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Contract Drafting

'Wordsmithing'

Why contract language shouldn't be an afterthought.



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'Wordsmithing' is a term that's popular among red-meat-eating dealmakers.

At best, it refers to minions working out, away from the negotiating table, the language needed to express a given deal point. It's also used dismissively of someone whose pedantry is getting in the way of the deal.

Either way, the term "wordsmithing" suggests that once you reach agreement on a given point, coming up with the wording to express it is something of a formality.

But routinely, contract parties ostensibly reach an understanding on a given deal point, then find themselves at loggerheads once someone goes back and looks closely at the contract language. Using examples drawn from recent case law, this article discusses some of the strange things that can happen between thought and expression.

'Best Efforts'

Sometimes the problem is that the parties haven't clearly thought the deal through. For example, it is commonplace for corporate

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lawyers and their clients to assume that if a party is under an obligation to use best efforts, it must exert itself more than it would have if it had been under an obligation to use reasonable efforts.

But that distinction is inherently problematic. Besides being dubious as a matter of semantics, it also suggests that a party under an obligation to use best efforts might have to act unreasonably in order to comply with that obligation. Unsurprisingly, courts have generally held that the various 'efforts' standards—and there are many possible permutations—are all equivalent to 'reasonable efforts.'

A court will occasionally suggest that 'best efforts' does represent a higher standard than 'reasonable efforts' but without offering a reasoned distinction. See, for example, an English case, *Rhodia International Holdings Ltd. v. Huntsman International LLC*, [2007] EWHC 292 (Comm), which attempts, unconvincingly, to distinguish 'best endeavours' and 'reasonable endeavours.'

So if you want to avoid finding your client on the losing end of an argument over what 'best efforts' means, make 'reasonable efforts' the only 'efforts' standard you use in your contracts. (You might want to use it as a defined term.) And if you want one of the parties to be under an obligation to take actions that go beyond what would reasonably be required, state explicitly what those actions are.

Condition or Obligation?

A contract might also muddy the distinction between different categories of contract

language. In this regard, a recurring question under contract law is whether a given contract provision using 'shall' expresses an obligation or a condition.

Consider the following example: "Jones shall submit any Dispute Notice to Acme no later than five days after Acme delivers the related invoice."

If this example expresses an obligation, Jones would be entitled to dispute an invoice even if he were to submit a Dispute Notice more than five days after delivery of the related invoice, and Acme's only recourse would be to seek damages for Jones' untimely delivery of the Dispute Notice.

If, on the other hand, this example expresses a condition, Jones would not be entitled to dispute an invoice if he had failed to satisfy the condition of timely submitting a Dispute Notice.

It is likely that Acme had in mind that this provision would constitute a condition. But the provision uses 'shall,' a hallmark of language of obligation. That tension might be enough to result in litigation if Jones fails to submit a timely dispute notice and is unwilling to accept that as a result he gave up any right to dispute a given invoice. Whether a given provision constitutes an obligation or a condition is certainly something that gets litigated. Law school students in many a first-year contracts class are treated to a case on this issue, *Howard v. Federal Crop Insurance Corp.*, 540 F.2d 695 (4th Cir. 1976).

And in any litigation, Jones would likely prevail, doubtless to Acme's dismay. If it is at all unclear whether a given provision is a

condition or an obligation, courts will generally hold that it is an obligation, so as to skirt the all-or-nothing quality of conditions. This tendency was on display in *Cumberland Farms, Inc. v. Rian Realty, Ltd.*, 2007 U.S. Dist. LEXIS 30878 (E.D.N.Y. April 26, 2007).

Acme would be advised to rephrase the provision to make it clear that it is a condition. It could do so in three different ways. Here is one: “In order to dispute an invoice, Jones must submit any Dispute Notice to Acme no later than five days after Acme delivers that invoice.”

Unduly Vague

Often a concept that had seemed simple enough in negotiations turns out to have been expressed in contract language that was unduly vague.

Consider the dispute between E-Scrap and ScrapComputer.com described in *Wollaston v. E-Scrap Tech., Inc.*, 2007 U.S. Dist. LEXIS 27484 (D. Az. April 12, 2007). It revolved around who was responsible for certain shipping charges. The contract provided as follows: “Owner [E-Scrap] agrees to provide suitable warehousing and commercial transportation at owners’ expense.” ScrapComputer.com sought summary judgment, contending that it was clear under the agreement that E-Scrap was responsible for the shipping costs. E-Scrap countered that the meaning of “commercial transportation” was unclear. The court agreed with E-Scrap and denied ScrapComputer.com’s motion for summary judgment.

This dispute arose because the drafter of the contract failed to address adequately who had to pay which transportation costs. Note that hallmark of weak drafting, the abstract noun—framing the sentence around “transportation” allowed the drafter to get away with not being more specific as to what was to be transported where and at whose expense.

A similar problem presented itself in another recent case, *Provident Bank v. Tennessee Farmers Mutual Insurance Co.*, 2007 U.S. App. LEXIS 10671 (6th Cir. May 2, 2007), in which the U.S. Court of Appeals for the Sixth Circuit considered the meaning of the word “foreclosure.”

The defendant insurance company had refused to pay an insurance policy’s proceeds to the plaintiff bank after the policyholders’ home burned to the ground. The question facing the court was whether the term “foreclosure,” as used in a notice provision in the insurance policy, referred to foreclosure proceedings or a foreclosure sale.

If the former, the provision in question—a condition—would have been satisfied had the bank notified the insurance company before foreclosure proceedings started. If the latter, the condition would have been satisfied had the bank notified the insurance company any time before the foreclosure sale. The Sixth Circuit reversed the judgment of the district court, holding that the insurance company was not entitled to summary judgment because the meaning of “foreclosure” in the insurance policy wasn’t clear—something the drafter should have been aware of.

Ambiguity

Thanks to the widely covered “comma” dispute between Rogers Communications and Aliant Inc., fans of contract language were recently reminded how ambiguity can scupper a contractual relationship. (The author has acted as expert for Rogers in that dispute.)

But that case was hardly exceptional. A recent Illinois case, *Regency Commercial Assocs., LLC v. Lopax, Inc.*, 2007 Ill. App. LEXIS 476 (Ill. App. Ct. May 4, 2007), provides another good example of the pernicious effects of syntactic ambiguity.

Here is the language at issue: “Seller will not after the date of this agreement sell, lease or permit to be occupied any real estate which Seller owns, manages or otherwise controls within one mile of the Land for the purpose of constructing, or having conducted thereon, any fast food ([quick-service-restaurant]) restaurant or restaurant facility whose principal food product is chicken on the bone, boneless chicken or chicken sandwiches.”

This provision appears ambiguous, in that it is not clear whether “fast food” modifies just “restaurant” or modifies both “restaurant” and “restaurant facility.” As a result, the parties ended up litigating whether Regency would be in breach of this provision if it leased a nearby parcel of land to a company that planned to operate a “Buffalo Wild Wings” on the premises.

Presumably most contract parties would rather avoid this kind of dispute. The only way you can purge contracts of ambiguity is if you’re familiar with the different kinds of ambiguity and know how to spot them in the wild. As regards the language at issue in the *Regency* case, the parties could have avoided ambiguity by, for example, referring to “any fast-food restaurant or fast-food restaurant facility,” although one would want to also make clear exactly what a “restaurant facility” is.

Singular or Plural?

A dispute can arise from the most subtle of drafting flaws. *Coral Production Corp. v. Central Resources, Inc.*, 273 Neb. 379 (Neb. 2007), arose out of a dispute between owners of fractional working interests in oil and gas assets. Their joint operating agreement provided that a certain preferential right would not apply if “substantially all of the assets and/or stock of the selling party is sold to a non-affiliated third party.” Coral contended that Central’s sale of its oil and gas assets did not fall within that exception because Central had sold the assets to more than one nonaffiliated person.

With respect to this argument, the district court held in favor of Central, and the Nebraska Supreme Court affirmed. But prevailing in such litigation comes a distant second to avoiding it in the first place. So whenever you’re drafting a provision that refers to a thing or an unnamed person, consider whether you want that provision to apply (1) regardless of the number of things or persons, (2) only with respect to one thing or person, or (3) only with respect to more than one thing or person. In most contexts, the first meaning is the one you’ll want to convey. If so, you should make that explicit by using “one or more.” For purposes of the exception in the joint operating agreement, Central would have done well to have it refer to “one or more non-affiliated persons.”

And don’t assume that you can finesse this issue with a “rule of construction” that says something like “Unless the context otherwise clearly indicates, words used in the singular include the plural, the plural includes the singular, and the neuter gender includes the masculine and the feminine.” For one thing, one is entitled to wonder whether throughout a contract every use of the singular really is intended to include the plural. And you could drive a truck through the caveat “unless the context otherwise clearly indicates.” If the parties get into an argument over singular versus plural, it is entirely likely that this sort of rule of construction won’t dissuade one or more parties from filing a lawsuit. And that’s exactly what came to pass in the *Coral* case—the contract at issue contained just such a rule of construction.

Overall Clarity

Most of the problems that afflict contract prose would not directly give rise to litigation of the sort described above. But ideally all contracts would nevertheless be drafted using language

Language and Logic

Here is an extract of a contract that can be considered representative of mainstream contract drafting. It is partially annotated to show shortcomings of language and logic. Next to the original version is a redraft that addresses the original's shortcomings.

Original Draft (156 words)

1. Term of Agreement. The term of this Agreement¹ shall² commence on the date hereof as first written above³ and shall continue in effect through December 31, 2007;⁴ provided that⁵ commencing on January 1, 2008 and each January 1 thereafter,⁶ the term of this Agreement shall automatically be extended for one additional year unless not later than twelve months prior to such⁷ January 1, the Company shall have given notice⁸ to Employee that it does not wish to extend this Agreement (which notice may not, in any event, be given sooner than January 1, 2008 such that this Agreement may not terminate prior to December 31, 2008)⁹; and provided, further, that notwithstanding¹⁰ any such notice by the Company not to extend, this Agreement shall automatically continue in effect for a period of 24 months beyond the then current term if a Change in Control (as defined in Section 3(i) hereof)¹¹ shall have occurred¹² during such term.¹³

Redraft (128 words, or 82 percent of the original draft)

1. Term. The initial term of this agreement ends at midnight at the end of December 31, 2008. The term of this agreement (consisting of the initial term and any one-year extensions in accordance with this section 1) will automatically be extended by consecutive one-year terms unless no later than one year before any such extension begins RMA notifies the Employee that it does not wish to extend this agreement. If a Change of Control occurs, then (1) any notice that RMA previously delivered in accordance with this section 1 that would preclude any extension commencing after the Change of Control will be deemed ineffective and (2) the term of this agreement will automatically be extended by two years and will then terminate without the possibility of automatic extension.

1. Don't use a capital A in references to 'this agreement.' And don't use 'Agreement' as a defined term.

2. This is language of policy, not language of obligation, so 'shall' is inappropriate.

3. You only need to refer to the effective date of a contract if the parties intend for it to become effective on a date other than the date stated in the introductory clause.

4. This agreement bears a 2007 date, so it's misleading to say that the initial term ends on December 31, 2007; due to the proviso that follows, the agreement would inevitably renew for at least one year. It would be clearer to have the initial term run through December 31, 2008.

5. 'Provided that' is an imprecise way to signal the relationship between two adjoined contract provisions. In this case, the provision that follows can stand on its own.

6. The phrase 'commencing on...and each January 1 thereafter' is redundant.

7. Don't use 'such' instead of the "pointing words" the, this, that, there, or those.

8. Using 'shall' isn't appropriate, as no duty is being expressed.

9. This parenthetical is redundant, because notice given in 2007 would be ineffective to prevent the contract from being extended through 2008.

10. There is always a clearer and more succinct alternative to 'notwithstanding.'

11. Such cross-reference parentheticals are inefficient.

12. The clause beginning 'if' is a conditional clause, so use 'occurs'. (Using 'shall' isn't appropriate, as no duty is being expressed.)

13. It is not clear whether after a two-year extension the agreement would be subject to further one-year extensions.

that is clear, modern, and effective.

For one thing, you can't foresee what glitch could give rise to a serious dispute. Your best bet is to insist on rigorous contract language across the board.

And indifferent drafting can give rise to litigation even in the absence of a crucial drafting flaw. If a contract is chock-full of archaisms, redundancies, bloated and turgid prose, and other inefficiencies, it would be harder to figure out what it says and whether it makes sense. As a result, it is less likely to reflect a comprehensive and well-conceived agreement of the parties.

Don't underestimate the challenge involved in crafting clear contract language. Virtually all contracts, even those from major law firms, are far less clear than they could be. (See the sidebar for a representative example of mainstream contract language and a clearer redraft.)

Fixing contract language takes time and requires more than dealmaker expertise, and change is unlikely to happen one lawyer at a time. Instead, responsibility for crafting contract language would have to be taken out of the hands of dealmakers—in other words, it would have to be commoditized. Given the efficient and cost-effective information-technology tools that are now available, that could readily be accomplished.

For law departments, commoditization could significantly cut costs; for the more nimble law firms, it could increase profitability. Those benefits could more than counterbalance the cultural obstacles to change, which is why companies such as Cisco Systems are starting to commoditize their routine drafting tasks. Given the challenges involved in commoditizing more sophisticated documents, that might best be accomplished by an independent vendor serving law departments and law firms.

But the final ingredient in commoditizing contract drafting is one that isn't susceptible to a technology solution—expertise in crafting clear and economical contract language. In other words, expertise in "wordsmithing."