

"Bauhaus Drafting"

Tips and Tricks for Modern English Language Contracts

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Topic 2: The correct use of *will* and *must*

As discussed in the first instalment of this series on English language contract drafting (see Bonner Rechtsjournal, Ausgabe 02/2011), modern legal writing style requires clear, precise and consistent use of language. This "Bauhaus" style of drafting moves away from the legalese-laden contracts of years past and toward a more contemporary approach that focuses its energy on precisely reflecting the party's rights and obligations. In the current and subsequent instalment of this series, I wish to further explore the use of what is known as "operative language" in structuring rights and duties in English language contracts.

The term "operative language" refers to those words in a contract that dictate the duties, rights and privileges of the parties to the agreement. In the previous instalment of this series, I discussed at length the correct usage of the word *shall* as the primary means of reflecting duties in English language contracts. In this current instalment, I wish to concentrate on the correct usages of two other words that are, in certain limited contexts, also used to create duties in English language contracts, namely, *will* and *must*.

In order to appreciate the role and importance of the use of such operative language, it is first necessary to briefly explore the role of the lawyer as the "legal structural engineer" of any contractual arrangement. As I often try to impress upon my students, once upon a time, long, long ago, there was a golden age when, besides the occasional literate aristocrat, only priests and lawyers could read. In those halcyon days, the lawyer was the master of the written agreement in all its permutations. Unfortunately for us, the literacy rate in the last hundred years has skyrocketed, thus no longer affording us this comfortable monopoly.

Why then are lawyers still such an intricate part of the contract making process? What do we bring to the table

that the other parties involved in the contract making process lack? Let's see, taking the average business agreement as an example, the CFO clearly has a brain, maybe two; the salesperson who brokered the deal knows more about the subject of the negotiated agreement than the lawyer drafting the contract could ever hope (or frankly want) to know; and often the office secretary has a humbling mastery of English grammar and usage. The question then remains, if the CFO has two brains, the salesperson knows the ins and outs of the deal like the back of his or her hand, and the secretary has mastered the present perfect progressive – and they all can read – what place is left for the humble lawyer? Have we become redundant?

Certainly not, thankfully. We of course have (or at least should have) a working knowledge of the law itself that we can bring to the table. However, in many contract deals "black letter law" does not dominate the business relationship being formed and is rarely overtly reflected throughout the contract itself. Legal considerations, like literally hundred of other considerations, factor into any agreement, but most of the content of the contract itself is dominated by the business or personal relationships being created. So it brings us once again back to the question at hand, why is it that the lawyer, rather than for example the CFO, the salesperson or secretary for that matter, writes the contract?

The reason is that the lawyer plays an indispensable role in creating the legal infrastructure upon which the actual business agreement is built. All of the above listed members of any given company can understand the business arrangement reflected in the final draft of the contract; but none of them are capable of weaving every element of the negotiated agreement onto a legal framework that transforms that specific agreement into a legally binding contract. That is why I characterize the lawyer as the structural engineer of the contractual arrangement; and as the structural engineer of the agreement, a lawyer must, when reviewing an English language contract, look beyond the text itself and focus on the words that create the legal infrastructure of the contract, namely, the operative language.

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For example, when skimming a contract, the phrase "Seller shall deliver ten apples on Friday" can be read and understood on its face by any literate person; CFO, salesperson, and secretary alike. However, what the lawyer sees, and others are oblivious to, are little words like *shall*, *may*, *must*, *if*, *when*, *entitled*, etc., that create the legal infrastructure of the contract. These are the critical words that dictate the rights and duties of the parties, and link the various elements of the negotiated agreement into a functioning and legally binding contractual relationship. Therefore, lawyers reviewing English language contracts must train their eyes so that these little, seemingly inconsequential, words jump off the page at them; and accordingly, structure their own contracts so that these words jump off the page at other lawyers reading the contracts that they themselves have drafted.

Having discussed the role the lawyer plays in creating the infrastructure of the contractual relationship, we can now turn our attention to the further exploration of the tools used to create this legal infrastructure. The two operative language words that are of interest to us in this instalment are *will* and *must*. As discussed in the previous instalment, generally *shall* is preferred to express duties, however, *will* and *must* both have their time and place.

Let us begin with the word *will*. As a general rule, *will* should be avoided in English language contracts for several reasons. Firstly, *will* is simply a weak word to express duties. Secondly, the word *will*, almost by definition violates the Golden Rule of Drafting: "Use the same word to represent the same thing, use a different word to represent a different thing." The word *will* is the cornerstone of English grammar's future tense. Therefore it should be reserved for this purpose, and should not be used to represent a duty, as English language contract drafting convention has much more specific and less grammatically critical words such as *shall* and *must* to accomplish this goal.

Thirdly, the word *will* should be avoided generally, let alone to express duties, in English language contracts due to the rather strict tense usage rules applied to English language contracts. Unlike in German contract drafting, which has a more flexible view of contract tenses, a well written English language contract should always be written in the *present tense*. The rationale behind this is summed up by the well-worn legal expression, "the contract is always speaking." This means that, from a common law perspective, the contract is not drafted "now" to refer to future events, but rather is a living document that's provisions come into existence at the very instance

an incorporated right vests or a duty is owed. Therefore, with English language contracts conventionally drafted in the present tense, there is generally no need to employ future tense grammar, and thus normally no reason to use the word *will* at all.

However, having said that, there are a few very limited exceptions to this general proscription of the word *will* in English language contracts:

1) If a contract section grants a party discretionary authority regarding a future event:

Choice of Color: The Buyer may choose the color the Painter will paint the car.

2) A contract declaration that includes a statement regarding intent:

Storage Facility: ABC Corp. and XYZ Ltd. intend to build a storage facility that will serve as the regional transportation hub. Each corporation shall contribute 50% of the cost to build the facility.

3) If a contract section states a party's belief or opinion about the future:

Modification: As a condition to any modification of this agreement, each party must obtain authorization from its Board of Directors and Stockholders. If, in the judgment of that party's Board of Directors, the amendment will have a material adverse effect on the stockholders...

4) A covenant that includes a statement about the future:

Painting of Facility: The Contractor shall use reasonable efforts to locate a subcontractor who will paint the Facility within 60 days.

5) If a section deals with a right that includes a statement about the future:

Deposit: The Landlord is entitled to retain the Tenant's Deposit to the extent necessary to reimburse itself for any and all expenses that it has incurred or will incur to repair the Tenant's damage to the Premises.

6) If a section of the contract warrants performance or a future state of facts:

Warranty: The Seller warrants to Buyer that the Product as packaged and shipped from Seller will be free from defects and will function and perform to industry standards.

Unlike *will*, the word *must* plays an important, if limited, role in modern English language contract drafting. However, it should first be noted that, as a general matter, the word *must*

is a bit too strong for the rather delicate Anglo Saxon temperament. Perhaps we all have flashbacks of our mothers telling us, "You *must* eat your spinach!" In any event, if *must* is used in English language contracts, it should be used sparingly.

Having said this, the word *must* does not have a vital place in the modern common law contract drafting universe. By replacing an otherwise "average" *shall* with the word *must*, the contract drafter immediately adds emphasis to the duty in question. It is as if the drafter has put a *shall* in bold red ink and underlined it. If you were to actually employ such a means of emphasis in the text of a contract, of course, it would look rather odd, so instead the English language contract drafter uses the word *must*.

Legally of course, a duty is a duty, whether represented by the word *shall* or *must*, and it has to be performed regardless of which word you use; but both as a matter of expediency and judicial interpretation, putting the other party on notice in a slightly more dramatic fashion by using *must* does have its place. For example, if a right is triggered, but may vanish again if certain things are not done within a restricted time period, it is important to emphasize this fact to the party subject to the potential forfeit of right due to lack

of compliance. Also, due to the "giveth and taketh away" character of this contract provision, it behoves the careful lawyer to stress the reality of the situation, so as to avoid a soft hearted judge stepping in under claims of unfair warning. Therefore, modern drafting convention employs the word *must* rather than *shall* in this situation.

Therefore, the most common and useful use of *must* in modern English language contract drafting is when a condition is used to trigger a right, which itself may lapse if certain criteria are not followed or met within a set time period. For example, if I have an insurance contract and someone breaks my window, my insurance will normally cover the damages, but only on if I notify them within 60 days of the breakage and provide at least three repair estimates in writing. Thus, on the occurrence of an event (the condition) I have a right, but that right might lapse if certain criteria are not met within fixed time window. In order to stress the reality of a right coming into being, but potentially going away again, the word *must* is employed.

The modern, concise way to structure this sort of contractual situation is the following:

If/When (Triggering Condition) (Party) **must** (criteria 1, 2, 3...) (time limit).

For example, the above described insurance policy might read:

If a window is broken, the policy holder **must** provide three repair estimates, in writing,
(*triggering condition*) (party) (criteria 1,2,3...)

within 60 days.
(time limit)

Another example from an actual contract:

If Customer disputes any part of an invoice, then in order to withhold such amount from its
(*triggering condition*)

payment, Customer **must** notify TCS in writing as to the specific amounts contested and the
(party) (criteria 1,2,3...)

reasons for such dispute on or before the Due Date of the invoice.
(time limit)

This tried and true *If...must* pattern is an extremely useful structure to employ in creating a clear, succinct infrastructure upon which this common contractual arrangement can be built.

Having now fully addressed the operative language used to creating duties, in the next instalment of this series we will explore how most effectively and creatively to employ operative language to create rights and privileges in English language contracts.