FUNCTIONAL OR DYSFUNCTIONAL? THE LANGUAGE OF BUSINESS CONTRACTS IN ENGLISH*

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Abstract

In questo articolo si analizza il linguaggio dei contratti in inglese da una prospettiva funzionale, cercando di spiegare perché tali documenti sono ancora pieni di espressioni arcaiche e ridondanti. Dopo aver evidenziato alcune delle caratteristiche del linguaggio dei contratti in inglese, vengono esaminate le differenze fra la redazione di un testo legislativo e quella di un contratto. Successivamente si approfondiscono i motivi per cui i redattori sono così restii ad abbandonare le proprie abitudini consolidate. Infine si pone l'interrogativo se nel futuro il modo di redigere i contratti nel mondo anglofono potrebbe cambiare rispetto alla situazione attuale.

Introduction

In the English-speaking world, contracts – like wills and other texts pertaining to the sphere of private law – still tend to be littered with relics of a bygone era, such as archaic formulaic expressions (*now, therefore, this agreement witnesseth that...*), strings of synonyms or near-synonyms (*null and void*; *invalid, illegal and unenforceable*), and

* I am grateful to Kenneth Adams for his comments on a first draft of this paper. All remaining errors and inaccuracies are my own.

adverbial expressions typifying a more antiquated style of legal writing (*the Guarantors hereby agree that their obligations hereunder...*). After briefly highlighting some of the main linguistic features characterizing contracts, I compare the intrinsically 'conservative' nature of most contract drafters with the tendency among many legislative drafters to adopt a more modern approach to writing texts along the lines suggested by plain language exponents.

I thus attempt to solve the paradox as to why such "dysfunctional" (Adams 2008a) drafting practices continue to be used in contracts even in the 21st century, i.e. why drafters of contracts are generally so reluctant to abandon old habits. Evidently, it must be concluded that, despite their old-fashioned appearance and their dense legalese, contracts are still by and large capable of doing the job they are meant to do. Equally clearly, however, there is considerable room for improvement, since "legalese renders a contract a chore to read, negotiate, interpret, and use as a model" (*ibid.*), resulting in companies wasting time and money, as well as incurring the risk of disputes.

Finally, I ask whether the situation is likely to change in the foreseeable future.

1. *Some linguistic features characterizing contracts in English*

Before examining some linguistic features that characterize contracts in English, it is worth mentioning three points which may seem obvious but which nonetheless are worth bearing in mind in the discussion that follows. First, thousands of contracts are signed every day in the English-speaking world and they come in a variety of guises. Second, differences exist between the legal systems of each English-speaking country, even if they are all modelled to varying degrees on the Common law system that has prevailed in England since the Middle Ages. Third, within the English-speaking world the United States of America plays by far the most influential role in the world economy. Thus, when referring to a 'contract in English' we should remember that:

a) we are reasoning in terms of an abstract stereotype of a legal instrument which, for the sake of convenience, we will assume belongs to "mainstream contract drafting" (Adams 2008b:xxvi);

b) although the language of business contracts in English is very much the same the world over, the model is based above all on common practice in the US, even if – as we shall see – many contracts still display a number of the linguistic peculiarities normally associated with the era when America was a British colony.

That said, we can now begin our analysis. Mattila (2006:236) observes that the features peculiar to legal English are clearly in evidence in the field of contracts. First of all, contracts in English are renowned for being excessively wordy. For example, there is "a great deal of explanation, qualification, and limitation in the language" (Hill and King 2005:175) in Anglo-American contracts compared with their German counterparts, thought to be one-half or two-thirds the size of comparable US agreements (Hill and King 2005:175-176). The verbosity of most contracts in English is held to be a direct consequence of the common law rationale: "under common law the terms of a contract are always interpreted literally and narrowly" (Mattila 2006:237). The metaphor of the arms race has been aptly applied (Hill and King 2005:171) as reflecting the logic driving the contracting parties:

> Nobody will have the incentive to truncate, weeding out what's unlikely or just unnecessarily convoluted. Indeed, on the contrary, everybody (...) will have the incentive to keep what there is and add whatever they think can go wrong or might expressly rebut some possible misreading of the contract language (Hill and King 2005:182).

A second characteristic of contracts in English is that they still tend to contain outmoded expressions and legal jargon:

> Any given business contract (...) will almost certainly be cluttered with deficient usages that, collectively, turn prose into 'legalese' – flagrant archaisms, meaningless boilerplate, redundant synonyms, use of *shall* to mean anything other than 'has a duty to', inefficient layout, and so forth" (Adams 2008:xxv).

Of course, archaic formulaic expressions are deeply rooted in legal culture in general: Westminster has used the same enactment clause at the beginning of laws for centuries. But the discrepancy between form and content can be particularly striking in contracts drafted by companies that normally project an image of hi-tech modernity, as in this formulaic extract from a contract of 2008:

> NOW, THEREFORE, for and in consideration of the premises and the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and on the terms and subject to the conditions herein set forth,

the parties have agreed and do hereby agree as follows: ... IN WITNESS WHEREOF, the parties have duly executed this Amendment effective[1].

Stylistically there is nothing to distinguish this type of prose from the following extract taken from a contract signed by Gravier de Vergennes and Benjamin Franklin in 1782:

> The high contracting parties reciprocally bind themselves to the faithful observance of this contract, the ratifications of which shall be exchanged in the space of nine months from this day, or sooner if possible. In testimony whereof we [...] in virtue of our respective powers, have signed these presents [...]"[2]

Redundant synonyms are another feature considered as typifying legal English in general, though in actual fact most of the more commonly cited examples – such as *null and void*, *any and all*, *will and testament*, *terms and conditions* – tend to occur more in contracts and wills than in legislative texts. As Gustafsson (1984:123) has observed, sometimes synonyms are needed "for technical accuracy and for the sake of precision and ambiguity, but there are cases where doubling up serves no specific purpose", as in the case of *any and all* in the following extract:

> Without limiting the generality of the foregoing, the registration rights conferred herein on the holders of Restricted Securities shall inure to the benefit of *any and all* subsequent holders from time to time of the Restricted Stock for so long as the certificates representing the Restricted Stock shall be required to bear the legend specified in Section 2 hereof[3].

All of the last three citations contain some of the adverbial expressions – *herein*, *hereby*[4], *whereof*, *hereof* – that have come to epitomize antiquated 'legalese' to such an extent that Darmstadter (2008) has ironically highlighted them in the title of his book. But these legalistic-sounding adverbials feature relatively rarely in legislative texts these days (they are heavily stigmatized in drafting manuals), whereas they still abound in contracts.

[1] Signed by Virtual Radiologic Corporation: see http://www.docstoc.com/docs/.

[2] from *Journals of the American Congress from 1774-1788* available at http://avalon.law.yale.edu/18th_century/fr-1782.asp.

[3] http://contracts.onecle.com/

[4] See Adams (2008b:29-30) on the use of *hereby* in the language of performance.

3. *Drafting laws v. drafting contracts*

Fifty years ago, i.e. around the time Mellinkoff began writing his trenchant critique of legal English (1963), the stylistic differences between drafting laws as opposed to contracts were probably less marked than today. Since then we have witnessed a gradual evolution in legislative drafting towards a more modern style, whereas the way contracts are drafted today seems to have changed relatively little over the years. This, of course, is a sweeping generalization. Within the English-speaking world there are legal institutions that are still relatively unreceptive to drafting in a more modern style. For example, the British and American legal establishments have tended, on the whole, to display a greater indifference than their counterparts in Australia, New Zealand or Scotland towards embracing change (Williams 2007). And there are companies that pride themselves in adopting a modern style in customer communication and contract drafting (Milne 2000)[5], though such cases are normally restricted to consumer contracts.

The impetus for innovating legal English came above all from what is generally known as the 'Plain language movement'. Paradoxically, it was in the fields of banking and insurance rather than legislative drafting that the first tangible signs of modernization occurred in the 1970s (Williams 2005:168). But perhaps the changed political climate of the 1980s in much of the western world – with 'deregulation' and 'privatization' becoming the new buzzwords – halted the drive towards consumer protection that had its roots in the 1960s. Certainly the much-heralded Plain language initiatives of the early 1970s did not lead, as some had imagined, to a dramatic switch in style towards clearly-worded, user-friendly insurance policies, mortgages or business contracts. Once the publicity had died down it was very much a case of 'business as usual'.

Meanwhile, changes in legislative drafting techniques slowly started to creep in despite the initial scepticism of a number of government institutions. Progress has been mixed, and most plain language exponents – and probably most non-lawyers – would argue that we are still a long way from having legislative texts that ordinary citizens can easily decipher[6].

[5] The Canadian company Clarica, referred to in Milne's article, is now a division of Sun Life Financial.

[6] Such an objective is not just a pipedream. In Sweden the Division for Legal and Linguistic Revision in the Ministry of Justice employs a number of legal experts – one of whom is devoted to promoting plain language within the European Union institutions – as well as legal advisors to provide legal and linguistic services to officials in ten Ministries.

Nevertheless, if we compare today's texts with those of 40 or 50 years ago, the differences are discernible. Even in the relatively 'conservative' drafting environment of Westminster we find laws now accompanied by 'Explanatory Notes', tax laws have been rewritten in a more user-friendly way (Williams 2007), and all new legislative texts are required to be gender-neutral (Williams 2008). By comparison, "the plain English movement has not yet made a major impact in relation to the drafting of contracts between private parties" (O'Malley 2010:104). In short, much of the language of contracts appears to be 'fossilized'.

Naturally, some types of contracts are more turgid than others, with businesses the worst offenders. The situation is slightly better in the sphere of consumer contracts where sometimes legislation has intervened to ensure that contracts are written in plain language, e.g. the Pennsylvania Plain Language Law of 1993[7].

The consequences of perpetuating a style of writing texts cluttered with redundant expressions and outdated legalese making documents unpleasant to read and hard to interpret are by no means negligible. Indeed, it has even been hypothesized (Balmford 2009) that an underlying cause of the global credit crisis which first broke out in the US in late 2008 was "a lack of clarity about legal and financial obligations. The crisis began when banks could neither borrow nor lend because the complexity of obligations prevented them from determining how much debt each of them owned." Blaming the current economic crisis on lawyers for producing incomprehensible legal documents is obviously a gross oversimplification of a highly complex issue. But the moral of the story is that if everybody understands what they are signing, then fewer mistakes will be made. Sometimes obfuscation may be deliberate, hiding misdeeds; but in most cases it is the result of habit and convention.

4. *Why the reluctance to abandon bad habits?*

Lawyers continue to draft contracts the way they do for a number of reasons. First, the rationale behind the common law system would seem to discourage brevity and an experimental approach to drafting. As Darmstadter (2008:xi) has observed: "The process of drafting a legal document does not encourage tinkering". Furthermore, public officials do not normally have to pay out of their own pockets if things go wrong. Companies do. This simple fact may help to account for why legislative drafting has, on the whole, been a little more adventurous over the last few decades than contract drafting.

Second, lawyers working for firms may well suffer from the 'cut and paste syndrome' insofar as, within reason, each contract is fairly much like another: transactions using very similar documentation are colloquially known as 'cookie cutter contracts' (Hill and King 2005:175). Once a template has been created there may often be little incentive to think through the details of each individual contract, such as fine-tuning the 'Miscellaneous' provisions (often referred to as 'boilerplate'), especially if the text stretches to dozens of pages. Moreover, lawyers may well be under pressure to produce a contract at short notice. Modern technology has also contributed in making document automation seductively easy. Legislative drafters, on the other hand, cannot so readily cut and paste because the subject matter of each law is different, thus forcing drafters to reflect on how best to word each individual clause.

Third, most legislative texts are normally scrutinized by a large number of different people at various stages, many of whom will contribute to the final product by making suggestions and alterations to the text. Generally speaking, contracts are drafted by a smaller number of people[8]. This relative lack of a critical audience (Adams 2008b:xxix) also tends to encourage the perpetuation of ingrained habits.

Finally, even though most American law schools provide courses in legal writing, the tendency is to focus above all on "litigation-related legal drafting (legal memoranda and motions before the court), not covering (or barely covering) the world of contracts" (O'Malley 2010:104). Budding lawyers, therefore, mostly learn the 'art' of drafting contracts on the job, assimilating the conventions – and the legalese – used by the law firm or company that employs them.

In short, even if lawyers themselves may have misgivings about producing texts that are unnecessarily verbose and written in a style that few can properly understand, many would probably argue that 'If it ain't broke, don't fix it'. Indeed, this resistance to change may sometimes be further exacerbated in cases where a new drafting style has been imposed from above. This is the case of the Real Estate Institute of New Zealand (REINZ) which recently introduced a new standard form of agreement for sale and

See 'The Swedish Government promotes clear drafting' at http://www.sweden.gov.se/content/1/c6/04/45/22/06c47d83.pdf.

[7] "The Pennsylvania Plain Language Law: Keeping Contracts Simple" at http://library.findlaw.com/1999/Dec/1/126611. html.

[8] This may not always be the case, especially if one of the parties is not from an English-speaking country: see O'Malley (2010:114-115).

purchase on the grounds that the pre-existing form was incomprehensible to the layperson. But apparently the reform has received a mixed reception from estate agents and lawyers, and "the attempt to translate well-worn legal terms into plain English has introduced new and untested terminology and concepts that are likely to lead to more, not less, litigation"[9]. At the same time there is clearly room for improvement in contract drafting which would possibly allow companies to save time and money. So is modernizing the language of contracts advisable or even feasible?

5. *To change or not to change*

> The fact remains that revising and clarifying a legal document always involves some judgment and some risk. But the risk is worth it, and writers should not be dissuaded. Otherwise, the legal profession will never start to level the mountain of bad forms and models that we have created. [...] Change is hard, but change has to come." (Kimble 2000:109)

These words come from an academic who has worked tirelessly to further the cause of Plain legal English, including the redrafting of the US Federal Rules of Civil Procedure. But few corporate lawyers will be convinced that "the risk is worth it" purely on the grounds that contract drafting style is in very poor shape. As with environmental issues, companies have to be given incentives to persuade them that in the long run the benefits of 'going green' outweigh the costs. This would seem to be the crux of the matter: will companies actually benefit from removing the deadwood from contracts?

The answer from lawyers who have produced manuals on contract drafting is, predictably, a resounding yes. Adams (2008b:xxv) affirms that "Much litigation has its roots in mishandled contract language, even when the lawyers had every incentive to draft carefully". He also identifies the desired shift in style as abandoning legalese in favour of standard English which "has nothing to do with dumbing down contract prose to make it accessible to the non-lawyer – an impossible notion, given that a contract is necessarily as complex as the transaction it embodies" (Adams 2008b:xxvi). But Darmstadter (2008:229) cautions that "Law is both relentlessly formal and relentlessly conservative", and that efforts in trying

[9] "Plain English agreement for sale and purchase: more questions than answers?", available at http://www.internationallawoffice.com/Newsletters/detail.aspx?g=a5d69071-435a-4303-a660-cf5f2fe8e7e7.

out new drafting techniques "may not be appreciated, at least not by other lawyers" (*ibid.*).

Moreover, it may not be possible to reduce the length of a contract in English to exactly that of its German, French or Italian counterpart. The 'arms race' can certainly be curbed to some extent in English contracts, but while the European civil law judge is allowed to reason on the basis of general principles laid down in the Civil Code, the common law judge often has no such option[10].

Hence contractual details in English may still need to be specified more than they are in civil law contracts. In short, even though a German contract may function perfectly well using the half the number of words of its common law counterpart, this does not automatically mean that a contract in English could also function equally well on the same number of words. But even a reduction of 10-15 per cent can only be beneficial.

The incentive to restyle contracts on the grounds that it might save on future litigation costs is, of course, impossible to quantify. Indeed, as we have seen in the REINZ case above, lawyers tend to fear that change might only worsen the situation. However, there would seem to be one area where the benefits of shorter, more comprehensible contracts could be more tangible: international trade. Despite the current economic crisis, the push towards globalization continues apace, with English increasingly used as the lingua franca of the international business community. Quite clearly, the arcane legalese normally adopted in contracts in English will often be a barrier to comprehension to non-native lawyers, especially if they are accustomed to the civil law system. The rise in international arbitration and alternative dispute resolution (ADR) is also the consequence of seeing too many contracts end up in courts through misunderstandings. A business deal is more likely to be clinched to the satisfaction of all parties if it is written in Standard English.

Conclusions

Despite all the reservations that many lawyers have about modernizing contract drafting, it is likely that in the long run some kind of transformation will take place. Besides the obvious economic benefits that would accrue from having clearly worded contracts in international trade which

[10] Common law (and, if relevant, the Uniform Commercial Code) allows judges to fill in certain gaps in a contract. I am grateful to Kenneth Adams (p.c.) for pointing this out to me.

would inevitably result in a greater willingness to enter into a contract, there are other considerations that might gradually make lawyers more amenable to restyling contracts. And the role played by Plain language movements in English-speaking countries in relentlessly focusing on the disadvantages of persisting with old-fashioned legalese, particularly in consumer contracts, is also important.

Then there is the 'domino theory': that is, if (admittedly a big 'if') one major corporation were to completely overhaul the language of its contracts, others might quickly follow suit, especially if the restyling were accompanied by positive media publicity.

A trend that seems to be spreading is for trade groups such as National Venture Capital Association to produce model documents and make them accessible online for others to use. Moreover, the diffusion of wikis – i.e. websites allowing visitors to add, remove or edit contents – could also be profitably applied to contract drafting, despite drawbacks such as how to ensure quality control (Adams 2007:3).

Furthermore, there is the quest of national governments and international institutions for ever greater harmonization of international laws and conventions in order to simplify business transactions which will almost certainly put pressure on lawyers operating in the English-speaking world to adopt a more flexible approach to contract drafting.

Of course, these are only hypotheses, and it could well be a while before the changes become perceptible. But there does seem to be a kind of historical inevitability about the future of contract drafting. It must surely be only a question of time before the obsolete structure of contracts in English implodes under its own weight, giving rise to a more streamlined, rational model, shorn of legalese and redundancies. In short, it is hard not to agree with Kimble's words cited above: change is hard, but change has to come.

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