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Plain English movement and Commercial Contracts

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For hundreds of years, people have lamented the incomprehensibility of legal documents and demanded to make them clearer and more understandable which has been now described as the Plain English movement. The movement has been long discussed and studied in the aspect of consumer contracts, legislative drafting, and impact on judgements but one aspect i.e., the commercial contract has been ignored because of myths surrounding its usage in Commercial contracts.

Keywords: *plain english movement, commercial contracts, legal document, legislative drafting.*

INTRODUCTION

WHAT EXACTLY IS PLAIN ENGLISH?

The controversy in the Plain English movement starts from the fact that there is no universal agreement on what is meant by Plain English. But the definition I fund for Plain English till now is the expression of concepts in clear and direct language and as simple a manner as circumstances permit. The last three words are important as simplicity is a relative term and is subjective. Some areas of law can be written in a manner that even a school-going kid could understand while some like commercial contracts use technical terms which makes it a bit complicated but still both of them can be classified as Plain English.

However, in broad terms Plain English has the following features-:

- "The omission of surplus words ("null and void", "full force and effect", "last will and testament");
- The avoidance of archaic words which serve to annoy lay readers without any gain in legal meaning ("said", "hereto", "hereinbefore");
- The use of familiar words in preference to grand-sounding synonyms or phrases ("if" instead of "in the event of", "before" instead of "prior to");
- The use of base verbs in preference to nominalizations ("object" instead of "make objection");
- The use of short sentences in preference to long ones;
- The use of simple sentence structure; The use of definitions;
- The use of the active tense in preference to the passive;
- The use of the present tense in preference to the future;
- The use of visual aids to comprehensions such as captions, indexes, size of print, spacing, paragraphing, indentations and helpful document layout." [1]

Above all this Plain English is reader-friendly. It is important to note that the use of Plain language does not mean removing a substantive provision that provides for a remote contingency but writing that provision in a simpler language. Plain English, therefore, is about the style of drafting and not about substance. The whole research paper has been written keeping in mind the above concept of Plain English.

LITERATURE REVIEW

Researchers for decades have been writing about the Plain English movement. The modern Plain English movement came into the spotlight in 1963 when David Mellinkoff published his book ***Language of the Law*** America, the book pointed out many absurdities of traditional legalese. The struggle to make the legal language to a layman's level, make it less convoluted

[1] Michael Hwang, 'Plain English in Commercial Contracts' (1990) 32 (2) Malaya Law Review, 296-310, <https://www.jstor.org/stable/pdf/24865633.pdf?refreqid=excelsior%3A86f197de74822b960e564b00cdbdd596&ab_segments=&origin=> accessed 10 June 2022

and more accessible to average citizens was resonated by it. The movement was later on popularized by Wydick's 1979 book ***Plain English for Lawyers.*** It provided easily digestible tips and exercises to present legal arguments straightforwardly and compellingly. For example, how to: (1) eliminate unnecessary words; (2) choose common, everyday words; (3) arrange words for clarity; (4) write with an active voice; (5) stop using overly long sentences; and (6) design your writing so that it's easy to read. This book even after forty years is very relevant and has been used by aw students, legal writing professors, attorneys, and judges all over the world. The movement gained its real momentum in the 1970s when Citibank 1970s launched its famous promissory notes written in Plain English, soon after President Richard Nixon stated that the "Federal Register be written in layman's terms". In 1978 when consumerism was spreading New York state required that all residential leases and consumer contracts be written in an understandable language. The Businesses had realised that by using Plain English in their consumer contracts they could have an edge over their competitors which is very well explained in the book by John Kimble, ***Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law***[2]. The book conducted empirical research of 50 organizations and agencies and showed how they were saved by using Plain English it also cleared the ten biggest myths around Plain English and highlighted 40 major events that happened in the history of Plain English. This book tried to answer all the issues raised related to the use of Plain English but one aspect was ignored which was its impact on commercial contracts.

Only find little research on the use of Plain English in commercial contracts, one of the best articles that I came across was Michael Hwang's article on JSTOR titled ***Plain English in Commercial Contracts*** but it only talked about how it was possible to integrate Plain English in Commercial contracts but it lacked practical aspect a bit as it did not give any method to draft and success stories. While Shawn Burton's article on Harvard Business School titled ***The Case for Plain-Language Contracts*** and Forbes 's ***Plain Language Contract on The Rise*** further supported the cause and gave economic feasibility to the use of Plain English in commercial

[2] Joseph Kimble, *Writing for dollars, writing to please: The case for plain language in business, government and Law* (Carolina Academic Press 2012)

contracts.[3]A case study like GE Aviation was given and their journey of simplifying commercial contracts and the economic benefits which they earned from it were discussed. But the articles were written much from the business and management sense and not from the point of view of the law. So this research tries to answer all these research gaps.

DISCUSSION

In this part by presenting arguments and counter arguments the question of that is it possible and viable to use the Plain English language in the contract is tried to answer.

OBJECTIONS AGAINST PLAIN ENGLISH

Till now all of the above things would have made sense and seemed logical. Nevertheless, there are a group of people who have and will always resist and dissent from this change and adoption of plain English, particularly in commercial contracts. Some of the reasons given by them are as followed:

I. Unnecessary in Commercial Contracts-: In commercial contracts both the parties involved are usually well-educated businessmen and tend to have people who are experts in concerning legal matters. There is, therefore, a negligible need for use of Plain English because both parties are familiar with the language of the law.

II. Lack of Time -: Surprisingly it actually takes more time to draft in Plain English than in traditional legal English. This is because most lawyers use tried and tested precedents which generally have very technical and legalistic language. Precedents include the main legal points that should be inserted in a commercial contract of that nature and save the time that a person would have to spend on research. Most lawyers and businesses are aware that drafting from scratch in Plain English inevitably requires more time and hard work.

III. Lack of Precedents: - Lawyers believe that precedents should not be departed until and unless actual terms of the deal deviate from the norm envisaged by precedent. In other words,

[3] Shawn Burton, 'The Case for Plain-Language Contracts' (*Harvard Business Review*, January 2018) <https://hbr.org/2018/01/the-case-for-plain-language-contracts> accessed 29 April 2022

no change should be brought in precedent without a good reason and as stated above also these tried and tested precedents are very complex and generally use legalese only. The reasons in favour of Plain English are not sufficient and compelling enough for lawyers to let alone abandon but even modify established precedents.

IV.I inevitable use of Technical Terms-: The law involves complex and technical terms and concepts that neither be ignored nor simplified into Plain English by draftsmen. Moreover, Commercial Contracts depending on their nature have a complex vocabulary of their own that cannot be translated into Plain English.

V. Uncertainty on Judicial Approach to Plain English -: It is not safe to draft in Plain English as we don't know how the court may react to it. Words in common usage have an open meaning which brings ambiguity to the contract and we don't know how curt may interpret that concerned clause.

VI. Fear Factors -:

(a). Peer Pressure -: Lawyers are known for sticking to established old norms and not for innovation. Indeed, it is not considered a compliment to say to a lawyer that he is innovative. There is simply zero incentive for a common lawyer to break the norm and draft in Plain English.

(b). Defensive law -: According to experts, it takes a lot of courage on behalf of the lawyer to express the traditional legalese precedent in their language as by doing so they are exposing themselves to a possible claim of negligence.

(c). Lack of comprehension skills -: At the time what happens is that lawyer has not understood the underlying legal principles in the precedent. This mostly happens when a lawyer is drafting in a specialist field which he is not fully acquainted with. The smart course for lawyers here is therefore to rely on a form prepared by specialists.

VII. Necessary Obscurities-: The commercial draftsman drafts to protect his client's interest on one hand and even make it acceptable to the other side. There are times when the commercial

lawyer has to regrettably clothe his true intentions with some vagueness in the language so that the other side does not comprehend the full implications of the clause. Hence Plain English drafting is deliberately avoided by commercial draftsmen.

ARE THE OBJECTIONS VALID?

- ***Unnecessary in Commercial Contracts***

It is well-known fact that Plain English Contracts have been generally directed to consumer contracts only. The primary objective of the Plain English movement was to protect consumers' interests while entering contracts like Personal loans, Life insurance, Sale of consumer goods, etc. These contracts were drafted in a complex manner and a consumer due to lack of time, power, and legal service usually suffered so mandatory use of Plain English movements in consumer contracts was demanded across the globe. The need for Plain English is perhaps less in situations where both parties (frequently business entities) are presented by their own solicitors. The transactions themselves are very complex than consumer agreements and as a result, they often follow a standard pattern. Experts like Felsenfeld and Siegel have themselves acknowledged that due drafting style in the commercial contract which aims to provide for all future contingencies these documents are inevitably lengthy.

Nonetheless, I would argue that it is not helpful to draft a contract in a manner that the client can't comprehend the terms framed easily. It is a myth that lawyers achieve greater respect because they are fluent in writing language which laymen can never figure out. In reality, the public at large (including business community) looks at us as sly people who by using bombastic, repetitive and unclear language at times take advantage of people. We do ourselves no good by adding word which supposed to add precision to drafting but has no real implication (like hereunder, aforementioned, commencing, indebtedness, etc). These words could be avoided or substituted with a common language in use. In today's business world simple language without loss of clarity and precision is preferred.

- ***Lack of Time***

Again, I somewhat agree with this argument. The initial attempts at drafting documents in Plain language will inevitably take more time than the traditional style. "Most lawyers charge fees based on time, so how would a lawyer justify a higher fee than usual for a document which is shorter than usual?" The answer to this problem is that it will take some time and lawyers and businesses both might have to face financial loss caused by the change in drafting style but it would be all worth it as shown in the data analysis.

At the same time, it becomes important to keep in mind that despite of strong urge to change the drafting style it won't happen overnight. The change in drafting style will only be achieved in a longer period with each document drafted moving closer to the desired Plain English form. With this, the issues of both time and cost should not appear as prohibitive as they seemed earlier. Moreover, the extra time spent on drafting in Plain English will be offset by the time that the lawyer would have to spend on explaining all that obscure and complex language of the contract to the client.

- ***Lack of Precedents***

I recognize that even after decades of the movement we still have not reached a time where there is a substantial amount of Plain English precedents developed. The difficulty is obvious and the solution is also clear. Publishers will have to coax editors to draft the precedents in Plain language. Though it is not something which an individual lawyer can do with given time this can surely be done which will also solve other problems raised. But for now, let us analyse the approach and steps taken by some of the leading publishers of precedents with respect to commercial law when it comes to the use of Plain Language-:

- ***Butterworths' Encyclopaedia of Forms and Precedents*** *(hereinafter referred to as Butterworths' Forms)* states in its Publishers' Note

"More modern coverage has been complemented by a more modern approach to style and layout. The presentation of the forms and precedents themselves has been brought into line with accepted modern practice. Archaic language has been eliminated, or least reduced,

wherever possible so that each form and precedent may be readily understood by practitioner and client alike."

- ***Longman's Practical Commercial Precedents*** states in its Introduction that-:

"Needless verbiage such as 'hereinafter called', 'of the first part' has been avoided. The precedents are concise, clear, and comprehensive. This is because commercial drafting is aimed not merely at the commercial lawyer on the other side with all his training but, even more importantly, at the client himself so that he may understand his obligations and need not be compelled always to seek explication from his lawyer."

- ***The Australian Encyclopaedia of Forms and Precedents*** has a helpful Introductory note on drafting techniques, where many of the principles of Plain English are discussed at length, but the note concludes-

"The editors realise that those who will make use of this encyclopedia will come from different generations and hold different philosophies. Although this note on styling has perhaps tended towards favouring the style taught in the practical legal training courses of the 1980s, a mix of forms has been kept so as to have material available for those users who do not appreciate this style. Indeed, in accordance with conveyancing etiquette, the editors have not altered a contributor's draft merely because the contributor has adopted either the traditional or new style, so that the various titles in this encyclopedia may, despite this preliminary note, from time to time defy its recommendation" So, as we can see all of these above publishers are also accepting the increasing use of Plain English in Commercial contract and also adapting and integrating this in their books.

- ***Inevitable use of technical terms***

I acknowledge that some of the legal jargon and technical terms cannot be substituted by Plain English words. But it does not mean that it is impossible to use Plain English in commercial contracts. The first and foremost thing is that we need to cautiously distinguish between terms of art (which we should avoid paraphrasing) and purely traditional words. The term art "is a

short expression that (a) conveys a fairly well-agreed meaning and (b) saves the many words that would otherwise be needed to convey that meaning". For example, "hearsay" is a term of art but not "suffer" or "permit".Secondly, apart from conveyancing documents, all other average commercial contract documents do not require extensive use of technical terms.

However, in any case, Plain language here does not here mean that all the contracts should be written in "schoolboy English". As Felsenfeld and Siegel put it-

"The Plain English movement is not designed to revolutionize the language of the law. Terms of art, used in professional settings by those who understand them, are invaluable. In this context, the issue of communication to lay parties is generally irrelevant"

If the technical term has to be used then it should be used but yet the result can be plain English. Like in the case of GE Aviation the clause before simplifying into Plain English was –

"Customer shall indemnify, defend, and hold Company harmless from any and all claims, suits, actions, liabilities, damages and costs, including reasonable attorneys' fees and court costs, incurred by Company arising from or based upon (a) any actual or alleged infringement of any United States patents, copyright, or other intellectual property right of a third party, attributable to Customer's use of the licensed System with other software, hardware or configuration not either provided by Company or specified in Exhibit D.3, (b) any data, information, technology, system or other Confidential Information disclosed or made available by Customer to Company under this Agreement, (c) the use, operation, maintenance, repair, safety, regulatory compliance or performance of any aircraft owned, leased, operated, or maintained by Customer of (d) any use, by Customer or by a third party to whom Customer has provided the information, of Customer's Flight Data, the System, or information generated by the System."

But after using Plain English this complex clause was reduced to-

"If an arbitrator finds that this contract was breached and losses were suffered because of that breach, the breaching party will compensate the non-breaching party for such losses or provide the remedies specified in Section 8 if Section 8 is breached."

Here the company did not remove any technical terms but just made it clearer and more concise. Hence, Plain English can be used no matter how many technical terms are used by the contract.

- ***Uncertainty on Judicial approach to Plain English***

How will the judiciary react to the contract written in the familiar yet unfamiliar in a legal fraternity? Will the judges find the contract too ambiguous or imprecise and fail to interpret it in the way the draftsmen intended? These questions are something that has been bothering the activists of Plain English for decades.

As far as the concern that we don't know how the court might interpret common words in court I find it impractical. Because in the first place tell me how many words in contracts are defined by the courts though they may have interpreted some words it is only for the purpose of that contract only. For example, "tenant's fixture" is a word that has been used a lot in courts but the court has never given a definitive interpretation of it. Disputes over the interpretation of contracts are not generally about the literal meaning of words or phrases but about how some unforeseen situation requires it to reinterpret in a different manner for that particular contract only. Those disputes will occur even if you have written the lengthiest and most formally drafted contract. They arise because of failure to predict a specific contingency which is a matter of legal substance and not of drafting language.

Secondly, I wonder how many solicitors actually check that in how many cases a precedent was used and how it was interpreted by the courts and actually rely on judicial dicta for drafting. I suspect that many lawyers just blindly rely on precedents because it has some required judicially interpreted keywords and never check their authorities by themselves.

So here even though we recognised the issue but it does not mean there will be more problems than faced in traditional drafted documents. If a document is drafted in Plain English, then by its very nature easier to understand and has a precise meaning making it less prone to an argument about its winning. The lawyer's drafting skills are laudable when they win a case before it is even filed. Generally, all business clients want language in contracts to be very clear

and precise to make sure that no opponent can advance a triable issue on the interpretation of the words used. So rather than creating the problem, it is more like a solution when it comes to uncertainty regarding the interpretation of terms.

The judiciary itself can look at the example of the former master of rolls, Lord Denning. His judgements are there in almost every aspect of law and are always very respected and never accused of lack of depth or imprecision yet the language he used was Plain English. To quote his own words-:

"At one time the judges used to deliver long judgments covering many pages without a break. I was, I think, the first to introduce a new system. I divided each judgment into separate parts: first the facts; second the law. 1 divided each of those parts into separate headings. I gave each heading a separate title. By so doing, the reader was able to go at once to the heading in which he was interested; and then to the passage material to him"

- ***Fear Factors***

Peer pressure

The straight answer to this is someone must take the first step. And many already have as shown in the data analysis part. In fact, the Plain English movement has been officially supported and encouraged by the governments of the USA, UK, Australia, and New Zealand by making their upcoming legislations mandatorily in Plain English. And even India's current Chief Justice N V Ramana recognised there was a high need of using Plain English when judges give judgement so the common crowd could understand it. So, though the attitudes are changing slowly they are surely changing and in today's legal and business world you need to adapt to the changes for even survival.

Defensive Law

For the lawyers afraid to depart from traditional precedents there is only one solution i.e., to wait for the new model and contracts to be established, So, when this is done, they can safely rely on the Plain English formats without fear of getting sued for negligence.

Lack of Comprehension

This is not a problem of Plain English but a lack of legal education on part of a lawyer. However, using Plain English have one advantage that now non-specialist when adopting the precedent will have a better idea of what the clause means and understand its implication and underlying rationale.

Necessary Obscurities

The *Australian Encyclopaedia of Forms and Precedents*, after discussing Plain English principles of drafting in its Introductory Note, makes this comment[4]-:

"Whilst the thrust of the above has been that if a document can be made simpler without sacrificing precision that should happen, there are some cases where one cannot avoid complication without sacrificing the validity of the document or the client's interest"

I also fully recognise the fact that a lawyer at times needs to use vague language like reasonable for the interest of the client it does not need to be used throughout the document. In the words of Wydick[5]-:

"*Vagueness is only a virtue if it is both necessary and intentional. Knowing when to be vague and when to press for more concrete terms is part of the art of lawyering*."

So, there are therefore occasions a draftsman needs to be less than plain but that is not always the case one needs to use this tool of vagueness very wisely.

OBSERVATIONS

In the discussion part, we have already answered that at least in theory it is possible to use Plain English in the drafting of commercial contracts. Now by presenting some case studies derived from secondary qualitative data we try to prove the viability of our arguments.

[4] 3rd Edition/Vol. 1, Australian Encyclopaedia, (1988) 3062
[5] 2nd Edition, Wydick R. C., (1985) 52

Many private companies like Cleveland Clinic simplified its billing statements and Sabre travel simplified guidelines for its customers and many others have exploited this movement to increase their profits but all of them deal with consumers i.e., consumer contracts when it comes to commercial contracts only a few companies have taken steps. KPMG, one of the leading international accounting firms which deliver its services to big corporate companies all over the world uses the slogan "It's time for clarity" and uses Plain English in all its contract because it understands that its clients value clear communication.

GE Aviation a world leader in providing aircraft engineers, systems, and avionics adopted Plain English in their contracts in the year 2014 itself. The complexity of the contracts was dragging negotiation for months and the sales team had to spend their time debating the archaic language of the law so the legal term proposed to convert its seven lengthy formats into one plain-language contract.[6]It took time and hard work on part of the team as they had decided to use Nom Sample No templates just a blank sheet of paper. According to the team unlearning how to write like a lawyer was harder but in the end, they produced a draft that didn't contain superfluous introductory recitals and legal jargon, legal concepts of the contract were laid down in simple language, and sentences were short and in active voice and definitions were eliminated. It was really a departure from the norm lawyers were shocked with the result. It turned out to be a miracle the review of the contract was always positive not a single customer complained about the plainness of the contract and the agreement took a whopping 60% less time to negotiate than the previous contract. In just three years by 2017, the company had signed hundreds of those contracts. Due to this huge success, the company is adopting Plain English in its other subsidiaries like GE hospitals. The results which can be derived from all the above discussions and qualitative data are presented in the next section.

RESULT

As we can derive using Plain English in Commercial contracts is not only possible but also has many advantages for business which can be listed as:

[6] Kate Vitasek, 'Plain Language Contracts On The Rise' (*Forbes*, 19 March 2018) <https://www.forbes.com/sites/katevitasek/2018/03/19/plain-language-contracts-on-the-rise/> accessed 30 April 2022

(a). Helps in saving time-: It certainly saves time for the reader and because of clear terms, customers make decisions quickly. In businesses, time is key to success and plain language reduces the time spent on negotiation to a huge extent and gives them an edge over competitors.

(b). Greater Comprehension-: Documents drafted in Plain English leads to greater comprehension not only by clients but by lawyer themselves. Due to its clear and precise language chances of dispute in future regarding interpretation of clause reduces. Moreover, when the client clearly understands the contract drafted, he will be able to comply with the terms better.

(c). Greater client rapport- The greater comprehension of the document, there would be greater client rapport. Most often Legal teams receive complaints that what they have drafted is frightening and could be made simpler. The precise documents give clients confidence that we are not trying to hide anything from them, and they can trust us. Building a good client rapport is essential and helps a business to improve its image.

RECOMMENDATIONS

Now that we are clear that Plain English in a commercial contract is desirable and achievable. So how do we advance its cause? I have the following recommendations from my side-

(a). Parliamentary Draftsmen should lead the way. For centuries commercial draftsmen follow the example of legislation in drafting commercial documents because they have been taught that parliamentary drafting is the correct way to draft. Until we have Plain English statutes the climate will not be right for Plain English in commercial documents.

(b). In order for a commercial lawyer to adapt to a Plain English style of drafting, he needs Plain English precedents for all the standard commercial transactions. A good start has been made by the current editions of the commercial precedent books but these modern precedents will take some time before they are widely accepted. Acceptance will be slower in those

Commonwealth countries like India which have not yet appreciated the importance of Plain English.

(c) Lawyers will need to study their existing precedents so as to understand the exact legal meaning and significance of the time hallowed phrases and words they have been using all these years. Without such understanding, they cannot adapt with confidence to Plain English. They will always be looking over their shoulders for the security blanket of the familiar precedent. They will not really know if they would lose any legal protection by adopting modern and simpler language in place of the archaic and complex.

(d) All lawyers should have on their desks a framed list of drafting commandments. This will include the most basic rules of Plain English drafting and in particular the or so words or phrases that Plain English draftsmen must avoid. Word processors can be programmed to reject words on the Plain English "hit list". We may therefore hope to eliminate by volition what the Maryland legislature could not (or would not) achieve by prescription.

(e) With the growing use of English as the *lingua franca* for international business transactions, lawyers will be asked to draft contracts for countries where English is not the first language. For e.g., you are asked to design a contract by a Thai client. So, working with non-native speakers of English will help to develop Plain English. [7]

LIMITATIONS AND SCOPE FOR FUTURE RESEARCH

There are two major limitations in the study which can be addressed in the future:

Lack of Primary Data-: To understand the real position of the research topic one needs to collect data from people affected by that research topic. Especially in a country like India where the Plain English Movement has not been adopted even by parliament and courts till now to know it becomes essential to understand the sentiments and opinions of business owners and lawyers to know the ground reality. However, due to a lack of resources and lack

[7] Michael Hwang (n 1)

of time primary data collection was not possible and I had to completely rely on secondary information.

Lack of Previous Research on the Topic-: When you can't collect primary data and secondary data is not easily available it becomes tougher to write a paper that is not biased. The Plain English Movement is not a novel idea, so much research has been done but not mainly focusing on Plain English's adoption in Commercial contracts. Moreover, very little information was available on India's journey in the Plain English movement let alone going into the niche of commercial contracts. So, the research analysis is done with very limited information available in the public domain.

CONCLUSION

Businesses should encourage and use Plain English in Commercial contracts as it not only improves the image of the firm but also gives them an advantage like an edge over competitors by reducing the time spent on negotiations, building greater consumer rapport, and many others. I would like to conclude with the advice of the Elizabethan scholar, Roger Ascham, who wrote over 400 years ago: - "*He that will write well in any tongue, must follow this counsel of Aristotle, to speak as the common people do, to think as wise men do; and so should every man understand him, and the judgment of wise men allow him.*"