

"Bauhaus Drafting"

Tips and Tricks for Modern English Language Contracts

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Topic 1: The correct usage of the word *shall*

Historically, English lawyers were paid by the word; so it is hardly surprising that common law countries have a tradition of long-winded contracts full of what is now known, pejoratively, as "legalese." While long a standard tool employed by members of the legal profession to make documents look "lawyery," the use of archaic legal wording and usage has fallen out of favor in the past 10 to 20 years.

In contrast, the modern drafting convention, emanating predominantly out of the United States, is what I like to term "Bauhaus Drafting." Focusing on conciseness, clear structure and consistent logical usage of legal vocabulary, this modern drafting style aims once and for all to bring contract drafting out of the 19th and into the 21st century. It is important that practicing lawyers be aware of and follow these modern drafting guidelines, so as not to appear out of touch with current conventions of legal English writing.

One of the most obvious "violations" of modern contract drafting is in the usage of the word *shall*. For years lawyers have sprinkled the word *shall* around contracts the way a loving grandmother sprinkles chocolate shavings on a torte – the more the better! This practice has resulted in the word *shall* often being used in two very contradictory ways within a single document.

The first common usage of *shall* is to represent a duty of one or both of the parties under the contract. If *shall* is used in this sense, no other word but the name of one of the parties signing the contracts should precede that word. For example: "The Buyer *shall*...", "The Seller *shall*...", "The Parties *shall*...", etc. The second common usage of *shall*, (but a usage which is, as I will demonstrate shortly, now regarded as incorrect/confusing), is as a substitute for *is*, *is to*, *should*, *is required to*, etc. For example: "The products *shall*...", "The agreement *shall*...", "The merger *shall*..." etc.

This dual usage is problematic for several reasons. Firstly, it violates what is commonly termed the *Golden Rule of Drafting*, namely, "never change your language unless you wish to change the meaning, and always change your language if you wish to change the meaning." Therefore, if *shall* is used to express a duty in a contract, which is its

most common and useful function, it should not be used in the same contract to represent anything other than a duty. Modern United States drafting convention has adopted this perspective, dictating that *shall* is to be used to signal duties, and only duties, in English language contracts.

Secondly, usage of *shall* to represent solely the parties' duties under the contract makes review and revision of contracts much easier. For example, if there are fourteen *shalls* on a given page of a contract, but only four represent duties under the contract with the other *shalls* more or less being used as legalistic window dressing, it makes it extremely difficult and time consuming for a lawyer to quickly and accurately determine the significance of the operative language (i.e., the duties and rights of the parties) employed in the contract.

How then does one distinguish between a "good *shall*" and "bad *shall*" when drafting or, perhaps even more importantly, reviewing an English language contract? Thankfully, there is a little trick to deal with this dilemma that is both easy to remember and nearly universally accurate. To check whether *shall* (and the related word *must* where appropriate) is used correctly, simply substitute the expression "*has an obligation to*" for the word *shall*. If the word *shall* is substituted with this phrase, and the substituted phrase makes sense grammatically, logically, and legally, and it flows comfortably in the section of the contract under review, then *shall* is being used correctly; that is, to express a party's duty under the contract. For example:

Correct: Seller *shall* deliver = Seller *has an obligation to* deliver

Buyer *shall* pay = Buyer *has an obligation to* pay

Conversely, if the phrase "*has an obligation to*" does not grammatically, logically, or legally make sense when substituted for the word *shall* in a contract, then the word *is*, *is to be*, *are*, or *are to be* should be substituted for the word *shall*; or the sentence should be restructured to represent a duty. For example:

Incorrect: The Apples *shall*... = The Apples *have an obligation to*... But this is a "false imperative" because an apple cannot have a contractual duty.

Correct: The Apples *are to*...

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Incorrect: The Horse/Computer/Agreement *shall...* = The Horse/Computer/Agreement *have an obligation to...*
But, again, this is a “false imperative”.

Correct: The Horse/Computer/Agreement *is to...*

-or-

The Buyer *shall* deliver a Horse/provide a Computer.

Incorrect: The Seller *shall be entitled to* = The Seller *has an obligation to be entitled to* = the Seller has a duty to have a right to something. But this is nonsensical. It has to be one or the other, a duty or a right, not both.

Correct: The Seller *is entitled to* (if the Seller has a right to something)

-or-

The Seller *may* (if the Seller has discretionary authority)

The general rule of thumb regarding the use of *shall* is that if the name of one of the parties signing the contract precedes the word *shall*, then the use of *shall* in that case is correct. However, there are three exceptions to this. In the following cases, even if one of the party’s names precedes the word *shall*, the use of *shall* is nevertheless wrong.

Firstly, under modern drafting convention, a very common yet easily recognizable mistake is when a party precedes *shall*, and *shall* is coupled with the form of the verb *to be* (as an auxiliary verb). In this situation, you should delete *shall* and change the verb *to be* to its present tense form:

Incorrect:

The Party *shall be* excused from the performance if... = The Party *has an obligation to* be excused. But, a party cannot logically have a duty to be excused.

Correct:

The Party *is* excused from the performance if...

-or-

The Party **is entitled to** be excused from the performance if...

Secondly, the use of *shall* is incorrect under modern drafting convention if a party precedes *shall* and *shall* is coupled with a form of the verb *to have* (thus, as an auxiliary or helping verb):

Incorrect:

The Party *shall have* obtained permission from the shareholders... (creating a condition)

Correct:

The Party *must* obtain permission from the shareholders...

Incorrect:

Either Party *shall have* the right to terminate... (creating discretionary authority)

Correct:

Either Party *may* terminate...

Lastly, the use of *shall* is incorrect if a party precedes *shall* in a clause that dictates the circumstances under which a particular event may occur. Typical words and phrases to look out for are: *that, if when, in the event of*, etc. These clauses are properly drafted in the present tense so that the clause reads as presently applying whenever the circumstances in question occur:

Incorrect:

If the Tenant *shall fail* to pay the rent when due... = If the Tenant has an obligation to fail to pay the rent when due. But this is illogical.

Correct:

If the Tenant *fails to* pay the rent when due...

By following the contract drafting conventions relating to the use of the word *shall* as outlined above, your English language contracts will not only be more contemporary, they will be more logical and clear as well.

The following chart summarizes the rules regarding the use of *shall* discussed above:

A Party signing the contact does not proceed the word <i>shall</i>	A Party signing the contact does precedes <i>shall</i>
<p><i>Shall</i> is always wrong :</p> <ul style="list-style-type: none"> - If not a duty/obligation/covenant – replace <i>shall</i> with another word, often <i>is to, are to.</i> - Re-structure the sentence so that the party has a duty 	<p><i>Shall</i> is generally correct, but there are two exceptions:</p> <ol style="list-style-type: none"> 1. If <i>shall</i> is coupled with the verb <i>to be</i> or <i>shall have</i>, <i>shall</i> is wrong. 2. If <i>shall</i> is in a clause that establishes a circumstance, <i>shall</i> is wrong (clue words include: <i>when, if, in the event of</i>, and <i>that</i>).