-011-9162-9>
- Giancaspro, M** and **Langos, C.** 2016. *Understanding Contract Law: A Practical Guide*. Sydney: LexisNexis.
- Groensteen, T.** 2007. *The System of Comics*. Jackson: University Press of Mississippi.
- Haapio, H.** 2012. Contract Clarity and Usability through Visualization. In: Marchese, FT and Banissi, E (eds.), 2012. *Knowledge Visualization Currents: From Text to Art to Culture*. London: Springer Science & Business Media. DOI: https://doi.org/10.1007/978-1-4471-4303-1_4
- Hatfield, C.** 2005. *Alternative Comics: An Emerging Literature*. Jackson: University Press of Mississippi.
- Hayes, KJ.** 2008. *The Road to Monticello: The Life and Mind of Thomas Jefferson*. New York: Oxford University Press.
- Hibbitts, BJ.** 1992. 'Coming to Our Senses': Communication and Legal Expression in Performance Cultures. *Emory Law Journal*, 41(4): 873–960.
- Kay, M** and **Terry, M.** 2010. Textured Agreements: Re-Envisioning Electronic Consent. In: *Symposium on Usable Privacy and Security*, Redmond, WA on 14–16 July 2010. DOI: <https://doi.org/10.1145/1837110.1837127>

- Keating, A** and **Andersen, CB**. 2016. A Graphic Contract: Taking Visualisation in Contracting a Step Further. *Journal of Strategic Contracting and Negotiation*, 2(1–2): 10–18. DOI: <https://doi.org/10.1177/2055563616672375>
- Landrum, JF**. 1992. *Out of Court: How to Protect Your Business from Litigation*. New Orleans: Headwaters Press.
- Liebing, RW**. 1999. *Architectural Working Drawings*. New York: John Wiley & Sons.
- Mauet, TA**. 2005. *Trials: Strategy, Skills, and the New Power of Persuasion*. New York: Aspen Publishers.
- McCloud, S**. 1993. *Understanding Comics: The Invisible Art*. Northampton: Paradox Press.
- Passera, S**. 2012. Enhancing Contract Usability and User Experience through Visualization: An Experimental Evaluation. In: *International Conference on Information Visualisation*, Montpellier, France on 11–13 July 2012. DOI: <https://doi.org/10.1109/IV.2012.69>
- Passera, S, Smedlund, A** and **Liinasuo, M**. 2016. Exploring Contract Visualization: Clarification and Framing Strategies to Shape Collaborative Business Relationships. *Journal of Strategic Contracting and Negotiation*, 2(1–2): 69–100. DOI: <https://doi.org/10.1177/2055563616669739>
- Phillips, L** and **Balmford, C**. 1995. Plain Language – It Just Plain Works. *The Compleat Lawyer*, 12: 27–30.
- Rekola, K** and **Boucht, K**. 2011. Visualizing Service Contracts – The Case of an Equipment Manufacturer. In: *International Conference on Information Visualisation*, London, England on 13–15 July 2011. DOI: <https://doi.org/10.1109/IV.2011.35>
- Schank Smith, K**. 2008. *Architects' Sketches: Dialogue and Design*. London: Routledge.
- Tiersma, PM**. 2000. *Legal Language*. London: University of Chicago Press.
- Waller, R**, et al. 2016. Cooperation through Clarity: Designing Simplified Contracts. *Journal of Strategic Contracting and Negotiation*, 2(1–2): 48–68. DOI: <https://doi.org/10.1177/2055563616668893>

Websites

- Andersen, CB.** (19 January 2018). *Comic Contracts and Other Ways to Make the Law Understandable* [Online] The Conversation. Available at <https://theconversation.com/comic-contracts-and-other-ways-to-make-the-law-understandable-90313> (accessed 22/12/2019).
- Aurecon.** (5 May 2018). *Australia's First Visual Employment Contracts Launched* [Online]. Available at <https://www.aurecongroup.com/about/latest-news/2018/may/visual-employment-contract>.
- Brownlee, J.** (16 April 2010). *GameStation EULA Collects 7,500 Souls from Unsuspecting Customers* [Online]. Available at <https://www.geek.com/games/gamestation-eula-collects-7500-souls-from-unsuspecting-customers-1194091/> (accessed 22/12/2019).
- Fox News.** (15 April 2010). *7,500 Online Shoppers Unknowingly Sold their Souls* [Online]. Available at <https://www.foxnews.com/tech/7500-online-shoppers-unknowingly-sold-their-souls> (accessed 22/12/2019).
- Fox-Brewster, T.** (29 September 2014). *Londoners Give Up Eldest Children in Public Wi-Fi Security Horror Show* [The Guardian Online]. Available at <https://www.theguardian.com/technology/2014/sep/29/londoners-wi-fi-security-herod-clause> (accessed 22/12/2019).
- Hern, A.** (14 July 2017). *Thousands Sign Up to Clean Sewage Because they Didn't Read the Small Print* [The Guardian Online]. Available at <https://www.theguardian.com/technology/2017/jul/14/wifi-terms-and-conditions-thousands-sign-up-clean-sewage-did-not-read-small-print> (accessed 22/12/2019).
- Hutchison, A.** (9 August 2018). *How Contracts Drawn Up as Comic Strips are Being Put to Use in South Africa* [Online] The Conversation. Available at <https://theconversation.com/how-contracts-drawn-up-as-comic-strips-are-being-put-to-use-in-south-africa-100835> (accessed 22/12/2019).
- Marin-Guzman, D.** (2 May 2018). *Aurecon Backs 'Visual Contracts' as Future of Work* [Online] Financial Review. Available at <https://www.afr.com/work-and-careers/management/aurecon-backs-visual-contracts-as-future-of-work-20180502-h0zjch> (accessed 22/12/2019).

Vitasek, K. (14 February 2017). *Comic Contracts: A Novel Approach to Contract Clarity and Accessibility* [Forbes Online]. Available at <https://www.forbes.com/sites/katevitasek/2017/02/14/comic-contracts-a-novel-approach-to-contract-clarity-and-accessibility/#1e2f1e347635>.

How to cite this article: Giancaspro, MA. 2020. Picture-Perfect or Potentially Perilous? Assessing the Validity of 'Comic Contracts'. *The Comics Grid: Journal of Comics Scholarship*, 10(1): 7, pp. 1–27. DOI: <https://doi.org/10.16995/cg.188>

Published: 16 July 2020

Copyright: © 2020 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.

Third-party content is included in articles for research and educational purposes only under Academic Fair Dealing/Fair Use. Unless otherwise stated all third-party content is copyright its original owners; all images of and references to characters and comic art presented on this site are ©, ® or ™ their respective owners.



The Comics Grid: Journal of Comics Scholarship is a peer-reviewed open access journal published by Open Library of Humanities.

OPEN ACCESS The Open Access icon, which is a stylized 'A' inside a circle.