"Bauhaus Drafting"

Tips and Tricks for Modern English Language Contracts

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Topic 5: The "Front" of the Contract

Having discussed in previous issues of the *Bonner Rechtsjournal* the basics of how to draft the operative language (see Bonner Rechtsjournal 02/2012, 207 ff.) and the key boilerplate provisions included in any English language contract (see Bonner Rechtsjournal 01/2013, 61 ff.), we now turn our attention to the formatting of the contract itself. This article will explore what is commonly termed the "front" of the contract, namely, the introductory sections of the contract. The "front" of a common law contract comprises the Exordium/Introductory Clause, Preamble/Recitals, and Transitional Language/Words of Agreement. These elements identify the agreement, explain its purpose, and state that the parties agree to the provisions that follow. As with other aspects of modern drafting usage, rather than simply falling back on 'it was ever thus', modern convention dictates that every aspect of the contract's structure must have a justifiable and rational purpose behind it. The goal of this article is to explain how and why the front of a common law language contract is drafted and structured the way it is, focusing as always on clear, logical and consistent usage.

The Exordium/Introductory Clause

What follows is an example of a well drafted introductory clause, technically known as the exordium:

> **STOCK PURCHASE AGREEMENT**
>
> This stock purchase agreement is dated September 12, 20XX, and is between ACME HOLDINGS; INC., a Delaware corporation ("ACME") and TROY TECHNOLOGIES LLC, a Delaware limited liability company ("Troy").

The term "Agreement" is used, not "Contract" in the title and throughout the contract. In the document itself, there is no need to capitalize 'agreement' if it is merely referring to the contract itself. If the agreement comprises more than one document or somehow relates to a complex business relationship memorialized in various documents, then the term 'Agreement' should be defined in the definition section and 'Agreement' capitalized throughout the document. The title of the document should also clearly identify the contractual agreement at hand, thus distinguishing it from other agreements. At the same time, the contract title should not be too long and cumbersome, nor should you use terms such as "Sale and Purchase Agreement"; as the one implies the other, chose either one or the other term, not both. The title of the agreement should then be 'pulled down' to the first sentence using the exact same wording. There is no need to capitalize it, as the goal should be to use lower case letters in the first sentence for both grammatical and esthetic reasons.

The first sentence should begin with 'This' so that you can structure it as a sentence. For similar reasons, you should use the term 'is dated' so that the sentence has a verb; the phrase 'is dated' is also simpler and clearer than 'made' or 'is entered into'. The actual dating of the contract, and the importance of the form and proper wording, will be discussed in the next section.

The term 'between' should be used, rather than the older and antiquated 'between and among' or 'by and between' in this section of the sentence. There was a time when it was thought that 'between' referred to two parties and 'among' for three or more, but it is clear that 'between' can also refer to three or more and thus this duality of usage has been abandoned in modern drafting.

The names of the parties should be written in all capital letter, followed by the type of legal entity they are and where that legal entity exists. While common, modern drafting style dictated that the parties not put their addresses in the exordium, rather, the address should appear in a separate 'notification' section located in the body of the contract. This makes the exordium clearer and less cluttered.

Following the identification of the legal entity, write the name of the parties as it will be referred to in the body of the contract. As the name of the parties is usually long and cumbersome, a shortened version of the name is usually used. The shorted reference name should be set off with parentheses, underlined, and put in quotation marks. It is also preferable to customize the names of the parties, rather than using abstract legal terms such as "lessor/lessee", "creditor/debtor", "transferor/transferee" etc., which might lead to unnecessary confusion.

Dating the Contract

Since the exact time a contract becomes enforceable can have significant legal implications, the dating of the contract is a crucial consideration. The dating of the contract

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can profoundly influences the covenants, representations and warranties made by the parties. Therefore, within the common law traditions, certain conventions dictate how one signals the parties' intention regarding contract dates. For example, if a contract is meant to become immediately effective upon the signing of both parties on the same date, modern drafting convention dictates that the date written in the exordium is the date the contract becomes effective. This date should generally be the only date provided for in the contract and therefore the signatories should not date their signatures. The example in the box above follows this format and indicates that the contract was signed by both parties on September 12th and that the contract's provisions are to take effect as of that date.

It is often the case, however, that the parties do not actually physically sign the contract at the same time, particularly in the common law system, which lacks the need to have a notary present. These time discrepancies are often due to logistics, unexpected delays or are intended to avoid gaps in coverage. The traditional way that English contracts reflect the reality that one or more parties signed a contract on a date other than the date dated in the introductory clause is to state that the agreement is 'dated *as of*' the given date (emphasis added). The use of 'as of' thus signals to the reader immediately that the date which follows is the effective date of the contract, with all the provisions of the contracts such as covenants, representations and warranties running from that date. When drafting a contract with an 'as of' date, you should also indicate its actual signing date somewhere else in the contract. This might be important for tax or other reasons. Therefore, have the signatories date their signatures and provide in the contract that it only becomes effective once the last party signs.

However, although the above approach is common, at least one American court has decided that it creates ambiguity as to the contract's effective date (see, *Sweetman v. Strescom Indus., Inc.* 389 A.2d 1319, 1322 (Del. Super. Ct. 1978). In addition, not all parties dealing with English language contracts may realize the significance of the 'as of' phrasing. Therefore, as precaution in international contracts, it might be wise to include the 'as of' signing date in the concluding paragraph:

> To evidence the parties' agreement to this agreement's provisions, the parties have executed and delivered this agreement *on January 1, 20XX, but contractual obligations relating hereto as of the date set forth in the exordium.*

Lastly, there are situations where the parties wish to execute a contract presently that will only take effect at a later date. In that situation, the parties should avoid putting a date in the exordium at all. Rather, the parties should include an "effective date" provision within the contract, ideally isolated and titled as such in order for the parties to quickly and easily find it.

STOCK PURCHASE AGREEMENT

This stock purchase agreement is between ACME HOLDINGS; INC., a Delaware corporation ("ACME") and TROY TECHNOLOGIES LLC, a Delaware limited liability company ("Troy").
(and in the body of the contract)

Effective Date. This agreement is effective as of February 10, 20XX.

The goal in all three versions – present, earlier or later dating– is to clearly signal to other lawyers whichever option the parties have chosen and assure that there is no ambiguity or confusion as to when representations, warranties or other time sensitive contractual provision come into effect.

The Recitals/Preamble

Most contracts of any length or complexity contain, following the title and before the body of the contract, a group of paragraphs known as the 'recitals' or 'preamble'. Courts use the recitals to help determine the intent of the parties. The recitals state any background information that the parties regard as relevant and serve to introduce the body of the contract. Although the practice of including recitals may be helpful, it is often overdone. More importantly, the drafter must be careful not to cast in the form of recitals provisions that are in fact representations or agreements.

Just as the opening arguments in a common law trial are not considered evidence but rather an orienteering overview, so too are the recitals viewed as a mere introduction without substantive effect. Due to this fact, the parties should not address in any detail the rights and obligations of the parties in the recitals. You should also not state in the agreement itself that the recitals are "incorporated by reference".

There are four common types of recitals. The first is 'context recitals', describing the circumstances leading up to the making of the agreement. A second type is the 'purpose recitals' which indicate in broad terms what the parties wish to accomplish. A third type is the 'simultaneous transaction recital' which, as the name implies, is utilized when there are a number of agreements being entered into at the same time. Lastly, and most importantly perhaps is the 'substantive importance recitals' which point the court toward a particular type of remedy by, for example, pointing out the uniqueness of the item under contract and thus paving the way for equitable relief. Similarly, in the event of ambiguity, as the guiding principle of contract interpretation is "the intent of the parties", this type of preamble may point to the envisioned relationship between the parties or the specificity of performance expected.

As far as structuring the recitals, once again simple, clear and logical is the name of the game. This is achieved by using conventional paragraph structure, rather than numbering. Additionally, although completely archaic, you still occasionally run across preambles prominently featuring

"WITNESSETH" and "WHEREAS". This phrasing *had* a time and a place. For centuries English language contracts were written by hand. In order to avoid attempts to alter the contracts meaning by changing the punctuation, they were written as one long single sentence without any punctuation, sometimes running on for pages! In order to break up the flow and to structure these documents, "WITTNESSETH" and "WHEREAS" were used prominently at various points throughout the document as reference points. Obviously, modern paragraph structuring, the use of punctuation and a printing press in every home has made the use of this style completely unnecessary. However, since drafting is passed from legal generation to generation, and since it does make the document look very "lawyerly", the usage has persisted into the modern time. It is, however, to be avoided at all costs.

The Transitional Language/Words of Agreement

In order to draw a bright line between the introduction to the contract and the 'legally binding' section of the contract, the common law contract uses 'transitional language', also known as 'words of agreement'. Once again, historic legalese without any modern logical or legal basis long dominated this section of the contract. For example, traditionally it was common to use the phrase "know all men by these presents" or "Now, therefore, in consideration of the premises[1] and mutual promises herein contained, the parties hereby agree as follows."[2] Rather than using this archaic form, the following are the modern drafting conventions:

If the contract/contains a set of recitals, the transitional language should be:

Accordingly, the parties agree as follows:

-or -

The parties *therefore* agree as follows:
(emphasis added)

If the contract does not contain a set of recitals, the transitional language should be:

The parties agree as follows: / It is agreed:

This transitional language should follow immediately after the exordium/preamble and before the definition section. Its purpose is to draw a clear line as to where the background information regarding the contract ends and where the substantive elements of the contract begin.

By applying these simple and logical drafting conventions to your exordium, recitals and transitional language, the "front" of your English language contracts will conform to modern drafting style.

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[1] *Premises* is not a typographical error. It means "that which came before" (i.e., the information provided in the exordium).

[2] The common law requires an offer, acceptance and consideration in order to form a binding contract. While a complex legal concept, consideration can be summarized as a "bargained for exchange". It was thought that if the parties stated that "good consideration" had been given, then the court would enforce the contract. However, the courts have consistently ruled that just because someone states consideration has been given, it does not make it true, and thus the contact could be found to lack consideration regardless of such a statement. As this phrasing does not in reality serve as a legal safety net, it should be avoided.