



Thursday, October 18, 2007

Contract Drafting

BY KENNETH A. ADAMS

IF YOU want to take control of your contract drafting, as opposed to regurgitating the language of whatever contract models you happen to be using, you'll have to decide what to do with "shall."

Here's where things currently stand in the United States: On the one hand, the corporate bar is addicted to "shall," with business contracts exhibiting rampant overuse of the word. On the other hand, some commentators on legal writing insist that "shall" be dropped from contracts. The most vocal is perhaps Bryan Garner, editor in chief of Black's Law Dictionary and author of many books on legal writing. A useful statement of that view, albeit from an Australian perspective, can be found in "Plain Language for Lawyers," by Michèle M. Asprey.

I take a position between these two extremes. I recommend that for purposes of business contracts you use "shall" only to impose an obligation on the subject of a sentence—in other words, to convey the meaning "has a duty to." Eliminating "shall" entirely has little to recommend it: replacing it with "must" would eliminate a useful distinction along with only negligible risks; lawyers find "must" unduly bossy; and "will" is even less promising as an alternative.

Kenneth A. Adams is a consultant and speaker on contract drafting, a lecturer at the University of Pennsylvania Law School, and author of "A Manual of Style for Contract Drafting" (ABA 2004). His Web site and blog are at www.adamsdrafting.com. This column will be on hiatus in the coming months and will resume in mid-2008.

Making Sense of 'Shall'



A fresh look at an overused word

Background

"Shall" is a modal auxiliary verb.¹ Unlike the other auxiliaries ("be," "do," "have"), the modal auxiliaries (including "shall," "will," "must," "can," and "may") supply information about the mood of the main verb that follows. "Shall" was originally a full verb (like "eat," "walk," and "play") conveying obligation or compulsion, but now it's used only as an auxiliary, as is the modal "will," which originally carried the sense of volition.

Because obligations and intentions concern future conduct, and because there's no true future tense in English, "shall" and "will" also came to be used with future time.

The result is that "shall" and "will" have each been used to express modal meanings and to mark future time. A rule arose, at least in England, to distinguish these two uses: to express future time, use "shall" when in the first person and "will" when in the second or third person, and do the reverse to convey modal meanings. This cumbersome

rule developed many exceptions.

The rule and its exceptions have largely been abandoned—in common usage, "shall" is rarely used to indicate future time and barely survives in its modal form. But in the stylized context of the language of business contracts, which as a general matter use only the third person, "shall" continues to serve as the principal means of expressing obligations.

The Problem of Overuse

But contract drafters use "shall" to do more than express obligations. They use it to express future time, and "shall" also creeps into contexts that have nothing to do with expressing obligations or future time. It sometimes seems as if drafters suspect that a contract provision won't be enforceable unless it features "shall."

This overuse of "shall" plays a large role in distancing contract prose from standard English, thereby making it harder to read. But it also helps render drafters oblivious to nuances that come into play in deciding who should be doing what in a given provision, and why.

This can result in disputes. A perennial question in contract interpretation is whether a given provision constitutes a condition or an obligation. If a provision uses language associated with obligations—as in "Widgetco shall submit any Dispute Notice to Acme no later than five Business Days after delivery of the related invoice"—a court would likely hold that it constitutes an obligation, even if it would make more sense as a condition.

Disciplined Use of 'Shall'

One way to address overuse of "shall" is through more disciplined use of the word. I advocate using "shall" only to express an

obligation that's imposed on the subject of a sentence in the active voice—"Doe shall purchase the shares from Acme." (But if a contract uses the first or second person—that's sometimes the case with letter agreements—your best bet would be to treat it as analogous to a consumer contract and not use "shall.")

To test whether a given "shall" is appropriate, check whether the sentence would still make sense grammatically if you were to replace "shall" with "has [or have] a duty to." (It doesn't work in all contexts—if you mistakenly make a condition sound like an obligation by using "shall," it would still make sense when tested using "has a duty.")

But Garner, Asprey, and other legal-writing commentators advocate doing away with "shall" entirely because it's too prone to misuse and is inconsistent with general English usage. In Garner's words, "few lawyers have the semantic acuity to identify correct and incorrect 'shalls' even after a few hours of study. That being so, there can hardly be much hope of the profession's using 'shall' consistently."² As explained below, I don't share this view.

Negligible Benefits of 'Must'

One alternative to "shall" as a means of expressing obligations is "must," which Asprey favors. Using "must" would be more in keeping with general English usage, but once you consider the implications, abandoning "shall" in favor of "must" seems counterproductive.

Replacing "shall" with "must" would result in "must" being used to express any obligation, whether it's imposed on the subject of a sentence—"The Company must reimburse the Consultant for all authorized expenses"—or on someone else—"The Closing must take place at Acme's offices." But in business contracts, unlike other forms of drafting, confusion is unlikely to arise over whether "shall" expresses an obligation or instead means "may" or "should." So for purposes of

expressing obligations, as a general matter "shall" can be relied on to convey the same meaning as "must," and replacing the former with the latter would make little difference.

Using "must" instead of "shall" would also preclude drafters from using "shall" to express future time. But the benefits of doing so would be modest: Using "shall" instead of "will" to express future time—as in "This agreement shall automatically terminate when the Acme Contract



It would be best to eliminate 'shall' from statutes and consumer contracts. But there's no reason to automatically apply that approach to business contracts.



terminates"—is inartful, but it's unlikely to result in confusion as to meaning. The same applies to the use of "shall" to express future time even when the simple present tense would be more appropriate, as in "This agreement shall be governed by New York law." Furthermore, depriving drafters of "shall" would be unlikely to make them more restrained about overuse of futurity—the most likely result would be overuse of "will."

The risks posed by "shall" can be overstated. For example, to give an indication of those risks, Garner points to the many pages devoted to "shall" in West's multivolume "Words and Phrases."³ But of the cases cited, most involve the language of statutes, not contracts.

The only issue relating to overuse of "shall" that routinely results in contract disputes is uncertainty regarding whether a given provision represents an obligation or a condition. But replacing "shall" with "must" or any other verb wouldn't resolve that problem. Instead, you'd need to revamp the provision to make it clear that you're expressing a condition—as in "In order to dispute any invoice, Widgetco must submit any Dispute Notice to Acme no later than five Business Days after delivery of the related invoice."

A Useful Distinction

The negligible benefits that would result are only part of the problem with using "must" instead of "shall" across the board. A more significant issue is that eliminating "shall" represents a quick fix that does nothing to help drafters ensure that contract obligations are expressed in the most effective way.

By contrast, disciplined use of "shall" has a role to play in that regard. As a rule, it's best to impose an obligation on the subject of the sentence, so as to make it clear who owes the obligation—"The Company shall reimburse the Consultant for all authorized expenses." But an obligation can be expressed in other ways that at best are wordy and at worst obscure

who owes the obligation. For example, one could use the passive voice—"The Consultant shall be reimbursed for all authorized expenses." Or one could use "is entitled to"—"The Consultant shall be entitled to be reimbursed for all authorized expenses." Or one could use the verb "receive"—"The Consultant shall receive reimbursement for all authorized expenses." In each of the three preceding examples, it's not stated who is required to reimburse the consultant. Depending on the context, that kind of problem could lead to a dispute.

Any drafter using the "has a duty" test to check whether in the preceding four examples "shall" was used to impose an obligation on the subject of the sentence would determine that the latter three examples fail the test. In each case, the drafter would be advised to restructure the obligation so as to make it clear who has the obligation.

And the "has a duty" test has a further benefit—it would allow drafters to diagnose inappropriate use of "shall" to express future time.

One could adopt the "has a duty" test and still use either "shall" or "must" for all obligations. But to make it easier for drafters to distinguish between obligations

imposed on the subject of the sentence and all other obligations, it would be best to use different words to convey those meanings. (And doing so would be in keeping with a core principle of drafting—don't use any given word or phrase to convey more than one meaning.) The path of least resistance would be to use "shall" for the former and "must" for the latter. Because this distinction couldn't reasonably be construed as relating to the degree of obligation, it couldn't cause any unintended mischief.

Stridency of 'Must'

So using "must" to express all obligations would offer negligible benefits and would eliminate a useful distinction. But widespread adoption of "must" in business contracts instead of "shall" faces an even more fundamental obstacle—many drafters consider that stating all obligations using "must" results in contracts that sound unduly bossy.

Asprey dismisses that objection as being "based on taste, not logic." But it would seem unrealistic to expect drafters to ignore issues of tone when deciding how to express obligations.

Because of the bossy tone of "must," Garner advocates using "will" to express obligations in business contracts.⁴ "Will" might be a more expedient choice than "must," but it's ultimately more problematic. For one thing, in general English usage "will" expresses future time rather than obligations. Furthermore, if you use "will" to impose an obligation on the subject of a sentence, you'd also use it to impose an obligation on someone other than the subject of the sentence, as well as to express future time. Such multiple meanings are exactly what currently afflicts use of "shall." So "will" isn't a plausible alternative to "must," let alone to the distinction between "shall" and "must" that I advocate.

Other alternatives to "must" are "agrees to" and "undertakes to," but their advantages are outweighed by their shortcomings. On the one hand, they're not susceptible to being used to express anything other than an obligation imposed on the subject of a sentence. On the other hand, they're ponderous, particularly "undertakes to,"

and it would be awkward to use them to express an obligation that would only arise in the future, as in "On termination of this agreement, Acme agrees to return the Confidential Materials." But the most significant problem with "agrees to" is that whereas some drafters use "agrees to" to impose an obligation, others use it as language of performance, with the idea that "Acme agrees to assign its rights to the Patent" means the same thing as "Acme hereby assigns its rights to the Patent." Clearly this could lead to confusion and litigation. See, for example, *IpVenture, Inc. v. Prostar Computer, Inc.*, 2007 WL 2812677 (Fed Cir. Sept. 28, 2007).

Everyday Use of 'Shall'

Another objection to "shall" is that it doesn't make sense to perpetuate it in contracts given that "shall" has all but disappeared from general usage. But a given population—including the corporate bar—will develop the syntax that fits its requirements. Those requirements would likely differ from the needs of other populations, with a distinctive syntax being the result. Business contracts between sophisticated parties use a language that is stylized and limited—drafting a contract is comparable to writing computer code. It shouldn't be disconcerting that in this context a word of otherwise limited utility—"shall"—has come to serve a useful function.

Those who favor eliminating "shall" from business contracts are in the habit of suggesting that the more forward-thinking of us have already abandoned "shall" and that it's only a matter of time before the rest follow suit. I haven't seen any evidence of that.

I concur that it would be best to eliminate "shall" from statutes and consumer contracts. But there's no reason to automatically apply that approach to business contracts—they serve a different function and address a different audience. That's why moves to drop "shall" from court rules, statutes, and consumer contracts have no bearing on how it's used in business-contract usages.

Missing the Bigger Problem

Due to the focus on "shall," little attention has been paid to the bigger

problem—the muddled and limited verb-use palette on display in mainstream contract drafting. Once you gain control of your verbs and related issues—for example, once you're able to draft a condition that no one would confuse for an obligation—you will understand better what to say in a contract and how to say it.

Banishing "shall" deals with the symptom, not the disease. By contrast, using "shall" to mean only "has a duty to" is intended to help treat the disease.

Those who would banish "shall" have argued that disciplined use of "shall" is beyond the reach of lawyers. But such pessimism isn't warranted. The rule underlying disciplined use of "shall"—use it to mean only "has a duty to"—is certainly straightforward enough. It does require a modest amount of semantic acuity on the part of drafters, but no more than the minimum amount required to competently articulate a client's needs.

Besides, it's too early to write corporate lawyers off as being incapable of disciplined use of "shall." Give training a chance—the notion that there are alternatives to simply regurgitating the inadequate language of contract models is still a relatively novel one. The key to disciplined verb use is education, in the form of training and rigorous reference materials. That might sound unrealistic, but I suggest that it's more plausible than the notion that the corporate bar would willingly purge its contracts of "shall" despite the limited benefits of doing so and the manifest shortcomings of the alternatives.



1. This account of the origins of "shall" is largely derived from Joseph Kimble, "The Many Misuses of 'Shall,'" *Scribes J. Legal Writing* 61, 61-64 (1992).

2. Bryan Garner, *A Dictionary of Modern Legal Usage* 940 (2d ed. 1995).

3. *Id.*

4. *Id.* at 941.