



Translating English language contracts

With their thickets of legalese, contracts can pose a daunting task for translators. **Kenneth A. Adams**, an authority on contract language, offers pointers



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Legal prose has long been the butt of jokes and the target of red-faced invective. I'm generally not inclined to join in the fun – when you encounter lousy prose at every turn, it can seem beside the point to single out one profession.

But I am willing to dispassionately acknowledge that one category of legal prose is particularly abject: legal drafting, which is a form of writing used in preparing legal instruments that seek to regulate conduct. These include statutes, regulations, and wills, but my experience is mainly with contracts.

When I'm called on to review a contract that is representative of current drafting standards, my first thought is a selfish one – a mild aggravation that I should have to wade yet again through the archaisms, redundancies, turgidities, and other problems that clog the prose of the average contract. But sporadically my thoughts are for a different constituency, those who have to translate English-language contracts.

This is in part the result of a modest exposure to languages during a childhood in various parts of Europe and Africa. My siblings spent their summer holidays as escort-interpreters for the US State Department, and my sister Christine is a conference interpreter. While my French was too shaky for that sort of undertaking, it is proficient enough to give me a sense of the sometimes awkward interface between languages. When my sister is telling an interpreting war story, I can generally be counted on to know

when to laugh. More recently, while working in the Geneva, Switzerland, office of a US law firm, I was occasionally called on to translate legal prose – always French-to-English, thankfully, but that was taxing enough. The experience caused me to wonder how a translator would tackle the sort of contracts that I routinely wrestle with.

In the years since that posting, I've devoted plenty of time to exploring the intricacies of the language of contracts. My focus isn't which provisions to include in a given contract, but instead how to express those provisions in clear and efficient prose. I thought that I'd take the opportunity in this article to explore, for an audience of translators, just a few of the many oddities of contract prose. I'm an American lawyer, but my comments apply equally to contracts drafted in Commonwealth countries.

Words without meaning

I would imagine that the principal problem facing a translator is that many elements of a contract are included not because of the meaning they convey, but because they've always been there and the drafter feels that the contract somehow wouldn't look right without them. Since the drafter incorporates those elements without considering their meaning, it can be awkward for the translator to attribute meaning to them.

Witnesseth

In any contract, the body of the contract – that which the parties are agreeing to – is preceded by the title,

the introductory clause (which names the parties), and, more often than not, recitals, which provide background information.

Recitals are often preceded by the centred heading *WITNESSETH*, with or without underlining, a space between each letter, and other glam embellishments. Such headings may be picturesque, but they're inane. Drafters seem to think that *witnesseth* is a command in the imperative mood – perhaps something akin to *Hear ye!* It is actually in the third-person singular, and is the remnant of a longer phrase, such as *This document witnesseth that* As a heading, it makes no sense.

I don't bother giving recitals a heading. But if you're faced with translating a *witnesseth* heading, your best option would be to pretend that it means 'background'. (That word is sometimes used instead of *witnesseth* as a recital heading.)

Recitals of consideration

At the end of the recitals comes the lead-in, which indicates that the parties are agreeing to that which follows. In most contracts, the lead-in refers, in a 'recital of consideration', to the consideration for the promises made by the parties to the contract.

Recitals of consideration can take many forms, but here is a lead-in containing a relatively full-blown example: *NOW, THEREFORE, in consideration of the premises and the mutual covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto covenant and agree as follows.*

In contract law, consideration means that which motivates a person to do something. A promise by another to do something is one form of consideration; money is another. Consideration, or some substitute, is required in order for an agreement to be enforceable. The ostensible function of a recital of consideration is to render enforceable a contract

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that would otherwise be held unenforceable due to lack of consideration. In this respect, however, the standard recital of consideration is of no help, since the case law shows that a recital cannot transform into valid consideration something that cannot be consideration, and a false recital of consideration cannot create consideration where there was none.

But the recital of consideration nonetheless survives. When revising a form contract, practitioners gloss over the recital of consideration. They're too busy with the daily demands of their practice to revisit concepts last encountered early on in their contracts course at law school; it's good enough for them that the recital of consideration has long been a standard feature. And they might find it comforting: the incantatory quality reinforces the notion that the law is a murky thing not to be tackled without that shaman, your lawyer. So the recital of consideration is passed down from contract to contract without a second's thought.

This explains why the recital of consideration has acquired, like barnacles on a hulk, other ludicrous archaisms, notably the hectoring *NOW THEREFORE*, the entirely obscure *in consideration of the premises* (meaning *therefore*), and the verb and noun *covenant*, which is presumably valued for its Old Testament atmospherics. It also explains the presence of outdated buzzwords of the law relating to consideration, such as references to *sufficient* or *valuable* consideration.

Instead of relying on a traditional recital of consideration, a drafter would be advised to simply state in the lead-in that *The parties therefore agree as follows*. Until such time as that practice catches on, translators will be forced to tackle the recital of consideration. In so doing, they'll be forced to lavish more thought on the recital of consideration than any lawyer does.

Shall

A less flagrant but more pervasive problem with contract prose concerns the use of verbs.

A clause or sentence in the body of the contract can serve one of a number of purposes. Each purpose requires its own category of language, and each category raises its own issues of usage.

What distinguishes the categories of contract language is the use of verbs, and lawyers blur the distinctions through rampant overuse of *shall*.

Shall is a modal auxiliary verb. Unlike the other auxiliaries (*be, do, have*), the modal auxiliaries (*shall, will, must, can, may*) express modal meaning, such as possibility, volition, and obligation. *Shall* was originally a full verb (like *eat, walk, and play*) and used to convey obligation or compulsion, but now it is 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 is 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 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 rule and its many 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 stylised context of legal drafting, which essentially uses only the third person, *shall* continues to serve as the principal means of expressing obligations, while *will* expresses future time.

It is standard practice to indicate that Acme has a duty to perform a given action by stating that *Acme shall perform* that action. This use of *shall* is consistent with the use of *shall* in standard English, and for various reasons it is superior to the alternatives, *must* and *will*.

The problem lies not with this use of *shall*, but rather with the use of *shall* in other categories of contract language. It almost seems as if drafters feel that unless a contract

provision contains *shall*, it won't be binding. As a result, it is commonplace to find *shall* used inappropriately in the following contexts, among others:

- to convey obligations imposed on someone other than the subject of the sentence (the Closing *shall* be held at Acme's offices)
- to convey the rules underlying the contract, known as 'policies' (This agreement *shall* be governed by New York law)
- in conditional clauses and matrix clauses (If Jones *shall* cease to be employed by Acme, Acme *shall* have an option to purchase the Shares from Jones)

In such contexts, instead of *shall* a drafter should, depending on the context, use *must, will*, or the present tense, or restructure the provision (for instance by using the active voice instead of the passive voice).

The significance of this for the translator is that you need to be able to tell when *shall* is being used to convey an obligation and when it is being used indiscriminately.

Provisos

A traditional component of legal drafting is the proviso, which consists of a clause introduced by *provided that* and set off from the preceding clause by a comma or semicolon.

In contracts, provisos are usually introduced with a semicolon and *provided, however, that, with provided* and *however* underlined for emphasis. In the case of a proviso that immediately follows another proviso, the formula used is *provided further, however, that* or something similar.

In this context, *provided that* is a truncation of the 'term of enactment' *it is provided that*; into the 19th-century, *provided that* was used to introduce statutory language. But *provided* is also a conjunction meaning *if or on condition that*, as in 'I'll let you go to the party, provided you take a taxi home.' It may be that this everyday use of *provided* dulls modern drafters to the fact that as currently used in contracts, *provided that* essentially continues to serve its original function: it is used to introduce not only conditions to the main clause, but also limitations and exceptions to the main clause, as well as new provisions that can be considered independently of the main clause.

As a result, using *provided that*

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is an imprecise way to signal the relationship between two adjoined contract clauses. A more precise alternative is always available, whether it be another conjunction (such as *except*) or a semicolon, colon, or full stop. And sometimes it is clearer to insert a phrase or other modifier somewhere in the body of the main clause rather than tacking on a proviso.

But I imagine that for the translator, the conservative approach would be to preserve the inadequacies of the original prose by simply using some stock phrase when translating *provided that*. Preserving the eccentric punctuation and underlining might also help warn the reader that one is dealing with legalese.

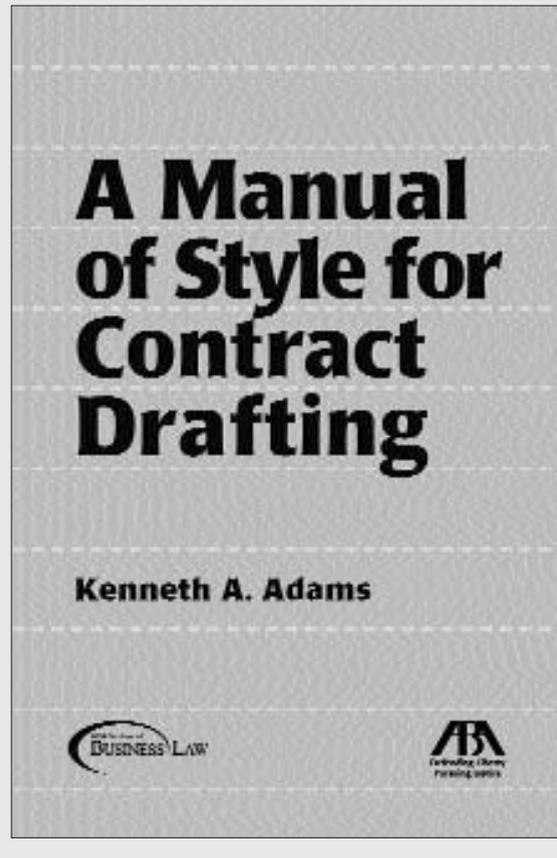
Synonym strings

Lawyers have long strung together synonyms, and rare is the contract that does not include strings of two, three, or more synonyms or near-synonyms. Some synonym strings, such as *right, title, and interest*, have a long history. Others appear to be improvisations, such as the requirement, in a share purchase agreement, that Smith *sell, convey, assign, transfer, and deliver* the shares to Jones. It is improvisations of this sort that suggest that while the synonym habit may have etymological or rhetorical origins, it survives because it allows the drafter to finesse the often-awkward task of selecting the best word for a given provision.

Drafters would be better off replacing synonym strings with a single word, unless nuances of meaning indicate that there is some benefit to using more than one of the words, using *interest* instead of *right, title, and interest*; using *sell* instead of *sell, convey, assign, transfer, and deliver*.

But a string may be necessary to make sure that a provision covers the universe of possibilities. For instance, a securities purchase agreement might include a representation by the seller that the shares are free of any *lien, community property interest, equitable interest, option, pledge, security interest, or right of first refusal*, or some similar formulation. While this string doubtless includes some redundancy, a drafter would be rash to eliminate every element except, say, *lien* without being sure that courts had

A MANUAL OF STYLE FOR CONTRACT DRAFTING



Kenneth Adams is the author of *A Manual of Style for Contract Drafting* (American Bar Association 2004). It represents the first comprehensive and accessible guide to drafting clear and effective contracts.

The book was written from the perspective of an American lawyer, but it would be of use to a wider readership, because contracts drafted in the US and contracts drafted in Commonwealth countries share the same basic concepts and use essentially the same language. Translators of legal drafting might find the sections describing the use of verbs in the different categories of contract language particularly helpful.

The book is available from the American Bar Association. Purchasers in the United States can buy it from the ABA's website, www.abanet.org. Purchasers elsewhere should call the ABA at (800) 285-2221 or email them at orders@abanet.org. Alternative purchasing channels are currently being arranged; for updates on availability, visit www.adamsdrafting.com.

construed *lien* sufficiently broadly to encompass the other terms and that the parties were aware what *lien* was intended to cover.

If a translator faced with a synonym string were able to ascertain that the extra synonyms were tacked on not to enhance meaning but instead out of tradition or an excess of caution, the translator could conceivably elect to translate just one of the synonyms. But that would seem to involve more editorial discretion than most translators would be comfortable with; realistically, there would seem to be no alternative to translating each of the synonyms.

But that presents problems of its own. For example, contracts often contain a bloated governing-law provision along the following lines: *This agreement shall in all respects be interpreted, construed, and governed by and in accordance with the laws of the State of New York*. Depending on the language involved, a translator might be at a loss to find a separate translation for each of the near-synonyms *interpreted, construed, and governed by*, not to mention *by* and *in accordance with*.

The prospects for change

Over the past 30 years or so, law schools and law firms have expended considerable efforts on improving standards of legal writing. Until recently, no comparable efforts have been made toward improving legal drafting. It may be that one reason for this is that whereas litigators are forced to write for an exacting audience – judges – a contract is generally read only by the lawyers who drafted and negotiated it and, to varying degrees, their clients. That does not represent a critical audience.

As a result, corporate lawyers remain under the sway of that most powerful of illusions, the illusion that one writes – or rather, in this case, drafts – well. They cling to tradition, and many are liable to respond tetchily to suggestions that current usages are inadequate.

Any change will come slowly. Making available to the corporate bar a comprehensive set of guidelines for contract drafting could facilitate change. In that regard, perhaps my new book, *A Manual of Style for Contract Drafting* (see above), will help move things along. □