

DRAFTING INTERNATIONAL AGREEMENTS IN LEGAL ENGLISH

1. Introduction

A *plain* English style of writing is simply *well-written English*. No more, no less. Since at least the 1970s if not earlier, legal writers have been encouraged to use the English language in a way that is understood by all readers. Though this guide focuses on business and commercial usage, the writer of legal documentation should always remember that written communication in English is read most often in the international business environment of today by persons who are often non-native English speakers and probably without a formal legal education. Unfortunately, many legal writers tend to express a multiple of ideas and thoughts in their writings in the hope of being able to be understood through a shotgun effect. This results in a *complicated, non-transparent and wordy style*.

This guide attempts to provide a quick reference aid to writers who are interpreting, revising or writing legal documentation, most notably agreements. Further, the differences in common law and civil law jurisdictions are considered to aid in the selection of words and expressions when one or the other is the governing jurisdiction in the agreement.

In any event, let us first consider the discussion of the **rectification of names** under Confucius:

“The following passage occurs in the chapter ‘Zi Lu’ 子路 in the Analects:

Zi Lu said: ‘The monarch of the state of Wei wants you to govern the country, what is the first thing you plan on doing?’ Confucius said: ‘First it is necessary to rectify the names.’ Zi Lu said: ‘Is that really

what has to be done? You are being too pedantic, aren't you now? How will you rectify these names? Confucius said: 'Zhong You, you are too unrefined. A gentleman, faced with a matter that he does not understand, takes a sceptical attitude. If names are not correct, one cannot speak smoothly and reasonably, and if one cannot speak smoothly and reasonably, affairs cannot be managed successfully. If affairs cannot be managed successfully, rites and music will not be conducted. If rites and music are not conducted, punishments will not be suitable. And if punishments are not suitable, the common people will not know what to do. So, when the gentleman uses names, it is necessary to be able to speak so that people understand. If one can say it, one can definitely do it. A gentleman should not be careless with words.'

Since this is the earliest known discussion of the rectification of names [zhengming 正名], nearly all subsequent discussions, regardless from what perspective, cite it. Yet exactly what kind of names did Confucius 孔子 [551-479 BCE] wish to rectify? Since ancient times, this simple question has inspired many answers, but no consensus view or uniform conclusion has emerged to this day.” (Cao Feng, 2016.)

Some discussions have suggested that the rectification of names refers to rectifying characters meaning that the *form, meaning and sound* of characters must be fixed before people can use them to speak and act. Therefore, the title of a person be it father and son, or monarch and minister should correspond to their actual behaviour.

A further interpretation suggests that the expression ‘rectification of names’ refers to rectification of actuality meaning using names to rectify actuality. Otherwise, precise meanings will not be used negating effective communication and resulting in conceptual confusion and even deception (Holt, 2016). In other words, when the word is dog, it is immediately recognised as meaning a dog and not a cat, and so forth.

Thus, in the broader sense, the rectification of names extends to writings in general being **clear, concise and correct** since *‘it is necessary to be able to [write] so that people understand’.*

This is particularly necessary today because of the international cooperation in business and the increasing use of English in most international documentation and negotiations. This highlights the necessity of providing practical guidelines for both native and non-native speakers in respect of *understanding, using and writing* such documentation. These practical guidelines focus on commercial documentation particularly those establishing a contractual relationship. Though being repetitive, these guidelines should result in all documentation being understood more *clearly, concisely and correctly*.

It is to be noted that this is not a guide about contract principles or other legal concepts. The guide assumes that the writer has a good understanding of the applicable law and any formalities necessary to establish a binding relationship. Some explanations on legal issues arising at common or civil law are presented, but, in conjunction with the sample agreements at the end of this guide, these are limited to providing explanations of certain expressions, phrases or even entire provisions used in agreements as well as outlining the interpretative process of the courts. These explanations are to assist writers in adapting such expressions, phrases and provisions to individual needs and the applicable jurisdiction. Therefore, **this guide is primarily intended to be used in *designing, understanding and writing* documentation in legal English and not to replace respected legal representation.**

For convenience, this guide is divided into three parts:

- **Legal Drafting Steps**

An overview of the steps relating to the process of writing legal documentation.

- **Principles of Legal Writing**

A review of the general principles of good writing and those specific principles related to legal writing.

- **Common Document Format**

An overview of the common structure and specific provisions in respect of international agreements.

In addition, several appendices appear at the end to assist the writer in respect of:

- Appendix I: Document Design.
- Appendix II: Punctuation.
- Appendix III: Recommended use of familiar words in place of short phrases and archaic words.
- Appendix IV: Recommended use of familiar words in place of common Latin expressions.

Several sample agreements are included in Appendix V to bring all these points into perspective.

Last, for clarity of the representatives and structure of corporate entities since they are the usual parties to international agreements, Appendix VI has been added to show the basic structure of corporations in England, United States, continental Europe (specifically Germany) and China.

2. Legal Writing Steps

It is rare that a writer is given a blank sheet of paper and tasked to write commercial documentation though such originality should be encouraged. Normally, the writer begins with a model or previous documentation and proceeds to change and modify this document often by deleting parts and then copying and pasting from other documentation while seldom writing an original thought. This widespread ‘*salad*’ approach to writing should be discouraged and more creative thinking employed by the writer.

With respect to an agreement, the writer needs to remember that the purpose of documenting an agreement is often to avoid or minimise future conflicts and disputes which may arise when the parties rely solely on an oral agreement even though binding between the parties. Therefore, it is necessary to consider worst-case scenarios in the planning. Then, for an appropriate brain-storming session, the creative working process requires some structural framework. This framework will take into consideration the head of agreement or terms, or letter of intent which provides the key commercial provisions as agreed to between the parties. This is then used as the basis to write the formal agreement.

2.1 Outline Document Structure

Referring to section 4 below, it is necessary to structure the *beginning, middle and end* of the agreement based on the agreed key commercial provisions.

The *beginning* is:

- the identification of the parties to the agreement through details of the names, addresses and means of contacting the parties, and
- perhaps the background and intention of the parties, and purpose of the agreement.

As it is usually a legal person or entity which is the party to an international agreement, it could be noted as explained below that it is common in the civil law jurisdictions as well as more and more under common law to identify the legal person or entity not only by its registered name but also its registration number.

Then, in respect of the *middle*, list the appropriate operative provisions of the agreement dividing them into three groups, namely:

- the *main commercial* provisions,
- *other commercial* and *main legal* provisions, and
- the *miscellaneous legal* provisions.

Last, the *end* provides details, particularly names, address and contact information about the legal representatives and signatories of the parties to the agreement.

2.2 State the Rights or Obligations

Most contractual provisions state that one of the parties has an *obligation* and, of course, this implies the corollary that the other has a *right*. It can be noted that some provisions may provide only information that describes and supplements such rights and obligations.

List the components of each contractual provisions considering Coode's Rule (see below 3.3.5) and for each sketch out the:

- the *legal subject* being which person, or legal person or entity who or which is commanded or permitted to act, and
- the *legal action* being what the subject is commanded or permitted to do

followed by any *exceptions, exemptions, limitations, qualifications or restrictions* to or on the legal action. Then

- the *case* being the circumstances in which the legal action is confined and
- the *condition* being the circumstances in which the provision is to operate.

As stated below, obligations are agreed between the parties and do not require any magical word such as *has to*, *must*, *shall* or *others* to be enforceable. Such words also do not bestow on an obligation a specific level of importance.

The issue is to first state that a party *agrees*, or the parties *agree* or is or are *obligated* to perform the described obligation. Then state in the same or under a separate provision the consequences of an *incident*, *delay* or *default* regarding the performance of the obligation. Though in an actual dispute, specific performance or an order to perform may be decreed or issued by a court, these consequences generally allow rectification or monetary adjustment before a party has the right to cancel, end or terminate the agreement. The consequences are stated in this way and not determined earlier by use of such magical words in the granting provision. (See also below 3.1.2 *Verbs, auxiliary verbs: shall and may.*)

2.3 Writing Process

initial draft

Draft an initial version of each provision again considering *Coode's Rule* and focusing first only on the *general rule* consisting of the *legal subject* and *legal action* applicable in the provision and then list any exceptions, exemptions, limitations, qualifications or restrictions that may be applicable to the legal action.

When the rule does not have universal and constant application, write out the *confining* circumstances (the *when*) and then list the appropriate conditions for the rule to be *operational* (the *if*).

Next, compose the provision **in the order of case, condition, legal subject and legal action.**

Consider the *listing order* of the provisions in the document and then any necessary *paragraphing* within provisions and, finally, the *numbering* (see Appendix I under item 9) to present the contractual provisions in a manner that facilitates an easier reading and better understanding.

review words

Review the provisions for *consistency* of the meaning and use of expressions and words, identify words that need to be defined and then ensure that the definition is appropriate for each use of the word in the document.

When a word is defined and used only in one provision, then it is not necessary to include it in a separate definition provision.

When defined words are used more than once in the agreement, then list them in a separate definition provision either:

- at the beginning of the agreement (short list),
- at the end of the agreement (longer list),
- in a *schedule* attached to the agreement (even longer list especially when subject to change over time) or
- in a separate *exhibit book* when the list is exceptionally long, detailed and better managed as a separate document.

review sentences

Take the time to review the sentences for length and order especially focusing on keeping the subject, verb and object close together, and minimizing interjections which hinder the readability.

You want to ensure that the provision is *logical, readable and understandable*.

review verbs

In conjunction with sentence review, consider whether the active or even passive voice is appropriate to ensure a simple, yet direct language.

Further, has the correct verb been effectively used to express either an obligation or right in a clear and definable manner?

review punctuation

Please take the time to ascertain whether the punctuation enables the reader to read and understand each provision as intended.

Be particularly careful about the use of commas and avoid insertions or interjections with the use of round or square brackets, or dashes in an agreement which tend to leave doubt as to whether a statement or description within these marks is intended to be in or out of the agreement.

use headings and numbering

Upon having completed the review, confirm numbering and highlight headings. As a rule, numbering provides a reference aid for the practical aspect of using the agreement while headings enable a quick aid in searching relevant topics.

These consequent working steps as explained in more details below should enable the writer to present a document that is well designed and expresses the intention of the parties in a *logical, orderly and systematic* manner.

