



## **MODULE 3**

# **LANGUAGE AND STYLE IN CONTRACT DRAFTING**

### **INTRODUCTION**

Contract drafting may seem dry and technical there are several strongly held ideological ideas underlying contract law and its rules that are motivated by how a person uses few basic ideas to communicate<sup>1</sup>. The term proper language describes the particular necessities of the legal document. In the drafting, much emphasis is given to the words, like every term, clauses and punctuation is important. Also, the drafter must, at the very start of the document, define key terms that shall be used throughout the document.

The soul of the contract lies in a few basic ideas which can be used as rules in terms of contract drafting:

- Using correct language
- Using punctuation
- Keeping in mind grammar and style
- Using Active Voice
- Vagueness
- Ambiguity

When it comes to contract drafting, revision is very important. However, what you might achieve from revision is learning how to sentence structure, using transitions, paragraphing, grammar, and punctuation. We are going to be discussing these in detail in the article.

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<sup>1</sup> Chris, Goddard, with Amy Feller and Rue- Ann Ormand, Basic Principle Of Contract Drafting, (<https://docplayer.net/21484350-Basic-principles-of-contract-drafting-course-materials-chris-goddard-with-amy-fellner-and-rue-ann-ormand.html>)



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### USING THE CORRECT LANGUAGE

Using the correct language means using plain English language and not legalese. Legalese refers to the formal and technical language of legal documents<sup>2</sup>. It is important not to use archaic terms such as hereinafter, hereby, as they do not present a contract with anything useful.

The usage of legal pairs (e.g., good and sufficient) leads to unnecessary addition to the contract and serves no purpose. To keep the contract simple, it is important to not use Latin or foreign expressions (e.g., bona fide). They will help you achieve precise language which provides firm standards for compliance and enforcement. It avoids vagueness<sup>3</sup>.

Example - “Seller has not entered into any other contract or agreement to sell or encumber the Property or any part *thereof*.” Here, “its” can replace “thereof.” This sentence can be rewritten as “Seller has not entered into any other contract or agreement to sell or encumber the Property or any of *its* parts.”<sup>4</sup>

### USING PUNCTUATION

Another problem you might face in contract drafting is the undesirable drafting of long sentences. Good use of punctuation can be to cut short sentences to create a clear picture of what you want to convey. Rearrange long sentences: use punctuation surgically. Learning how to use different punctuations will help you construct sentences strategically and it will even appeal to the reader. It is easy to create ambiguity or uncertainty by wrong punctuation, or wrong positioning in the sentence of certain words.

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<sup>2</sup> Translegal (<https://www.translegal.com/lesson/avoiding-legalese-2-2/>)

<sup>3</sup> Chris, Goddard, with Amy Feller and Rue- Ann Ormand, Basic Principle Of Contract Drafting, (<https://docplayer.net/21484350-Basic-principles-of-contract-drafting-course-materials-chris-goddard-with-amy-fellner-and-rue-ann-ormand.html>)

<sup>4</sup> By Christina Costa & Muyiwa Odeniyide, TIPS FOR ACHIEVING CLARITY IN CONTRACT DRAFTING (<https://www.law.georgetown.edu/wp-content/uploads/2018/07/Tips-for-Achieving-Clarity-in-Contract-Drafting.pdf>)



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**For example**, “Do it early in the first quarter” sets a shorter deadline than “Do it early, in the first quarter”. Likewise,<sup>5</sup>

### **Some Punctuation used-**

**THE COMMA (,)** – The comma is the most used punctuation mark, by using coma extra information can be added in a sentence, coma is also used in coordinating dates, separating items, and writing quotes. Never use a comma between a subject and its verb, For example, do not use a comma between two subjects that share a verb or between two verbs that share a subject<sup>6</sup>

**THE HYPHEN (-)** - Hyphens can be used between two words that function together to modify a subsequent word in the sentence, as in “well-pled complaint.” Hyphens can also be used to connect some prefixes to words

**THE DASH (—)** - Dashes set off additional information or a modifying clause. As opposed to parentheses or commas, dashes create emphasis and give the impression that the added information is important, surprising, or abrupt One crucial witness—the defendant’s mother—refused to corroborate the alibi.

**THE SEMICOLON (;)** - Semicolons connect independent sentences that are logically closely related or work together as part of a larger idea. Semicolons tell the reader that more information, following the semicolon, will clarify your meaning. They add emphasis to the second clause as an important explanation of the first.

**THE COLON (:)** - Colons end a sentence that creates anticipation or suspense that the next sentence or phrase resolves, Colons also introduce a list or introduce a quotation that is not integrated into the writer’s sentence.

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<sup>5</sup> Chris, Goddard, with Amy Feller and Rue- Ann Ormand, Basic Principle Of Contract Drafting, (<https://docplayer.net/21484350-Basic-principles-of-contract-drafting-course-materials-chris-goddard-with-amy-fellner-and-rue-ann-ormand.html>)

<sup>6</sup> By Christina Costa & Muyiwa Odeniyide, TIPS FOR ACHIEVING CLARITY IN CONTRACT DRAFTING (<https://www.law.georgetown.edu/wp-content/uploads/2018/07/Tips-for-Achieving-Clarity-in-Contract-Drafting.pdf>)



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### **KEEPING IN MIND GRAMMAR AND STYLE**

English is a language that allows for a lot of playing around with tools like grammar. English has many ways to describe obligation, rights, prohibition and permission, freedom to choose, and limits on that freedom.

**Here are some general guidelines:**<sup>7</sup>

- Obligation (an order)- You must do it, Do it
- Authorization (option)- You may do it
- Prohibition (a ban)- You must not do it
- Preference (a recommendation )- You should do it
- Intention (promise)- we will do it
- No obligation- you need not do it

A few other rules would be to not use 'shall' in contract drafting as it could lead to potential loopholes and it has several meanings that are easily confused, even by lawyers. Use "must" if you want to show obligation.

Whenever there is a requirement or a condition to be stated, make sure to state it positively. Using double negatives can only create misunderstandings. Each negative adds to the risk of error.

### **USING ACTIVE VOICE**

What can be easily confusing when drafting is how to use active voice and avoid using passive voice. It is a general rule that when you are forming a contract, it is pertinent to use an active voice. A serious problem in legal documents is the overuse of passive verbs. Passive verbs hide responsibility and make sentences longer than needed.

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<sup>7</sup> Chris, Goddard, with Amy Feller and Rue- Ann Ormand, Basic Principle Of Contract Drafting, (<https://docplayer.net/21484350-Basic-principles-of-contract-drafting-course-materials-chris-goddard-with-amy-fellner-and-rue-ann-ormand.html>)



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### Examples of Active Voice:

- The supplier will provide the Products or Services as specified in the Purchase Order.
- The supplier will begin work only after receiving a Purchase Order from Buyer.
- Buyer may request changes and Supplier will submit to Buyer the impact of such changes

**For example**, “Supplier shall deliver the Product to the Buyer” makes it clear that the Supplier (who is the subject of the sentence) is responsible to deliver (the verb of the sentence) the Product to the Buyer. Passive voice sentences are longer and can create confusion. They can also de-emphasize the responsibility of the party.<sup>8</sup>

Possible cures-

1. Put a subject (the “doer”) before the verb.
2. Cut part of the verb
3. Use another verb.

Usage of passive voice should be avoided but it can be used sometimes in the drafting. However, it should be used rarely. Two or three times a page is enough. Use passives when the doer of the verb is obvious, unimportant, or unknown<sup>9</sup>. Another important tip would be to use ‘you’ where possible. Without “you” it is almost impossible to avoid passives, especially when stating obligations (imperatives).

The cleanest way to avoid passives is to lead with verbs as commands, e.g., provide, avoid, include, perform. In this way, it is even possible to avoid “you must”. Active verbs become natural for writers who ask the important question – WHO does WHAT to WHOM? (in grammar: SUBJECT + VERB + OBJECT).

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<sup>8</sup> Knowledge to Negotiate, Witing in the Active Voice,  
(<http://knowledgetonegotiate.blogspot.com/2010/12/writing-in-active-voice.html>)

<sup>9</sup> Chris, Goddard, with Amy Feller and Rue- Ann Ormand, Basic Principle Of Contract Drafting,  
(<https://docplayer.net/21484350-Basic-principles-of-contract-drafting-course-materials-chris-goddard-with-amy-fellner-and-rue-ann-ormand.html>)



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These would constitute one of the defaults and mandatory rules that the writer has to follow when drafting the contract. A few other rules to be kept in mind would be to keep sentences short up to an average of 15 words. If you go over 30, you run the risk that the reader may have a problem following you. As an author, you are responsible for communicating your ideas efficiently and effectively. Note the exception when using bullet points and lists. Try to keep subjects and verbs together: a short interruption between a subject and its verb will not slow readers much. But along one will interfere with the communication process. Keep compound verbs together: do not force readers to keep too much in their minds. Put verbs early: let readers know what the sentence is going to do.<sup>10</sup>

### **VAGUENESS AND AMBIGUITY**

A contract language shows the clarity of thought that is going through the mind of the person who is drafting the contract. Certain obstacles such as vagueness and ambiguity can confuse the reader and often lead to the interpretation boundaries that make way for non-essential meetings. Vagueness can also be expedient if addressing an issue precisely would make negotiations longer or more contentions than one or both parties want. To avoid this, this article will help you and discuss the following concepts-

A contract is ambiguous if the contract is reasonably subject to more than one interpretation. Sometimes, this can mean that it is unclear as to what the parties intended overall. But usually, an ambiguous contract means that a specific term, word, phrase, or definition is vague or unclear. One source of uncertain meaning in contracts is vagueness. With vagueness, whether a given standard is met is a function of the circumstances<sup>11</sup>.

An example of a vague word in a contract is the word promptly. How fast a contracting party must act to comply with an obligation to do something promptly is a function of what would be reasonable under the circumstances. There is no specific deadline.

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<sup>10</sup> Chris Goddard, with Amy Fellner and Rue-Ann Ormand, Basic Principles of Contract Drafting (<https://www.ulaplant.fi/loader.aspx?id=60a15dd5-ebc6-4d06-a730-c363a4cf4327>)

<sup>11</sup> Kem Adams, A new taxonomy of vagueness in contract, (<https://www.adamsdrafting.com/a-new-taxonomy-of-vagueness-in-contracts/>)



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Even though many vague terms serve a useful purpose as they give hope of a loophole for the future, it is completely unethical to incorporate them into the contract. As a general principle, a contract should be clear about the obligations of each party.<sup>12</sup>

With vagueness comes the possibility of dispute. A contracting party under an obligation to do something promptly might act fast enough that no one could reasonably say that they had not acted promptly. But the longer they take, the greater the likelihood of the other party's deciding that they had not acted promptly.

That being the case, it would seem sensible to be specific instead of vague. Saying, for example, no later than five days after instead of promptly after allows you to avoid the possibility of dispute.<sup>13</sup>

Drafters use vagueness whenever lack of control (over the future, over someone else's conduct) renders precise standards unworkable. For example, if a provision requiring reimbursement of legal expenses might apply to a broad range of litigation, from the trivial to the catastrophic, it might make sense to express a cap not as a specific amount but instead by referring to reasonable legal expenses.<sup>14</sup>

There's vagueness associated with the adjectives- reasonable, prompt, material, negligent, satisfactory, and workmanlike (among others) and any related adverbs. Vagueness using such words is assessed using a reasonable person standard.

Reasonable-person vagueness fuels plenty of litigation. But floating vagueness incorporates an extra measure of uncertainty. So use reasonable-person vagueness only when being precise doesn't make sense or exacts too great a negotiation cost, and try not to use floating vagueness at all.

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<sup>12</sup> We agree, accelerated contract drafting, (<https://precontractual.com/cross-border-contracting-book/how-to-draft-clear-and-precise-contracts/using-vague-terms-in-contracts/#:~:text=As%20a%20general%20principle%2C%20a,of%20intention%2C%20materiality%20or%20reasonableness.>)

<sup>14</sup> Ambiguous Contract, LegalMatch (<https://www.legalmatch.com/law-library/article/ambiguous-contracts.html#:~:text=A%20contract%20is%20considered%20to,definition%20is%20vague%20or%20unclear.>)



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Using gradations in vagueness like using the word grossly negligent instead of negligent. If you decode it, it means that if negligent behavior is unreasonable behavior, grossly negligent behavior is unreasonable behavior. How bad does behavior have to be to be grossly negligent? This fact is not known.<sup>15</sup>

### **Avoid these things while drafting a vague contract-**

1. Contracts mentioning contractual terms in the future. For example, the contract may state that the parties will mutually agree to new prices every six months or that the parties will agree on including additional products to be subject to the contract each calendar quarter.
2. Instead of agreeing on specific obligations and measurable criteria for objectively determining if a party has met those obligations, entrepreneurs often agree to use “best efforts,” “commercially reasonable efforts,” “reasonable efforts,” “reasonable best efforts,” “good faith efforts” or some other vague standard. Unfortunately, when asked what the difference is between these standards, the parties do not agree. Contracting parties are more surprised to learn that courts frequently do not agree on the meaning of these standards and the meanings will be different depending on the court interpreting the contract<sup>16</sup>.
3. Rather than agree on a specific period for performance, contracts vaguely specify that the task must be performed “timely,” “as soon as practical,” “as soon as reasonably practical,” “as soon as possible” or “immediately.” It is a much better practice to specify the number of days by which each party must perform a task.

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<sup>15</sup> We agree, accelerated contract drafting, (<https://precontractual.com/cross-border-contracting-book/how-to-draft-clear-and-precise-contracts/using-vague-terms-in-contracts/#:~:text=As%20a%20general%20principle%2C%20a,of%20intention%2C%20materiality%20or%20reasonableness.>)

<sup>16</sup> David G. Bates, 7 ways to avoid signing vague contract, ([bizjournals.com/bizjournals/how-to/growth-strategies/2017/06/7-ways-to-avoid-signing-vague-contracts.html](http://bizjournals.com/bizjournals/how-to/growth-strategies/2017/06/7-ways-to-avoid-signing-vague-contracts.html))



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4. Avoid defining critical terms in the contract and instead, generally refer to important terms in the contract and hope the definition will be mutually agreed upon in the future.

For example, referring in the contract to “profits,” “costs” and “revenues,” “reasonable expenses” or “standard quality,” or relying on what are perceived by the parties to be standard terms that in reality are not uniformly defined across the industry or, in the case of a dispute, by expert witnesses.

5. Do not include conflicting terms within the contract. Frequently, to avoid agreeing on a specific, mutually agreed-upon duration for the length of the contract, parties will enter into agreements specifying a one-, two- or three-year contract term and simultaneously agree that either party may terminate the agreement at any time upon written notice.

### TIPS FOR ACHIEVING CLARITY IN CONTRACT DRAFTING

#### There are few tips to achieve clarity in contract drafting

- **Shall and will** – the shall is used when referring to an obligation which is to be completed by the parties, whereas the word will is used to establish future consequences of events and circumstances that do not obligate the parties
- **Using May** – The word may is used as the auxiliary verb in a statement permitting, but not obligated, a party to act in a particular way. the word “may” mean permissive or discretionary unless the context indicates otherwise
- **Short Sentences** - Shorter sentences often make a contract more readable. As a rule of thumb, if a sentence is longer than three lines, you should consider reworking it by either reformatting the provision into sub-sections or breaking it up into two or more sentences<sup>17</sup>

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<sup>17</sup> specification writing guidance, ([https://dipl.nt.gov.au/\\_\\_data/assets/pdf\\_file/0020/234155/specification-writing-guidance-booklet.pdf](https://dipl.nt.gov.au/__data/assets/pdf_file/0020/234155/specification-writing-guidance-booklet.pdf))



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- **Try Not to Bury Verbs:** In drafting your contract, try not to use abstract nouns at the expense of verbs. This is often called “burying” the verb. Buried verbs allow you to avoid naming the actor like the use of the passive voice sometimes does.
- **Use plural language** – Using plural nouns or repeating nouns and avoiding gender-specific language, because it may mislead, distract, or offend some readers.
- **Formatting Sections and Sub-Sections:** An easy way you can add clarity to a contract is to use sections and subsections effectively. Using shorter sections generally makes a contract easier to read.

