

DRAFT BETTER CONTRACTS

An LOD toolkit for in-house legal teams



About LOD

LOD pioneered the very first alternative legal service in 2007, and we continue to lead the exciting market we created.

We support the best legal teams in the world with our brilliant legal professionals, legal services team, processes and technology. Together, we find new ways to boost the value that in-house legal teams deliver today, tomorrow and in the future.

LOD is still one of the largest and fastest-growing flexible legal services businesses in the world. We have offices in 9 locations and over 1000 world class lawyers and paralegals, legal operations and tech experts, and risk and compliance professionals. We're constantly recognised for our innovative approach, working hand in hand with clients to create the future of legal work.

“ Lawyers spend half their time trying to understand what other lawyers wrote; and the other half of their days writing things that other lawyers spend half their time trying to understand. ”

Samuel Goldberg

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Purpose of toolkit

The aim of this document is to help you draft better contracts

"Better" means clear, simple, consistent, and legally accurate contracts as judged by the audience (i.e., contract users, being those negotiating or managing it).

Our 10 core legal drafting philosophies

- 1 Time and resources are best spent negotiating the commercial deal, not the T&Cs.
- 2 90%+ of your standard commercial contracts should not have any questions, negotiations or changes relating to the T&Cs.
- 3 Start with fair, balanced T&Cs that you would expect if you were the other party.
- 4 Don't use one word more than necessary. Save every minute and every keystroke.
- 5 Use simple, common language that's understood by the audience – not archaic legal terminology. Write as you speak.
- 6 Don't unknowingly increase your risk profile and, of course, still be legally correct.
- 7 Structure the document to make it as quick and easy as possible for the audience.
- 8 Make it easy, empowering and safe for non-lawyers to complete the first draft without the need to change the T&Cs.
- 9 Draft the document so it can more easily be digitised and automated in future.
- 10 Remove ambiguity.



Fair terms from the outset

Fair and reasonable terms

If terms are one-sided, they will probably offend the other side and waste resources for all involved. Especially, when the party who drafted the contract would accept a more balanced position in any case. Your aim should be that 90% of T&Cs are not questioned, negotiated or changed (**QNC**). They are not queried because they are self-explanatory, clear and concise. They are not negotiated because they are fulsome and fair. This combination means the first iteration does not need to change.

The resources involved with QNC should be focused on getting the best possible commercial deal – i.e., something more important. Fairness normally means having reciprocal rights and putting yourself in the shoes of a reasonable, ordinary counter party.

Even Microsoft, despite their commercial leverage, realised that they are wasting their resources and their customers' by sending one-sided T&Cs. Their new T&Cs are far more balanced and concise. It keeps their customers and their sales staff happy. It allows them to contract faster, therefore improving cashflow. It hasn't increased their real risks because they are carefully mitigated outside the contract

Examples

Passive	Active
You cannot assign or transfer this	Neither party can assign or transfer this Agreement without the other party's
You indemnify us for all claims relating to your breach of this Agreement and if you	Each party indemnifies the other party relating to a negligent act or omission

Simplicity

Keep sentences short

No one likes long sentences. They usually are ambiguous and cause confusion. If a reader has to read a sentence more than once, there is a problem.

- <15 words/sentence (WPS) on average
- None are >30 WPS
- Always <4 lines
- Flesch Reading Ease (FRE) test should be >40, with the higher the better
- Flesch-Kincaid Grade Level (FKGL) score should be <10, with the lower the easier to read

See [here](#) for more info about readability scores.

Time and The Economist magazines must have >50 on the FRE test. Consumer laws are normally between 40 and 50. The Harvard Law Review is in the low 30s. The FKGL score is the number of years education you need to understand the document or selected text. You should aim for a Year 10 student being able to understand your contracts.

To achieve short sentences:

- 1 Look for a joiner (and, but, or, nor, for) between two main ideas. Delete the joiner and have two sentences.
- 2 Look for exceptions, conditions, or other qualifiers that restrict or expand the main idea. Move them into separate sentences.
- 3 Look for a word or related words in the original sentence that can be repeated in a new second sentence.

Draft actively

Using the active voice is the number one way to shorten and clarify your sentences. In the active voice, the sentence's subject performs the action. In the passive voice, the sentence's subject is acted upon. In the truncated passive, the subject is missing altogether. This can be problematic in contract drafting.

Drafting actively forces you to write the way most people think – first the sentence's subject, followed by its verb, and last its object (answering the question, who is doing what for whom).

The following examples change the passive voice to active voice. Note that the active voice version uses fewer words to say the same thing and the sentence's concept is clearer.

Passive	Active
The notice must be given by us to you.	We must notify you.
This Agreement may not be modified except by written consent of the parties.	The parties may modify this Agreement only by written consent.

Keep related words together

Keep the sentence's subject, verb, and object close and usually near the sentence's beginning. Inserting phrases in the middle of sentences between the subject and the verb, or the verb and the object hinder understanding. Place these interruptive phrases at the end or beginning of the sentence; near the word or phrase they modify; or in a new sentence.

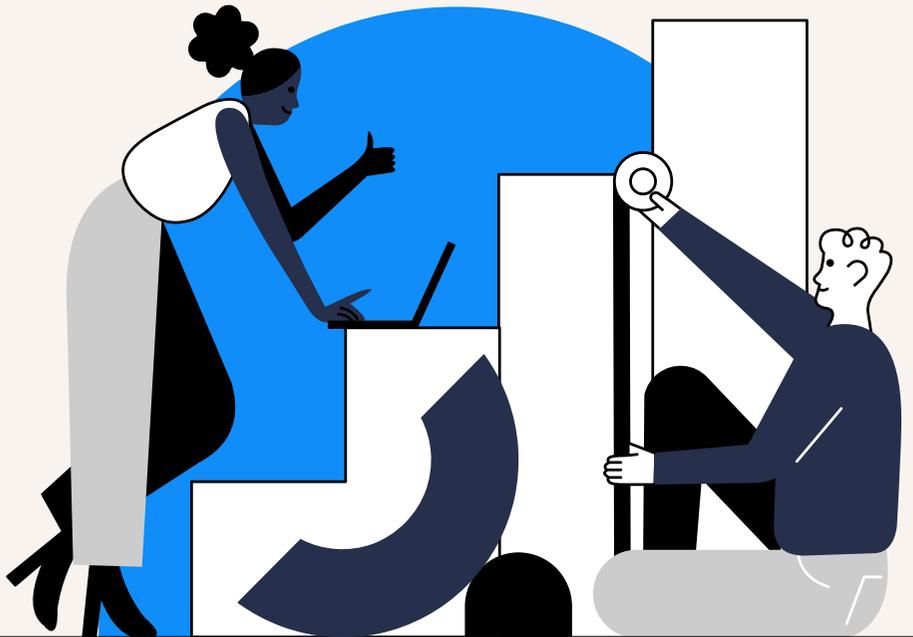
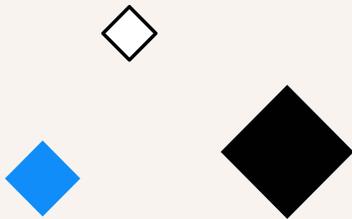
Don't say	Say
The option to purchase the asset, unless revocation by us has occurred at an earlier date, shall expire on 30 June 2022.	Your option to purchase the asset ends on 30 June 2022 unless we revoke it earlier.



Draft positively

Reframe negative statements in the positive. Negative words in contracts include: not, however, unless, even though, except, until, and failure.

Don't say	Say
The Development Plan need not be revised at intervals of not more than two years if the Parties do not disagree.	The Contractor must revise the Development Plan every two years unless the Parties agree to a longer term.



Draft presently

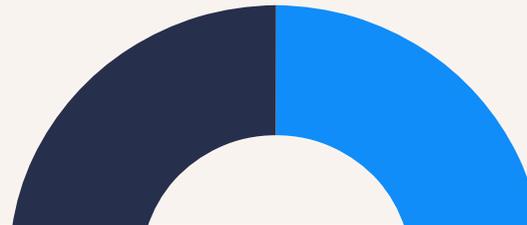
A contract should always be drafted in the present tense. A contract assumes that an event is always occurring now, not yesterday or tomorrow. If you switch between the future, the past, and the present, you will confuse your reader. Only use the future or past tense if that usage clarifies the concept.

Don't say	Say
If any provision of this Agreement shall be deemed to be judged invalid for any reason whatsoever, such invalidity shall not affect the validity or operation of any other provision of this Agreement.	If a provision of this Agreement is invalid, the invalidity does not affect the validity of another provision.

Contracts for consumers - particularly sales contracts

For organisations that contract with consumers (i.e., individuals as distinct from businesses), consider drafting using a Q&A style. The question is the heading which the customer (counterparty) wants to know the answer for.

Don't say	Say
<p>Privacy</p> <p>On termination or expiry of this Agreement, the Company must promptly return to the Customer or, if requested by the Customer, destroy all copies of the Personal Information, in which case any right to use, copy or disclose that Personal Information ceases.</p>	<p>What happens with your personal information when you stop using our Service?</p> <p>Upon your request we will either destroy your personal information or return it to you.</p>



Use the right word or phrase

Pick modern, ordinary words – not fancy or obscure words

Readers understand words that are current and ordinary. If you use a pompous word or legal jargon, they will either ignore the jargon, make assumptions or call you to explain. This is inefficient or could lead to disputes later.

- Omit needless words.
- Avoid very rare words, foreign words, and technical jargon.

Helpful resource: the ACT Parliamentary Counsel's Office details 600+ words and phrases to be avoided in drafting, including suggested replacements (APCO List).

The list is available [here](#).



Don't say	Say
Cease	Stop
Commerce	Start or begin
Endeavour	Try
Shall	Must or will
Prior to	Before
Pursuant to	In or under
Termination	End
Usage	Use
Presents	Has
Violation	Breach
Recitals	Background

Don't use legalese

Don't use words like aforementioned, forthwith, hereby, hereinafter, hereof, said, such, thereof, whereas, and witnesseth. The following more common words are just as precise: the, that, those, or them.

Don't use Latin or other foreign words

The APCO List has numerous examples of foreign words that can be replaced with their English equivalent.

Passive	Active
Inter alia	Among other things
Mutatis mutandis	With necessary changes

Cut needless words

Remove redundant couplets and triplets

A string of words generally meaning the same thing is seldom more accurate than a single word that has a broad enough meaning to cover all of them. A string can also have unintended legal consequences and doesn't add precision.

If the string cannot be shortened and is used more than once, create a definition using one word.

Don't say	Say
Sell, convey, assign, dispose of, and transfer	Transfer or dispose
Stop and cease	Stop
Any and all	Pick one
Authorise and empower	Pick one



Cut compound constructions

Don't say	Say
In the event of	If
In respect of	About, concerning, with, for, as to
Prior to	Before
Until such time as	Until
A period of 6 months	6 months
Each separate provision	Each provision

Don't make verbs into nouns

Pay is a simple verb. You can dress it up as a noun by changing it to payment.

Don't say	Say
We shall make a payment to you 30 days after we receive your invoice.	We will pay you 30 days after we receive your invoice.

Don't use numbers and words

- e.g., "two-hundred dollars (\$200.00)"

It doesn't increase accuracy and may lead to an unintended meaning if there is an inconsistency. It does increase the words and keystrokes for no reason. If the number is nine or less, spell it out. Otherwise, use numbers.

Don't state the obvious

It doesn't increase accuracy and may lead to an unintended meaning if there is an inconsistency. It does increase the words and keystrokes for no reason. If the number is nine or less, spell it out. Otherwise, use numbers.

Correct ambiguity

A word or phrase is only ambiguous if it is capable of more than one meaning

Ambiguity is the cause of most contractual litigation. It usually results from unintentional drafting errors.

Vagueness is not ambiguity

Vagueness is usually intentional and connotes uncertainty around the edges of a word's meaning. They are important if the parties do not want certainty. E.g., "We must give notice of acceptance within a reasonable time from delivery." If the parties wanted the notice period to be certain, they could have required the notice be given within three days after the delivery. Other vague words that are used often in agreements include: as soon as practicable, due diligence, immediately, material, proper, satisfactorily, and substantial.

Correct inconsistent (contextual) ambiguities

An ambiguity called contextual ambiguity results if:

- one provision is inconsistent with another;
- a definition does not fit within the text; or
- a document incorporated by reference conflicts with the agreement's main text.

Contextual ambiguity usually results from poor proofing.

Structure

You need to organise your contracts logically, with headings, giving the reader a road map for their deal. A well set out contract should enable the reader to skim read and find their most relevant parts in the time that they have available. Ensuring that all variable fields are grouped together (e.g. in the Agreement Details or Special Conditions sections) will assist down the track if you decide to automate creation of contracts.

Recommended structure is:

- **Cover Page** (only if contract has >30 pages) containing the agreement title and party names
- **Contents Page** (only if contract has >30 pages)
- **Agreement Title** (if not using a Cover Page)
- **Agreement Details** table (main commercial terms)
- **Special Conditions** (if any)
- **Terms and Conditions** (with definitions first and in chronological order or in terms of importance)
- **Execution Page** - have a date line for each signatory so it avoids arguments about the date of the contract
- **Schedules**
- **Annexures/Attachments**

- 1 Group similar or related provisions together.** E.g., group provisions relating to a party's duties together and ones relating to payments together.
- 2 Organise the related provisions according to importance** (e.g., A will do XYZ for B. B will pay A. If the parties don't do that, and then boilerplate clauses at the end) and then order them by putting:
 - (a) frequently used ones before the less frequently used ones;
 - (b) general ones before specific ones; and
 - (c) early time-based ones before the later time-based ones (chronological order).
- 3 After organising the related provisions, generally put a provision's rule (what must be done or not done) before:**
 - (a) how, where, or when the action must be done or not done; and
 - (b) any qualifiers (exceptions, conditions, limitations).

Reduce the need to amend the terms

Include common scenarios in the template contract and use preface words or the Agreement Details to specify if that scenario applies to the deal.

E.g., If we are not buying Goods from you, this clause does not apply.

Avoid cross-references

The less cross-references the easier it is to understand and there is less chance of them breaking in different versions of Word or the document.

Optional clauses

If circumstances will rarely arise, have that clause as an option. Don't include them as a default.

Party names – use “you” and “we” etc

We recommend using normal language such as we, you, your and us to define and describe the parties. It also considerably shortens the contract.

If you cannot use this language, use Company as the principal party and Supplier as the counterparty in commercial, operational buy/sell deals. Don't use capitals for “you” and “we” unless they start a sentence.

Long-form vs Short-form

In most cases, having both versions is unnecessary because one contract can achieve both brevity and inclusiveness. Before you decide to have a LFA and SFA, challenge yourself to do one version. Start with the SFA and add parts from the LFA. If you don't think the combined document works, you can do the LFA as well.

Schedules and Agreement Details

A lot of disputes arise because of inconsistencies and ambiguities in the Schedules, the Agreement Details and as between the Schedules, Agreement Details and T&Cs.

Ensure that guidance notes are included in the Agreement Details and Schedules – especially those that relate to the scope of work, deliverables, pricing, payment and delays – i.e., the critical commercial deal terms.

Example

In consideration of the disclosure referred to in clause 1, Receiving Party shall not disclose the Confidential Information or the fact that Confidential Information has been disclosed or that discussions are taking place relating to the Area to anyone without the prior written consent of Disclosing Party, except as provided in this Agreement.

Receiving Party will immediately inform the Disclosing Party of the full circumstances of any potential, suspected or actual disclosure of the Confidential Information contrary to the terms of this Agreement and Receiving Party shall immediately take all necessary action to stop and/or cease the disclosure of the Confidential Information.

An average reader would likely have difficulty understanding these sentences.

- **Step 1 - Break up the sentences.**
Put the main rule first and list lesser ideas separately. Keep related ideas together.
- **Step 2 - Check for legal accuracy.**
Use of both shall and will to create duties violates the rule of consistency.
- **Step 3 - Simplify sentence structure.**
Look for items that can be combined or made into lists.
- **Step 4 - Cut unnecessary words.**
Pick the right words.

Revised examples

- 1 Subject to clause 2, ABC will not disclose to anyone:
 - (a) Confidential Information;
 - (b) XYZ's disclosure of the Confidential Information; or
 - (c) the parties' discussions about the Area.
- 2 Exception to Non-Disclosure Duty. ABC's non-disclosure duty does not apply if:
 - (a) XYZ provides prior written consent; or
 - (b) the exception in clause [X] applies.
- 3 Breach of Non-Disclosure Duty. If Confidential Information is disclosed contrary to this Agreement, ABC will immediately inform XYZ and stop the disclosure.
- 4 ABC's duty to inform applies to any potential, suspected or actual disclosure.

RESULT:

The final revision follows. Compared to the original version, the total words have been cut by 20%, the WPS have dropped from 51 to 8, and Readability Index has increased from 0 to 48.



Other Toolkits in the Series

Measure your impact

8 KPIs for in-house legal teams

Creative problem solving

5 stages of Design Thinking for in-house legal teams

Increase your influence

6 stages of positioning for in-house legal teams to impact business strategy

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Manage change

5 tips for managing change better

Manage legal supplier procurement

5 tips for running a successful procurement process

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