

“Bauhaus Drafting”

Tips and Tricks for Modern English Language Contracts

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Topic 6: Drafting Style Tips

Contracts do not need to be eloquent, but they do need to be clear, simple and concise. This is even more important when drafting English language contracts for a non-native speaking audience. The following are 20 conventions of style and usage that promote clarity, simplicity, and conciseness in English contracts (and some points, I assume, would improve German language contracts as well!):

1. Use Consistent Terminology – The “Golden Rule of Drafting” is to always use the same word to refer to the same person, thing, entity or concept, and always use a different word to refer to a different person, thing, entity or concept.

“Buyer”, “Vendee”, “Recipient”, “Purchaser” all mean the same thing, so pick one and use it throughout the contract.

2. Write Short Sentences – Limit each sentence to one idea. In English, aim for an average sentence length of no more than 20 words, and ideally 12 words or less.

For Example:

Buyer, who will make all shipment arrangements, will accept the goods at the place of delivery, which is Seller's plant in Ohio, and will have the goods removed by no later than 10 days following the date of this contract, subject to extension if Department of Transportation permits are delayed.

It could be broken down, reworded, and condensed as follows:

Buyer shall accept delivery of the goods at Seller's plant in Ohio. Within 10 days following the date of this contract, Buyer shall remove the goods from Seller's premises. This time is automatically extended if Department of Transportation permits are delayed.

3. Use Simple Sentence Structure – The easiest type of sentence for the reader of a contract to understand is one that is structured in order of subject, operative language, verb and object.

Buyer [subject] shall [operative language] deliver [verb] the goods [object].

This is particularly important in contract drafting. By loading the front of the first sentence of the first paragraph of any particular contract provision with this “subject, operative language, verb, object” structure, the reader of the contract can spot the relevant provisions of that particular section quickly and easily:

§1.1 Buyer shall deliver goods ...

§1.2 Seller may delay shipment ...

§1.3 Buyer is entitled to a refund ...

4. Use Common, Ordinary Words – Keep the focus on writing clearly and understandably, using the simplest language you can. An Attorney must balance simple language and structure while at the same time accurately reflecting the goals of the client.

Say *sign* instead of *execute* a contract

Say *debt* instead of *indebtedness*

Say *pay* instead of *remunerate*

5. Use Terms of Art and Trade Terms Consciously and Cautiously

a. Define “special words” in a definition section.

b. Only use these “special words” in the contract itself in the exact way you defined them in the definition section.

c. Use the “find and replace” function on your computer to make sure that the definition fits your usage.

6. Avoid Unconventional Capitalization – for example, *THEREFORE*, or *WHEREAS*:

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Historically, hand-written English contracts were one long sentence with no punctuation. This was done in order to avoid people coming along later and adding punctuation in an effort to change the agreements meaning. In order to break-up these long, handwritten documents, and to give them some sort of structure, "THEREFORE" and "WHEREAS" were written in large, bold, capital letters in an effort to distinguish various sections of the documents. With the birth of the printing press, let alone computers, this style is outdated, distracting and purposeless. However, you still see it being done on occasion in modern contractual documents. It is best avoided.

7. Eliminate Legalese – hereinafter, said, heretofore, thenceforth, witnesseth, party of the first part, party of the second part, etc.

Commonly known as "legalese", these archaic words, and the verbose character they give to a document, are confusing and grammatically unnecessary and should be avoided.

8. Avoid the Use of *said*, *such*, and *same* –

- a. Do not use *said* or *such* as adjectives.

Replace "said goods" or "such goods" with "the goods"

- b. Do not use *such* or *same* as pronouns.

"will ship the same" = "will ship the (tractor, widget, etc.)"

9. Eliminate All Redundant Couplets and Triplets – such as:

- a. *furnish and supply*
- b. *sell, alienate, and dispose of*
- c. *terminate, cancel, or revoke*
- d. *lien, charge, or encumbrance*

Simply pick one or the other, and follow the "Golden Rule" by using it consistently throughout the contract.

10. Eliminate Redundant Enumeration – for example:

Seller has four (4) days to ...

11. Eliminate Other Redundant Expressions. For example, implicit in the notion of *100 meters* is that a distance is involved. It is thus unnecessary to refer in a contract to a *distance of 100 yards*.
Omit *period* in "*after a period of time*"

Omit *the month of* in "*during the month of January*"

Omit *until a later time* in "*postponed until a later time*"

12. Use 'to be' Verbs Sparingly – The *to be* verbs include *was*, *is*, *are*, *were*, and *been*. Active verbs are usually clearer and more concise. Thus, instead of saying:

If Contractor is unable to ...

Say,

If Contractor cannot

13. Avoid Compound Prepositions – The expression *in order to*, which contains two prepositions, can be replaced with the single preposition *to*. Similarly:

- a. Replace *by all means* with *by*
- b. Replace *until such time as* with *until*
- c. Replace *as a consequence of* with *because of*
- d. Replace *in case of* with *if*
- e. Replace *in a manner characteristic of* with *like*

14. Avoid Nominalization – a nominalization is a verb that has been converted into a noun. Another verb must then be put into the sentence to make it grammatical. When the 'doer' is not the grammatical subject, the normal grammatical order is interrupted. Without an active verb a sentence suffers, and nominalizations essentially freeze action verbs in nouns. This causes the sentence to collapse under its own weight, as the writer must usually add prepositions and other phrases to sort out meaning. Nominalization is one of the biggest problems in legal English prose.

For example, the simple verb *alter* becomes *an alteration* (noun), to which the verb *make* must now be added = *make an alteration*. This is both wordy and confusing!

Common nominalizations include: "determination," "commencement," "investigation," "reliance," "failure," "formulation," and "analysis".

It is best to use the "pure verbs" when possible, for example:

- Replace *have a knowledge of* with *know*
- Replace *submit a payment* with *pay*
- Replace *make provision for* with *provide*

15. Write in the Active Voice – Replace *the goods shall be inspected by the Buyer* [8 words] with *Buyer shall inspect the goods* [5 words].

16. Write in the Present Tense – an English language contract is said to be “constantly speaking”, therefore, use of the past and present tense rarely necessary.

a. Instead of:

“if Buyer’s default was caused by” (past tense)

Say,

“if Buyer’s default is caused by” (present tense)

b. Instead of:

“Buyer will be entitled to” (future tense)

Say,

“Buyer is entitled to” (present tense)

17. Draft ‘Positively’ rather than ‘Negatively’

Instead of saying:

...this section does not apply to deliveries made on or before October 1st

Say

...this section applies only to deliveries made after October 1st

18. The caption of the contract should say “Agreement” not “Contract”

19. Make Sure the Headings of Each Contract Section Accurately Reflect the Substance of the Text

20. Avoid Gender-Specific Pronouns and Terms – While often not a problem in “one off” contracts, as the parties are known and the appropriate pronoun can be applied; pronoun usage can be particularly problematic in English language contracts, particularly form/standardized contracts. Although some novel efforts have been made over the years to create universal gender neutral pronoun – he/she or (s)he being the most memorable and notorious – both are to be avoided!

Some viable options are:

a. Delete the pronoun altogether: “Tenant may repaint the interior but before so (he) [omit the pronoun] must notify Landlord.

b. Repeat the noun: “Tenant may repaint the interior but before doing so Tenant must notify landlord.

c. Change the pronoun to *the*, *a*, or *this*.
Thus, instead of saying:

“exercise his right to first refusal”

Say

“exercise the right to first refusal.

By adopting these 20 conventions of style, your English language contracts should be, if not eloquent, at least free from the clutter that can make your English language contracts unnecessarily confusing and unclear.