"Bauhaus Drafting"

Tips and Tricks for Modern English Language Contracts

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Topic 3: The correct use of *entitled to* and *may*

As discussed in the first two instalments of this series on English language contract drafting (see Bonner Rechtsjournal, Ausgabe 01/2012), in order to accurately transform a negotiated agreement into a binding legal document, modern contract drafting focuses on the use of consistent, clear, and logical wording and structure – what I term "Bauhaus Drafting". Of central importance is the correct use of "operative language". To review, "operative language" is used to describe the words in a contract that dictate the duties, rights and privileges of the parties to the contract. These words are essential in order to build the legal infrastructure of any contract in English.

In the two previous instalments of this series, I discussed at length the correct usage of the words *shall, will* and *must* to express "duties" in English language contracts. In this current instalment, I wish to discuss the correct words to express "rights" and "privileges" within a contract, namely *entitled to* and *may*. As noted in the previous instalments, such small, seemingly inconsequential words are, in reality, the essential tools by which lawyers weave legal consequences into a contract. In addition, as we will see, the correct use of *entitled to* and *may* also have important psychological as well as strategic implications for the shrewd contract drafter.

Creating "Rights" in English Language Contracts

Let's first look at how "rights" are drafted in English language contracts. I hope I am not insulting the reader's intelligence by pointing out the old common contract law maxim: "*for every duty there is a right, and for every right there is a duty*." Traditionally, duties in English language contracts are represented by the word *shall*, and rights are represented by the phrase *entitled to*. Given the facts that rights and duties are two sides of the same coin, the following have exactly the same meaning:

Seller *shall* deliver...

Buyer is *entitled to* receive...

Both of the above phrases have the same legal consequences; they simply are coming at those legal consequences from two different angles. Therefore, I could draft an entire contract using duty language:

Seller shall...Buyer shall...Seller shall...Seller shall... Buyer shall...

I could also just as easily draft a "mirror image" of the same contract, with all the exact same legal consequences, but this time using rights language:

Buyer is entitled to...Seller is entitled to...Buyer is entitled to... Buyer is entitled to...Seller is entitled to...

Again, both versions would have the exact same legal consequences. However, all things being equal, lawyers tend to prefer to use duty language because it is both more succinct and uses the active voice. On the other hand, using rights language tends to lead to more unclear, less direct, complicated, passive voice sentence structures, all of which are normally to be avoided.

If we have established at this point that an entire contract could be drafted using only duties language or only rights language; and if we have also established that duty language, and thus the use of *shall,* is preferable to rights language, and the use of *entitled to*, due to both grammatical and clarity considerations, the question remains as to why one would ever choose to use rights language in a contract, and thus the phrase *entitled to*, in the first place?

The answer is that "rights structured" provisions are incorporated into a contract based on strategic, rather than stylistic or grammatical, considerations. The simple fact is that rights give people a feeling of power and entitlement. For example, the U.S. Constitution has a "Bill of Rights", not a "Bill of Things the Government Shall Not Do to Us" though, legally, that is what Americans are actually worried about. To have rights, as I tell my students, gives people a "warm and fuzzy" feeling inside, plain and simple! That warm and fuzzy feeling can be utilized by lawyers to their advantage in a number of scenarios.

One of the most basic situations is when there is a "big fish" and "little fish" scenario, such a consumer contract. For example, if I am drafting a contract for a major automobile manufacture, I could state:

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Manufacturer *shall* give a refund …

Rather, it is better to state:

The Purchaser is *entitled to* receive a refund …

Similarly, insurance policies often employ rights language, not:

Insurance company *shall* replace the window.

But rather:

The policy holder is *entitled to* a replacement window.

While the grammar in a "rights structured" contract clause may be a bit more complicated, the psychological benefits justify the extra effort. It gives the other party a sense, real or imagined, of power and makes the entire contract look more like a two way street, even if reality dictates otherwise.

The psychological effects of using rights language in contracts can also ultimately impact a company's bottom line as well. For example, in an employment contract, an employee who works on commission might be faced with either one of the following sections in his or her contract:

Company *shall* pay a 5% bonus on all sales over €500,000.

Agent is *entitled to* receive a 5% bonus on all sales over €500,000.

While legally exactly the same, which do you think will make the agent feel more "warm and fuzzy", thus pushing him or her to meet the sales quota and, ultimately, helping Company's bottom line? Clearly it is the latter "rights structured" sentence. Therefore, as a matter of strategy, the conscious use rights language, and thus the phrase *entitled to,* should be employed to create such a positive tone in contractual relationships.

Creating "Privileges" in English Language Contracts

Privileges are defined in common law contract theory as, "a right without a duty corollary". Thus a privilege is "one-sided" right, a form of discretionary authority that gives its holder a choice or permission to act. The word *may* is traditionally used in English language contracts to create privileges and not the word *can* (in fact, the mantra in my drafting course is, "there are no *cans* in contracts"). In a similar fashion to *entitled to*, the word *may* in contracts should be employed consciously to strengthen your clients' position.

The most obvious use of *may* is dictated by simple English grammar, namely, when a party has a right to choose between more than one option:

Seller *may* deliver by land, sea or air.

No great mystery in this usage.

In addition, when *either party* has a right to do something or exercise an option, *may* is traditionally employed in English language contracts:

Either party *may* assign this contract …

However, the more subtle and yet extremely useful way of utilizing the operative language *may* is when it is employed to exercise unilateral discretionary authority. By placing a *may* into a contract, the contract drafter is allowing decisions on what actions will be taken in a given situation to be made at that point in the future when it comes into being. A *may* is normally triggered by a condition precedent or condition subsequent drafted into the contract. Once one of these conditions is triggered, the beneficiary of the condition is then allowed to choose from various options in responding to the condition. Thus, by using the word *may* a lawyer creates "forks in the road" within the contract. For example:

If the compressor breaks, the Manufacture *may* send a technician to repair the generator or provide Buyer with a refund.

In this case, which "path" (repair or refund) Manufacturer takes is entirely within the control of Manufacturer, Buyer has no say in which option will be chosen. Not only does that allow Manufacture to control the course of the contract, it also allows Manufacture to deal with the realities on the ground in the here and now (is it more cost effective, at present, to service the generator or refund the money?) rather than locking themselves into a course of action at the contract's conception, as the *shall* / *entitled to* dichotomy by definition does.

Thus, the use of *may* can be a powerful tool to put your client, or the other party, in the driver's seat as the contractual relationship plays itself out. This being the case, as with any operative language, when a lawyer comes across the word *may* in a contract, it behooves him or her to pause and analyze who this particular privilege is benefiting and how might the various options available impact the future course of the contract. At a more general level, one should be conscious of just how many *mays* are on your client's side of the ledger, and how many *mays* are on the other side. As a general rule, the more *mays* any one particular party have, the more control that party exercises over how the contractual relationship unfolds over the life of the contract; thus dictating the direction the contract will take at various twists and turns in the parties' contractual relationship.

This concludes our discussion of operative language use in English language contracts. Once again I would like to

stress the following point: as a lawyer dealing with English language contracts, one must train one's eyes so that words such as *shall, must, entitled to,* and *may* jump off the page at you. Not only are these the fundamentally building block for any well-written and legally enforceable contract, they are also, as we have seen, above and beyond simple style, essential tools to craft a contract that best meets your clients' needs and interests.