




Contract Language in Russian and English

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Who I Am and What We're Doing Here

- Introduction
 - What gives contracts power?
 - What defines good writing?
 - Contract language categories in English
 - Contract language categories in Russian
 - Transferring from one to the other
- 




What Gives Contracts Power?

- ▶ Will of the parties, not...
 - ▶ Magic words
 - ▶ Archaisms
 - ▶ That a lawyer wrote it
- ▶ Consistent contract language
 - ▶ Better chance of correct interpretation
 - ▶ By courts
 - ▶ By parties



Good Writing in Contracts

- ▶ Parallel texts – not a guarantee of quality
- ▶ Verb structures are terms
 - ▶ “shall,” “must,” “may” carry special meanings
 - ▶ Be consistent!
- ▶ Have an authority to cite if challenged



A Manual of Style for Contract Drafting

FOURTH EDITION

Kenneth A. Adams



AMERICAN BAR ASSOCIATION
Business Law Section



Language of Agreement

- ▶ Introduction *only*
- ▶ “Agree”
- ▶ The entire contract is about agreeing
 - ▶ Throat-clearing: using “agree,” “consent,” etc. elsewhere, as a lead-in
 - ▶ Redundant, given the nature of contracts
 - ▶ Obscures actual language category

“The parties therefore agree as follows:” (MSCD p. 44)



Language of Performance

- ▶ Must result in change of status for person or thing
- ▶ “Hereby”

“Acme hereby purchases the Assets from Doe.”

“Acme hereby grants Widgetco a license...” (MSCD p. 52)



Language of Obligation

- Imposes an obligation on someone
- “shall” if subject is a party
- “must” (or rephrase) if not
- *Has a duty test*: can “shall” be replaced with “has a duty to”?

“Acme shall purchase the shares from Doe.” (MSCD p. 58)

“The Consultant must be reimbursed for all authorized expenses.”
(MSCD p. 67)

not “Any controversy... shall be settled by arbitration.” (MSCD p. 62)



Language of Discretion

- ▶ “may”: when a party can choose to do something or not
- ▶ “is not required to”: when a party can choose not to do something
- ▶ *Avoid* “may not” instead of “is not required to”
 - ▶ Potential confusion with prohibition

“Acme may appoint one or more subcontractors.” (MSCD p. 76)

“Acme is not required to replace the Widget Equipment.” (ibid. p. 88)



Language of Prohibition

- ▶ “shall not,” “must not”
- ▶ If tempted to use “may not,” see previous section

“The Customer shall not modify the Equipment without Acme’s prior written consent.” (MSCD p. 90)



Language of Policy

- ▶ Policies: “rules that the parties must observe but that don’t, at least expressly, require or permit action or inaction” (MSCD p. 94)
 - ▶ Scope, meaning, duration of contract
 - ▶ Rules for specific circumstances

- ▶ Simple present, or “will” for uncertain future events

“This agreement terminates on 31 December 2019.”

“Interest is payable at a rate of 8% per year.” (MSCD p. 95)

“Any attempted transfer of Shares in violation of this agreement will be void.” (ibid. p. 94)

“This agreement will terminate upon the closing of a Qualified IPO.” (ibid. p. 95)



Language of Declaration

- Assertions of fact
 - “states” if the subject has knowledge of the fact
 - “acknowledges” if the other party has knowledge of the fact
 - No need to use “hereby”

“[Party name] states that the following facts are accurate:” (MSCD p. 114)

“Acme acknowledges that the Consultant is in the business of providing services and consulting advice to others.” (MSCD p. 116)



Additional Categories

- ▶ Language of Intention

- ▶ Addresses issues to be handled by court
- ▶ Replaces language of policy if circumstance cannot be decided by parties
- ▶ “intend(s) that...”

- ▶ Language of Recommendation

- ▶ One party has more power
- ▶ Making recommendation explicit advantages party in court
- ▶ “recommends,” “encourages,” “reminds”



Conditions

- Modify other language categories
- Subordinate clause introduced by “if” or “unless”
 - Main clause uses “will” instead of simple present
 - “Shall,” “may,” “must” remain unchanged
- Avoid:
 - “shall”
 - “should”
 - Subjunctive mood



Russian Contracts

How do they achieve the same goals?



Language of Agreement

- ▶ Structure of introduction is vastly different
- ▶ The only place in a Russian contract to use the past tense

Стороны... «составили настоящий договор ... о нижеследующем»



Language of Performance

- ▶ Role played by акты that accompany contracts
- ▶ May be marked by настоящим, but often indistinguishable

«Во исполнение п. 1.1 Договора Продавец **передает**, а Покупатель **принимает** строительные материалы следующего ассортимента и количества:»

Language of Obligation

- ▶ May be explicit: «Арендодатель **обязан...**»
 - ▶ Often introduces a list
 - ▶ Not all items may complete the sentence grammatically
- ▶ May use just the present tense
 - ▶ «За нарушение сроков передачи имущества виновная сторона **уплачивает** другой стороне штраф.»
- ▶ May use a modal: «К претензии **должны быть приложены** документы...»
- ▶ May use a passive: «Арендная плата **вносится** не позднее...»

Language of Discretion / Prohibition

- ▶ May center around право: «Арендодатель **вправе / имеет право...**»
 - ▶ For prohibition, simply negated: **не вправе / не имеет право**
- ▶ May use modal: «Договор **может быть** досрочно расторгнут по соглашению Сторон.»
- ▶ Rare variant for prohibition: «Арендодатель **не дает своего согласия** Арендатору на сдачу Оборудования в субаренду...»



Language of Policy

- ▶ Policies concerning the contract:
 - ▶ Often use present: «Приложение №1 **является** неотъемлемой частью...»
 - ▶ Occasionally use future: «Все споры, связанные с настоящим Договором, **будут разрешаться** Сторонами путем переговоров.»
- ▶ Policies concerning the subject of the contract:
 - ▶ Generally use present: «Арендная плата **устанавливается** в размере...»
 - ▶ Often use a reflexive



Language of Declaration

- ▶ «заверяет», «гарантирует»
 - ▶ 2015 law change added legal protections for «заверения об обстоятельствах»
 - ▶ Vaguely defined, mostly caused confusion
 - ▶ One recommended phrasing: «Сторона 1 заверяет Сторону 2 о следующих обстоятельствах...»

«Арендодатель **гарантирует**, что на момент заключения Договора Оборудование в споре или под арестом не состоит...»



Conditions

- ▶ «В случае...» - generally followed by a noun:
 - ▶ «**В случае** несвоевременного **возврата** Оборудования, Арендодатель *вправе* потребовать...»
 - ▶ «**В случае наступления** этих обстоятельств Сторона обязана в течение 5 дней уведомить об этом другую Сторону.»
 - ▶ «**В случае недостижения** соглашения в ходе переговоров, заинтересованная Сторона *направляет* претензию в письменной форме.»
- ▶ Rarely «если...»
 - ▶ «Если обстоятельства непреодолимой силы продолжают действовать более 3 месяцев, то каждая Сторона вправе расторгнуть Договор в одностороннем порядке.»



Transfer Strategies

Tips and Pitfalls



Identify the Language Category

- ▶ Easy if a signal word is present
 - ▶ Обязуется
 - ▶ Гарантирует
 - ▶ Вправе
- ▶ Especially important when faced with present tense
 - ▶ Does a party need to perform an action?
 - ▶ Is there a condition associated with it?



Apply the Appropriate Structure

- ▶ “has a duty” test for *shall*
- ▶ Feel free to ignore Russian wording
 - ▶ E.g. вправе ≠ “has a right to,” *may* is sufficient
 - ▶ Adapt в случае to “if,” try to make noun into a verb
 - ▶ Might the “if” work better as an “unless”?
 - ▶ Change present to future tense with conditions, or for policies involving “uncertain future events”



Improve Drafting if Possible

- ▶ Keep to the spirit of the contract, but improve clarity
 - ▶ Remove throat-clearing
 - ▶ Make party explicit when imposing obligations
 - ▶ If obligation has no consequences, is it an obligation?
- ▶ Translating is not drafting
 - ▶ Improvements may not be possible
 - ▶ At a minimum, avoid adding confusion or ambiguity



Thank you for your time!

Questions?

► Sources

- Adams, Kenneth. *A Manual of Style for Contract Drafting*. 4th Ed. ABA Publishing, 2017.
- Набережный, Андрей. «Заверения об обстоятельствах: как применять нормы, чтобы они работали?» *Экономика и жизнь*. 6 Oct 2017.
- “Образцы договоров.” *Юридическая и налоговая консультация онлайн*. https://yuridicheskaya-konsultaciya.ru/dogovor/dogovor-obrazci_dogovorov.html

► Further reading

- Kenneth Adams's blog: *Adams on Contract Drafting*, adamsdrafting.com/blog

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