

Edward W. Daigneault

DRAFTING INTERNATIONAL AGREEMENTS IN LEGAL ENGLISH

pocket guide

2nd edition



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Preface

I am pleased to have the opportunity to prepare a second edition of this guide since I have received a number of useful suggestions and encouragement in respect to the first edition.

This edition is not an extensive rewrite, but it gives me an opportunity to review and supplement many of the comments that I rendered in the first edition. Further, I have restructured the contents to assist practitioners in using the guidelines in daily practice. Last, I have added a new section about the process of legal drafting since many drafters are often stymied when undertaking this task without following religiously a form or model agreement, a creative process that should be encouraged.

I repeat my comment from the first edition: It remains a continual challenge to provide practical assistance to both native and non-native English speakers who work in an international business and multi-lingual environment. Assisting those requiring the use of commercial documentation in English remains the goal of this publication and I would most welcome any comments from readers as to suggestions for the next edition.

I would like to thank Dr. Doris Vogl for her wonderful suggestions and encouragement and, as well, appreciation and gratitude are extended to the students attending my university course on this theme during recent years for their helpful suggestions in respect to this text as teaching material. I wish also to extend my thanks to Dr. Wolfgang Pichler and Mag. Barbara Kern of MANZ'sche Verlags- und Universitätsbuchhandlung GmbH for their support and encouragement.

Edward W. Daigneault

Vienna, May 2009

DRAFTING INTERNATIONAL AGREEMENTS IN LEGAL ENGLISH

1. Introduction

Any document leaving the desk of a lawyer, company officer or, for that matter, any person may have legal consequences. This, of course, implies a tremendous range of documentation. For simplicity and acknowledging the most practical use by non-native English speakers in business, the examples used in this guide focus on the contents of documents having a commercial impact, particularly those establishing a contractual relationship. This has been increasingly highlighted by the international cooperation in business and the fact that most documentation is written in English. Even so, the practical guidelines presented here should result in all legal writing being *brief, clear and precise*.

In spite of the examples, this is not a guide about contract principles or other legal concepts. It is written on the assumption that the drafter has a good understanding of the applicable law and any formalities¹ necessary to establish a binding relationship. Some explanations on legal issues arising at common law are presented, but these are limited to providing explanations of certain expressions, phrases or even entire provisions used in agreements as well as outlining the interpretative process of common-law courts. These explanations are to assist drafters in adapting such expressions, phrases and provisions to the applicable jurisdiction. Therefore, this guide is primarily intended to be used in *designing, understanding and writing* documentation in legal English.

¹ For example, at common law, an offer and acceptance, certainty as to agreed terms, intention to be legally bound, capacity to contract and exchange of valuable consideration — the latter is a common-law requirement unless signed as a deed. A deed at common law renders promises in the absence of consideration enforceable.

For convenience, this guide is divided into three parts:

- **Legal Drafting Steps**

An overview of the steps relating to the process of legal drafting.

- **Principles of Legal Drafting**

A review of the general principles of good writing and those specific to legal writing.

- **Standard Document Format**

An overview of specific provisions in respect of agreements.

A number of appendices appear at the end to guide the drafter through the necessary steps of:

- document design (appendix I),
- punctuation (appendix II),
- recommended familiar words and short phrases (appendix III) and
- replacement of Latin terms (appendix IV).

Finally, a number of specimen contracts are included in appendix V to bring all these points into perspective.

2. Legal Drafting Steps

It is rarely the case that a drafter is given a blank sheet of paper and tasked to write an agreement though such original drafting should be encouraged. Normally, the drafter begins with a model or previously written agreement and proceeds to change and modify this document often by deleting parts and then copying and pasting from other agreements while seldom writing an original thought. This widespread ‘salad’ approach to drafting should be discouraged and more creative thinking employed by the drafter.

The drafter needs to remember that the purpose of documenting an agreement is often to avoid or minimize future conflicts and disputes. Therefore, it is necessary to consider worst-case scenarios in the planning. Then, after an appropriate brain-storming session, a creative working process requires some structural framework and, thus, the necessity here to provide some guidelines. These guidelines are to be considered after the negotiations and when the outline of the agreement has been achieved.

2.1 Outline Document Structure

As stated below in section 4, list the *opening* and *closing* provisions, and then detail the names, addresses and representatives of the parties.

Then list the appropriate operative provision dividing then into three groups, namely:

- the *main commercial* provisions,
- *other commercial* and *main legal* provisions, and
- the *miscellaneous legal* provision

(see also section 4).

2.2 State the Obligations or Rights

Most provisions state that one or the other party has an *obligation* (and, of course, that implies the corollary that the other has a right) or a right is specified.

List the provisions and for each sketch out the *who*, *what* and *when* of the obligation or right.

2.3 Drafting Process

initail draft

Draft an initial version of each provision giving consideration to *Coode's rule* (see section 3.3.5 below) and focusing only on the *general rule* applicable in the provision.

Next, consider whether the rule is to be restricted to stated circumstances (the *when*) and whether conditions are appropriate before the rule is operational (the *if*).

Consider any *limitations, qualifications or restrictions* that may be appropriate to the 'when-if-then' of Coode's rule.

Consider also *paragraphing* (see appendix I under item 9) to divide and present the provision in a manner that facilitates a better understanding and referencing.

review words

Review the drafted provisions for *consistency* of words and identify words the need to be defined.

Provide a *definition* in the provision or listed in a separate definition provision either at the beginning (short list), at the end (longer list) of the agreement or even in a schedule should the list be quite long.

review sentences

Take the time to review the sentences for length and order (the subject, verb and object) in each provision.

Is the provision logical and understandable?

review verbs

Consider whether the active or even passive is appropriate to ensure a simple, yet direct language.

Further, has the correct verb been properly used to express either an obligation or right in a clear and definable manner?

review punctuation

Please take the time to ascertain whether the punctuation enables the reader to understand each provision as intended.

Be particularly careful about the use of commas.

use headings and numbering

Upon having completed the review, add numbering and highlight headings. As a rule, numbering provides a reference aid for the practical aspect of using the agreement while headings enable a quick aid in searching relevant topics.

These consequent working steps should enable the drafter to present a document that is well designed and expresses the intention of the parties in a logical, orderly and systematic manner.

3. Principles of Legal Drafting

A *plain* English style of writing is simply *well-written English*. No more, no less. Since the 1970s, legal drafters have been encouraged to use the English language in a way that is understood by all readers. Though this guide focuses on business usage, the drafter should always remember that written communication is read most often in the business environment of today by persons without legal education and often non-native English speakers. Unfortunately, many legal writers tend to express a multiple of ideas and thoughts in their writings in the hope of being able to be understood through this shotgun effect. Therefore, the past resulted in a complicated, wordy and unclear style. The future should result in *brief, clear and precise* documents.

In this respect, *plain-English* guidelines are provided under the following headings:

- **general principles of good writing and**
- **specific principles of legal writing.**

An interesting word of caution about writing in plain English was raised by Pritchard². He reminds his readers about the earlier ‘torrential’ style of writing that resulted in courts not necessarily giving each word its ‘ordinary and natural meaning’ — see below. Pritchard referred to a Court of Appeal decision in the United Kingdom that seemed to hold that the use of fewer words may give a word ‘extra’ significance. And, as stated by Butt and Castle³, ‘[b]eing shorn of surplus words, a document in ‘plain English’ runs the risk of judiciary scrutiny of every word – a scrutiny even more intense than that exercised on traditionally-drafted documents, where refuge may be available in thickets of verbiage’.

Even so, the goal of the drafter remains the same: to write a comprehensible and useable document.

² John Pritchard, *The Practical Lawyer*.

³ Peter Butt and Richard Castle, *Modern Legal Drafting*.

3.1 General Principles of Good Writing

It may be stated that there are three basic principles of good writing:

- use short well-structured **sentences**,
- use active, strong **verbs** and
- choose **words** carefully.

3.1.1 Sentences

unity of sentence

Most sentences should be a single thought unit. Long sentences strain the reader's memory by often having a mixture of different subjects, verbs and objects. Instead of a single sentence with five thoughts, write five sentences.

Thus⁴:

The Licensee shall communicate to the Licensor any experience gained in exploiting, selling or marketing the Product or the System and shall grant the Licensor a non-exclusive licence in respect of improvements to or new applications of the Product or the System provided that⁵ in the case⁶ of severable improvements, the Licensee is not prevented⁷ during or after the term⁸ of the agreement from freely using his⁹ own improvements or licensing them to third parties, in so far¹⁰ that does not disclose the know-how communicated by the Licensor that is still

⁴ This was extracted from an actual agreement. It offers an opportunity to make a number of comments and suggestions about changes.

⁵ *Provisos* often appear in the sentence as an afterthought to remedy an omission. Its proper use is to state a 'special rule for a special circumstance': Paul Rylance, *Legal Writing & Drafting*.

⁶ Reserve 'in the case' for a 'legal case' and consider using *if* or *when*.

⁷ It is often more appropriate to state positively that the Licensee *may* do something.

⁸ Since 'term' is ambiguous, use *duration*.

⁹ Remove sexism from the agreement. Since the word 'Licensee' itself is neither male nor female, either use *its* or repeat the word Licensee.

¹⁰ The expression 'in so far' is redundant.

secret; (this is without prejudice to the Licensee's obligation to seek the Licensors' prior approval to such¹¹ licensing provided¹² such approval may not¹³ be withheld unless there are reason to believe that licensing improvements to third parties will disclose the Licensors' know-how.¹⁴)

Becomes:

The Licensee shall communicate to Licensors any experience gained in exploiting, selling or marketing the Product or the System.

The Licensee shall grant Licensors a non-exclusive licence in respect of improvements to or new applications of the Product or the System.

When the improvements are severable, Licensee may freely use its own improvements during or after the agreement or, when still secret know-how communicated by Licensors is not disclosed, license them to third parties.

Third-party licensing is without prejudice to the obligation of Licensee to seek the prior written consent of Licensors.

The consent may only be withheld if there are reasons to believe that licensing improvements to third parties disclose know-how of Licensors."

TIP: For **unity**, generally use one thought in a sentence and occasionally a compound or complex sentence.

Note that each of these sentences is important and warrants its own reference number. If related ideas are joined, it may be appropriate on occasion to write a compound or complex sentence

¹¹ 'Such' should not be used as a substitute for *the*, *these* or *this*.

¹² See footnote 5. Here, 'provided' (normally written with 'that') indicates an exception or qualification. Use 'but'.

¹³ See footnote 7. Use positive statements.

¹⁴ Since *parentheses* are intended to set off or play down an explanation, it should not be used here as the comment certainly forms an important part of the provision and, thus, the agreement.