

MITRATECH

# A Short History of Legal Drafting



# Introduction

The way deals are being done is changing. In order to understand where we are today with contracting, it's important to remember where we have come from.

Here, we will consider how contracts and other legal agreements were drafted in the past - as well as some more modern trends. We'll also take a look at the recent trend towards standardization of contractual language.

More specifically, we'll cover:

1. How modern legal language evolved to what it is today
2. Modern legal language and the future of drafting
3. Innovative approaches to the standardization of legal language
4. The pros and cons of the standardization of contractual language



# 01 The evolution of modern legal language

Lawyers are renowned for their convoluted writing! Consider this example taken from a New York Times article - yes, it is a county in Florida defining a person's bottom:

*“The area at the rear of the human body (sometimes referred to as the gluteus maximus) which lies between two imaginary lines running parallel to the ground when a person is standing, the first or top of such lines being one-half inch below the top of the vertical cleavage of the nates (i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom line being one-half inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold), and between two imaginary lines, one on each side of the body ...”*

This example was taken from a legal notice aimed at reducing indecent exposure in public places. It's...a lot, to say the least. There are a number of theories about why lawyers began to draft in this verbose way.

Many consider that they did so because it suited their own interests - if nobody could understand legal documents, they had to rely on lawyers for interpretation, and this ensured the lawyers a steady stream of work. It also made sure that they were paid well, as they charged per word.

Another theory is that the length is an attempt to ensure there is no misinterpretation of what the text is intended to convey.

Below is another example of legal drafting from a modern will. You'll see that it lists many words that are synonyms (i.e. there is an element of repetitiveness) and contains words that are foreign to mainstream English today (such as bequeath, which is derived from Old-English and has roots in Latin, Old French and Middle English).

*"I give, devise and bequeath all of rest, residue and remainder of my property which I may own at the time of my death, real, personal and mixed, of whatsoever kind and nature and wheresoever situate, including all property which I may acquire or to which I may become entitled after the execution of this will, in equal shares, absolutely and forever, to ARCHIE HOOVER, LUCY HOOVER, his wife, and ARCHIBALD HOOVER, per capita, to any of them living ninety (90) days after my death."*

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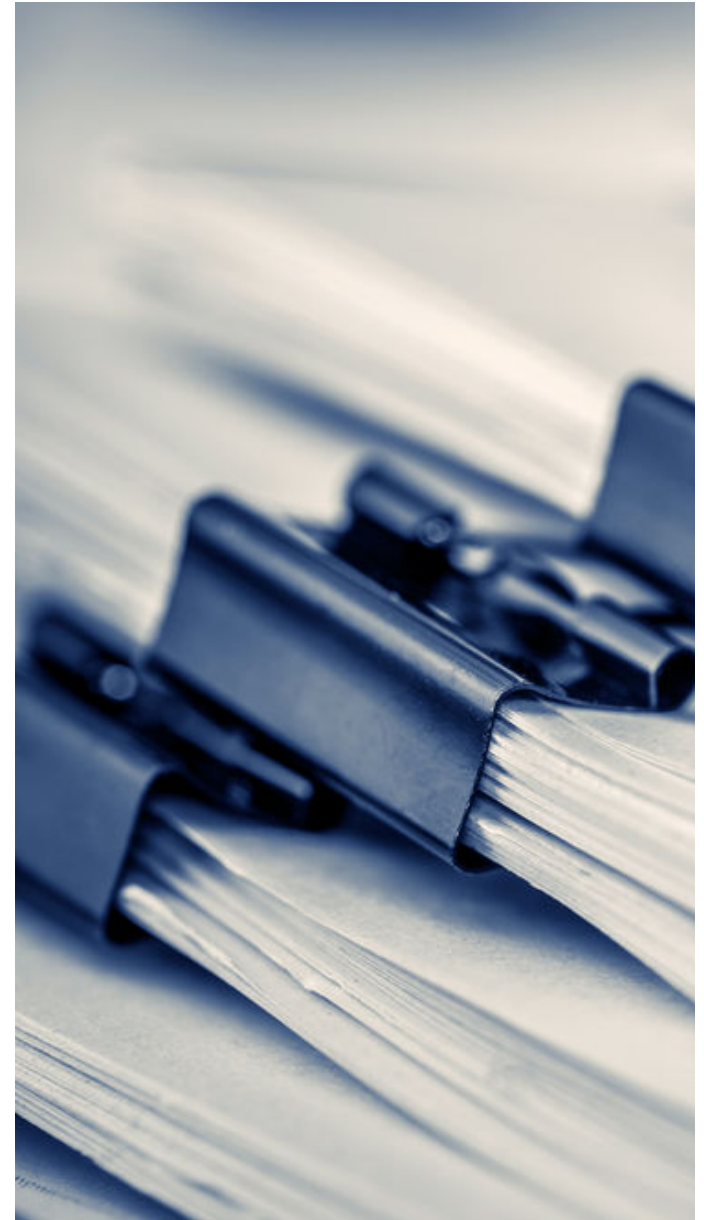
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## Mixture of languages from migration waves

When the common law as we know it was in its infant stages, migrants were coming to Britain from several places - such as Anglo-Saxon mercenaries, Latin-speaking missionaries, Scandinavian raiders and Norman invaders. The languages spoken by all of these migrants were similar, and the result of their cohabitation in Britain was the creation of what is known today as Old English.

This is what was used in early legal drafting. Latin and French were also used heavily as Latin was considered to be the language of the educated, and French (Norman French) for a long time was the language of the ruling class. It was not until 1731 that Britain's parliament ended the use of Latin and French in legal proceedings.

Words remain in legal writing today that are derived from these archaic languages.



## Alliteration as a stylistic point and to assist the illiterate

Alliteration was also used a lot in legal language from this era. It is thought that this was done to assist illiterate persons in understanding and remembering their legal obligations.

One example of this that is still used today is “to have and to hold”. Many of these phrases have now disappeared, but some think that this tradition explains why so many lawyers like to write long lists of words in their legal drafting when one or two would suffice. As common law uses a system of precedent, many of the terms derived from these languages remain in legal language today.

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## 02 Modern legal language and the future of drafting

### A push towards Plain English language and a push back?

Only recently has there been a push to simplify legal writing - the Plain English Movement. The Plain English Movement began in the 1960s. Some have surmised its emergence was due to changes in the economic landscape. For example, lawyers were no longer communicating only with other lawyers and law-makers no longer wrote only for a small educated and literate elite. At the same time, the public and legal profession itself had begun to become increasingly intolerant of the archaic and unnecessary complexity of legal writing.

The Plain English Movement has somewhat changed the way law has been written. Here are some examples of phrases written in traditional legal language versus a more modern plain english language approach. These examples were provided by John Pease, Group Director of Governance at St. John of God Health Care in Perth, Western Australia.



## 1. Traditional Legal Language:

The following summary is qualified in its entirety by the more detailed information contained elsewhere in the prospectus.

### *Plain English Language:*

This summary highlights some information in the Prospectus.

## 2. Traditional Legal Language:

Each certificate will represent an undivided interest in the trust and the interest of the certificate holders of each class or series will include the right to receive a varying percentage of each month's collections with respect to receivables of the trust at the times, in the manner and to the extent described herein, and with respect to any series offered hereby, in the Related Prospectus Supplement.

### *Plain English Language:*

The certificate holders will receive interest and principal payments from a varying percentage of credit card account collections.





The push for plain english in legal drafting continues today. However, archaisms remain in the law (as can be seen from the examples of drafting provided above). Assistant Professor-in-Residence at the University of Nevada Las Vegas's Law School, Lori D. Johnson, considers that there are some "magic phrases" in legal writing that should be respected and left untouched. She calls them "terms of art".

She writes:

*"...[W]here the redrafting of a traditional term of art, a phrase that stands as heavily- interpreted legal shorthand for a particular concept, would potentially undermine an attorney's efforts to most effectively advocate for his or her client's desired outcomes in a transaction, the traditional term of art should be retained. These terms of art exist as more than needlessly convoluted jargon meant to elevate legal discourse beyond the comprehension of the layman. Rather, they serve as a means of lending credibility and persuading audiences within an established discourse community."*



Some examples of terms of art noted by Johnson include “time is of the essence”, which is a term used in many contracts to convey that fulfilling obligations under the contract on time is material (i.e. if something is not done on time by one party there is deemed to have been a breach of contract), and The “Pari Passu Clause” which is a term used in inheritance clauses as well as lending and bankruptcy proceedings. It means that distributions will be made equally and without preference.

More recently, there has been a move towards “standardization of contractual language”. This movement advocates using standard language for contractual clauses that have the same meaning. Perhaps the sentiment that there are some phrases in legal language that should remain untouched is one of the reasons for this development.

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# 03 Innovative approaches to the standardization of legal language

There are practical reasons why standardizing contract language is more relevant today than it has ever been. The world has become more global and inter-jurisdictional contracting is now commonplace.

English is the most common language used in international contracts. As many of the parties agreeing to these contracts are not native English speakers, standardizing contractual terms is one way to make it easier for parties to understand their legal obligations and to what they are agreeing. For example, the European Union is working towards integrating its member economies to achieve this; it's important their contract laws are harmonized. Having standardized contracts has been promoted as a means for achieving this harmonization.



Interestingly, trends have been noted in contractual language written in languages other than English that show influence from English language contractual wording. Professor Andrew Godwin, who lectures in Banking and Finance at Australia's University of Melbourne, says he's noticed this when reading Chinese contracts over the years. This suggests even across languages there may be a move towards something akin to standardization.

### Approaches to standardizing contract language

Different approaches for how to proceed with the process of innovation and eventual standardization of contract drafting have been suggested.

Professor George G. Triantis at Stanford University notes some of the incentives and disincentives lawyers have for working on innovation and standardization of contractual clauses. He notes that:

*"[a]lthough standardization reduces contracting costs and yields learning and network benefits, it tends to chill innovation because adopters of novel contract terms are likely to face resistance from their counterparties and to bear the risk of surprising judicial interpretations of, or adverse market reactions to, the novel terms" and "[m]oreover, while innovators and early adopters bear these risks, they cannot capture the future gains that will be enjoyed by others if their novel terms become popular".\**

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## Entities working towards standardizing contractual language

In addition to this proposed decentralized or legal industry-based approach, there are governmental organizations and other industry entities that have their own working groups involved in standardizing contracts. For example, the Oregon State government has recently passed a bill to require state agencies to use standardized forms, templates and other documents.

Other industry bodies within the USA have formed their own working groups to establish standard form contracts. As mentioned in the article “Standardization of Standard-Form Contracts: Competition and Contract Implications”\*, examples include:

- The American Trucking Association
- The American Institute of Architects
- The Insurance Services Office

These government and industry entities have their own motivations for standardization.



Working together, they may be able to come up with standard contracts which benefit their organization as a whole. However, these same contracts do not necessarily benefit and may actually be disadvantageous to their counterparties. Legal issues in relation to contractual fairness and competition law may apply to these standardized contracts.

### Advancements in software including Machine Learning

Some software today provides tools for identifying and creating standard contracts as well as measuring the effectiveness of the terms within them for more efficient future drafting.

For example, some contract software providers such as KM Standards analyze past agreements to identify common clauses, agreement structure standard clause language and common clause alternatives to develop moc forms, playbooks, contract sets or new agreements.

Other effective contract management software allows for data to be gathered about the number of times a particular clause is negotiated and how long counterparties spend redrafting and negotiating it before they agree. This could enable troublesome clauses to be identified more readily as well as terms that are likely to work well.



Natural Language Processing and Machine Learning will also aid drafters of contracts in the future. Two academics at the Australian National University, Professors Michael Cortotti and Eric McCreath, have undertaken some preliminary analysis of Australian contract language. Their vision is to influence the development of technology to assist contract drafters through natural language processing.

Due to the changing business environment (i.e. the fact that it's becoming increasingly global) and advancements in technology, the experience of contract drafting will likely be very different in the near future. We encourage you to get involved in the process of contract innovation and standardization of contracts so you can be a part of creating this exciting future! However, we note there are arguments both for and against the standardization of contractual language - let's explore those now.

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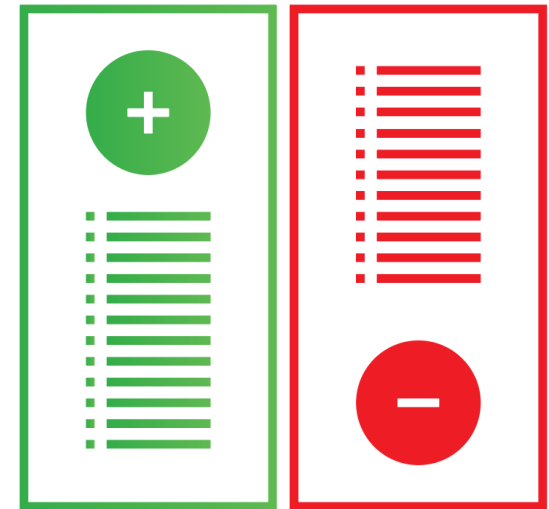
# Pros and cons of standardizing contractual language

It seems everyone in the contracting world has an opinion about how a contract should be drafted. So with so many differing opinions about how to draft a contract, how do people feel about contract standardization?

When you talk about the standardization of contract language, you'll usually encounter two types of people:

- Those who are for it and for whom standardization cannot come soon enough; and,
- Those who are more hesitant and concerned about the possible negative impact of such a change.

Let's take a closer look at the arguments on each side.





## Advantages

**Cost savings** - Contractual standardization would lead to contracting companies saving money as there would be a lower transaction cost as each contractual clause and contract would not have to be negotiated and renegotiated every time a company wants to contract.

**Productivity** - Proponents of contract standardization argue that it would increase contract managers' productivity. Less time would be spent in drafting and negotiation and more time could be spent on other contractual management tasks such as tracking and building stronger relationships with contractors.

**Efficiency** - Standardization of contractual language leads to more streamlined and centralized processes for fulfilling obligations under the contract. There is less confusion about what needs to be done and more time for making it happen - making the whole contracting process more effective and efficient.

**Certainty** - Standardization of contracts would lead to there being greater certainty about contractual terms. The clauses in these contracts will be more tried and tested due more frequent use. Also, a contract that is commonly used is more likely to be interpreted similarly and easily by courts, leading to even greater certainty about its meaning.



**Predictive Analytics** - It's easier to compare contracts with standardized language for contract management systems as well as leverage machine learning for predictive analytics. These sophisticated contract management systems can analyze past and current contract data in aggregate to provide all negotiators with useful information/feedback that can be leveraged for what we call, Predictive Agreement™. Such data includes the length of the closing time with a certain customer or vendor in past agreements or the amount of consideration agreed upon for certain types of contracts. A system with predictive analytics ensures you spend less time negotiating in the future and arrive at agreement more quickly and simply with your counterpart.

**Automation** - Converting obligations under the contracts into tasks is easier for contract management systems that leverage advanced technology. There is less room for error, as there is less chance it will misinterpret obligations and provide incorrect prompts (any variances or anomalies will be ironed out through the standardized terms being tried and tested over time).

**Risk Mitigation** - Standardizing contracts makes it easier for contract managers and their staff to ensure they have “ticked all the boxes” in the contracting process. Some workers in this field refer to checklists to ensure all the required elements of a contract have been met. If the same wording is used as is used in the checklist there is less room for error in this process.

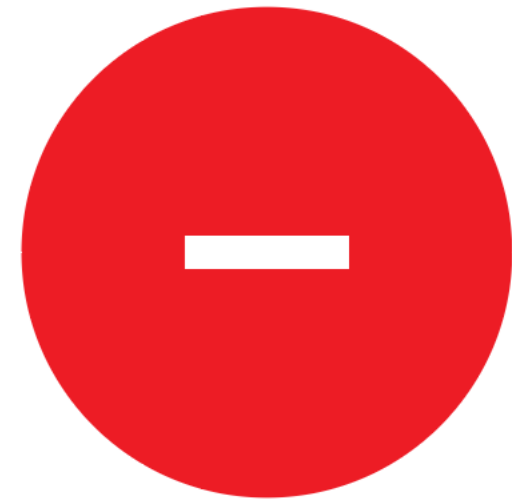


## Disadvantages

**No room for variation** - Standardization does not allow for variation in what you actually are agreeing to. There are subtly different meanings for different words. If you standardize contracts too much, the true meaning of what was intended to be agreed upon could be lost and there could be confusion about the obligations of the parties who agreed to the contract.

**Prohibits innovation** - Contractual standardization does not allow you to come up with better ways for writing the same thing and for slowly improving the way clauses are written over time. This stifles competition in the drafting of contracts. This is an interesting argument because without a system that analyses contractual data for specific clauses, any innovation that may come from competing clauses does not seem likely. You can use modern contract management software to analyze different clauses to determine which ones are the most productive in the process for deciding which clause to make the standard.

**Contract drafting is not something that can be automated but is an art** - This is the argument presented by Andrew Milchem in his comment noted above. He objects to the idea that a “cookie cutter” approach can be applied to contractual drafting as how a contract is written depends upon the risk and complexity of each case.



**Loss of jobs** - If you automate contracting, the knowledge of this craft will disappear as people with expertise in this field will be lost. Benefits will take time - the benefits of standardizing language will take time. A lot of data will be needed before contracting parties can reap the benefits of predictive analytics technology.

**Benefits don't justify the trouble** - Dissenters argue that the increased ROI that could come from contract standardization is not worth the trouble of changing how the practice is already performed today.

**Legal issues** - standardizing contractual language presents legal issues relating both to competition and contractual law. For example, if an industry group gets together to draft standardized language for contracts, they intend to exchange with customers and there's a chance that they will "collude" to draft terms that advantage themselves but disadvantage consumers. In working together this way, they breach competition laws and draft contracts that are unenforceable due to contractual law principles such as fairness.

So there you have some of the major arguments for and against standardizing contract language. It will be interesting where contract standardization goes in the next decade and how the development of contract management software technologies influences this.

# Conclusion

Legal drafting and in particular contractual drafting has evolved through time. It has gone through many changes in the last 50 years with the Plain English Movement and is still evolving with the trend towards Standardization of Contractual Language.

Where do you think it will evolve next? We think a continued trend towards standardization and the use of legal technology will lead to more Predictive Agreement™ in contract drafting and negotiation.



# About Mitratesch

Mitratesch is a proven global technology partner for corporate legal, risk & compliance, and HR professionals seeking to maximize productivity, control expense, and mitigate risk by deepening operational alignment, increasing visibility, and spurring collaboration across their organization.

With Mitratesch's proven portfolio of end-to-end solutions, organizations worldwide are able to implement best practices and standardize processes across all lines of business to manage risk and ensure business continuity.

Mitratesch serves over 1,500 organizations worldwide, including 30% of the Fortune 500 and over 500,000 users in 160 countries.

For more info, visit: [www.mitratesch.com](http://www.mitratesch.com)

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