



# BEWARE OF VAGUE DRAFTING!

## Introduction

In everyday legal drafting, lawyers commonly use “elastic” expressions such as “reasonable”, “as soon as practicable”, “material” and “satisfactory”.<sup>1</sup> While precise word choice is the primary aim of the legal draftsman, vague drafting may be desirable for “efficacy”<sup>2</sup> purposes described in the next section.

However, the justifications for vague drafting should not belie the fact that vagueness carries risks and may be inappropriate in certain contexts where precision and clarity are paramount. This article briefly considers when it may be appropriate to draft vaguely, and when vagueness should be avoided.

## When Vagueness May be Appropriate

Legal writing experts have observed that vagueness may be desirable if it is “intentional, artful”<sup>3</sup> or “necessary”,<sup>4</sup> or used with “conscious deliberation”.<sup>5</sup>

Some reasons why vague legal drafting may be justified are as follows:

- In transactional documents, it gives parties “the flexibility that is necessary to make the transaction work”.<sup>6</sup> For example, as it may be too time-consuming for parties to negotiate what constitutes a “*reasonable time*” in every scenario, the draftsman can leave it to the parties to work out an agreed timeframe after the contract is signed.<sup>7</sup>
- In some cases, using vague terms may be the only choice<sup>8</sup> “when it is not possible to map the trail in detail”.<sup>9</sup> For instance, vagueness may be used to give “general guidance” as seen in a US Supreme Court decision which held that “states may impose “*reasonable restrictions*” on the time, place and manner of lawyer advertising”.<sup>10</sup>
- Even if it is possible to be more precise, using vague terms can help to reduce “transaction costs”.<sup>11</sup> For example, defining a “*reasonable market price*” may be inefficient if the goods in question are “open-ended” and the market value of the goods can fluctuate.<sup>12</sup> In practice, it is common for contracting parties to agree to appoint an independent valuer to determine what a reasonable market price is.<sup>13</sup>



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## When Vagueness Should be Avoided

The preceding section's discussion may give the impression that efficacy is a sound basis for vague drafting in every case, and that it is always advisable to avoid committing to a definite position in legal drafting so long as it is done thoughtfully.

While using vague words (such as "reasonable") may be justified in certain circumstances, vagueness would not be appropriate for legal documents which require obligations to be drafted with a high degree of precision. For example, an Australian legal writing expert has observed that lawyers' undertakings "should always set out clearly what is undertaken to be done".<sup>14</sup> This is because the courts, as part of their supervisory jurisdiction over their officers, can enforce lawyers' undertakings given to other parties.<sup>15</sup>

A Singapore case in point is a 2017 High Court decision where the defendant law firm, which represented the claimants in an arbitration, had given letters of undertaking to the respondent in the arbitration.<sup>16</sup> The defendant law firm had undertaken to "hold" a sum of money (\$100,000) "as security for costs in our clients' account", but the undertaking contained no terms governing the release of the security. At issue was whether the defendant law firm had to release the security to satisfy the arbitrator's costs order against the claimants after the arbitrator had issued the final award.

The High Court held that, in view of the phrase "security for costs" in the undertaking and the background facts, the defendant law firm was obliged not only to *hold*, but also to *release*, the security upon the arbitrator issuing the final award in order to satisfy the costs order.<sup>17</sup>

Although the defendant law firm argued that it was obliged to release the security only after the arbitrator had made a further order to release the security, the High Court found that no such condition was stipulated in the undertaking and ordered the defendant law firm to release the security to the respondent in the arbitration.<sup>18</sup>

The High Court underscored that the defendant law firm should have drafted the undertaking precisely to carry out its intent:

*"Had the Defendant intended its obligation to pay under the Undertaking to be conditional upon a further order from the Arbitrator, the Defendant could have easily inserted words to this effect in the Undertaking."*<sup>19</sup> [emphasis added]

In other words, if an undertaking is unclear as to when the money would be released, the fault lies with the legal draftsman, and the Court will not cure the vagueness.

## Conclusion

Although it may sometimes be a fine line as to whether vague drafting is appropriate or not, a rule of thumb is that efficacy does not always trump precision. Particularly in cases where precision and clarity are key, lawyers should avoid vagueness, albeit intentional, because if a dispute arises, there is no guarantee that the courts would interpret the provision in question as the legal draftsman would have done.<sup>20</sup>

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## Endnotes

1. Peter Butt, *Legal Usage: A Modern Style Guide* (Australia: LexisNexis Butterworths, 2018) at p 664 (“Legal Usage”).
2. Elizabeth Fajans, Mary R. Falk and Helene S. Shapo, *Writing for Law Practice* (New York: Foundation Press, Second Edition, 2010) at p 400 (“Writing for Law Practice”).
3. Richard C. Wydick, *Plain English for Lawyers* (North Carolina: Carolina Academic Press, Fifth Edition, 2005) at p 57 (“Plain English”).
4. Mark Adler and Daphne Perry, *Clarity for Lawyers: Effective Legal Language* (London: Law Society Publishing, Third Edition, 2017) at p 181.
5. Thomas R. Haggard and George W. Kuney, *Legal Drafting: Process, Techniques and Exercises* (United States: Thomson/West, 2007) at p 177 (“Legal Drafting”).
6. *Legal Drafting*, *id.*, at p 175.
7. *Legal Drafting*, *supra* n 5, at pp 175-6.
8. *Legal Drafting*, *supra* n 5, at p 174.
9. *Plain English*, *supra* n 3, at p 57.
10. *Plain English*, *id.*
11. *Legal Drafting*, *supra* n 5, at p 175.
12. *Legal Drafting*, *id.*
13. *Legal Drafting*, *id.*
14. Peter Butt, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge: Cambridge University Press, Third Edition, 2013) at (6.38) (“Modern Legal Drafting”).
15. *Modern Legal Drafting*, *id.*
16. *Otto Ventures Pte Ltd v ECYT Law LLC* (2017) 4 SLR 776.
17. *Id.*, at (24).
18. *Supra* n 16, at (27).
19. *Id.*
20. *Writing for Law Practice*, *supra* n 2, at p 401.

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