INTRODUCTION

LOUISE: [00:00:15] Hello, and welcome to the Study Legal English Podcast. I'm your host Louise, and today I've got the one and only Ken Adams on the show. In this interview, we talk about THE code you need to know about when drafting contracts, the use of 'shall', and the use of legalese words, such as 'defend, indemnify, and hold harmless'.

We cover Ken's 'favorite', in quotation marks, video game, and his plans for taking over the contract drafting world with mini-Ken-Adams-robots, or something like that.

In this interview, Ken opens up in public for the first time about certain aspects of his personality. He talks about what drives him to do what he does and why he reacts in somewhat direct and harsh ways when confronted with disagreement. So, I know many of you out there know who Ken Adams is, but for those of you who don't well, you are going to find out. I'm going to sum up who Ken is with a Napolitano proverb. Naples is the city where modern pizza originated from. And I thought it fitting, not just because of the meaning, but because Ken loves pizza. I mean, well, who doesn't!? But Ken has a special talent for making pizza and often posts photos of his creations on Twitter. My friends, if I ever find myself in New York, not in a lockdown, I'm inviting myself round for Ken's special pizza. Oh yeah. Anyway, the proverb is: Quando il mare è calmo, ogni stupido è marinaio.

[00:02:09] So this means, When the weather's calm, every idiot's a sailor. The original proverb uses somewhat stronger language, but the meaning is this: when things are easy, we are all specialists, but we see the true experts in difficult times. Well, ladies and gentlemen, Ken is even a sailor when the weather is very, very bad. And by sailor, I mean ... contract drafting expert, and by bad weather, I mean ... when contract language gets convoluted, messy, and obscure, obviously!

What I'm trying to get across to you is this: there are a fair few people out there who call themselves contract drafting experts, but Ken is the real deal. He has a vision of how contracts can and should be. He has dedicated years to analyzing contract language and categorizing it systematically to come up with his own kind of code of
language for drafting and which you can follow to ensure your contracts are clear, concise, and accurate.

His book, *A Manual of Style for Contract Drafting*, is the leading authority on contract language used across the world for teaching contract drafting and by transactional lawyers looking to improve. If there’s one book you own on contract drafting, it should be Ken’s. I know a lot of you listeners already have it. I have it myself, and it’s a really helpful resource.

So today this is a real special opportunity for you to listen to an expert, as we talk about many aspects of contract language. So let’s go!

**START OF INTERVIEW**

LOUISE: [00:04:00] So, Ken, hi, welcome to the show.

KEN: Hello, pleasure to be speaking with you.

LOUISE: How are you doing? How’s your morning gone so far?

KEN: Hey, I’m awake, and it’s great. Of course, I’m at home where I’ve been for umpteen months. Very different from 2019 when I was basically elsewhere the entire time. But, such is life, such are the other times.

**HOW WAS DELIVERING COURSES LAST YEAR?**

LOUISE: [00:04:24] Last year you spent a lot of your time traveling around the world, presenting your work, delivering master classes, courses on contract drafting. It must have been an incredible experience. How was it?

KEN: Well, it has been a privilege for quite a few years to be doing that sort of thing, to have people, around the world, feel that what I have to say is interesting enough for them to ask that I wander over to speak with them.

Last year got a little silly, just because there was so much travel all over the place. In terms of flying somewhere relatively distant, then coming back two days later, then flying to pretty much the same place two days later. I enjoy my travel, it’s a bit of a guilty pleasure, being alone in the sky for X number of hours. Generally, I’m able to make good use of my time or simply sleep. I’m fine with that and my hotel time similarly, but I confess that the pandemic and our friend Zoom has showed me that a lot of that to and fro is wasteful—wasting my time, wasting the planet’s resources, and so the faintest of silver linings to the current situation is realizing that the to-ing and fro-ing, is not what gives anything meaning. I enjoy going for runs around Sydney Harbor or the Imperial Palace in Tokyo, and so there are fun components, but ultimately it’s the reason for being there that is relevant, and I can get that far more efficiently, a lot of the time, online.
I’m sure once we’re back to traveling, I’ll go back to doing in-person stuff to some extent, because it’s fun and there’s a kind of engagement you don’t get otherwise, but meanwhile, a lot of the stuff that used to be in person I suspect has permanently migrated online.

**HOW ARE YOUR ONLINE COURSES GOING NOW?**

LOUISE: [00:06:41] You’ve actually started online courses now and you’ve been delivering them. How are they going?

KEN: They’re going fine. It’s a work in progress. It’s called *Drafting Clearer Contracts: Masterclass*. The idea being that I’ve seen that when I go somewhere with a pile of books and do a day-long seminar, hand people the books, and then leave, that still presents a challenge to whoever is now in the possession of my 600-page book and is invited to make sense of it themselves.

So the idea of *Masterclass* is to give people an opportunity to get further along the learning curve than would otherwise be the case. It consists of eight weekly live, one-hour Zoom sessions, with a supporting site that has a bunch of materials. So for every session, people are invited to read chapters of the book, do quizzes and short drafting assignments. Then during the live sessions, I might do some sort of overview, but the most important part from my perspective is working through exercises or looking at a real-life contract where I’ve highlighted things that are problematic, and I invite people to tell me how they’re problematic.

[00:08:09] Some people have expected that with the name *Masterclass*, there’s, oh, a graduate-seminar vibe to it, but instead it’s more like a remedial-writing-meets-boot-camp. And it’s kind of rapid fire, with the idea of just trying to instill in people the neural pathways that allow people to recognize patterns and make decisions prompted by those patterns in terms of, Ah, it’s this kind of dysfunction, and I know the fix is *this*.

Drafting is not particularly the place for elevated musings, instead it is just endless small decisions, with the idea that the more decisions you get wrong, the greater the odds that you’re creating a kind of fog that can mask serious mistakes and otherwise just cause people to waste time and money in figuring out on what earth is going on.

I’ve analogized it to the worst video game in the world, where you have, in slow motion, these problems coming at you and you beat them, you deal with them as they come along. I actually find it kind of sport in small doses. In large doses, it’s pretty dreadful.

LOUISE: When are you going to team up with Nintendo and bring out a contract video game?
KEN: It’ll disappear without a trace! What the heck, if there were a way of making this sort of exercise … giving it more pizazz, I’m game for it, but I’m afraid, no, you just have to be hardwired to embrace this sort of challenge.

HOW DID YOU GET TO WHERE YOU ARE TODAY?

LOUISE: [00:09:51] Let’s get into some questions. How did you get to where you are today?

KEN: Fortitude, brilliance. No. Well, this is something that I’ve actually had occasion to ponder somewhat in recent months and years. I mean, I have contemplated my navel enough in the past to kind of think, hmm, okay, hey, this is a kind of interesting trajectory, but I recently looked at something I wrote in 2009 [here], there’s still a link up on my ‘Credentials’ page on my website, and it tells the story okay. But what I found of interest is that it describes a kind of drifting through secondary education—I grew up in England—through college in England, going to law school, but drifting in law school, and ultimately in law practice—drifting. Until in the mid-nineties at the ripe old age of around thirty-five, I thought, Hmm, why don’t I look at contract language? And then began a twenty-five-year saga of just, in the most incremental way possible, developing my expertise and finding a way to make a living at it.

But the additional ten years of perspective has made me look more closely at the drifting part of things and essentially it’s that different generations of my family have exhibited a marked tendency of remoteness coupled with a creative sort of intelligence. And I realized, ahem, maybe that’s me! And looking at it from the benefit of more years … is that I, and I think others have marked attention-deficit issues, particularly marked in my younger years.

[00:11:56] This is not a story I have told. It’s just something I’ve just contemplated idly, relatively recently, but essentially, I would have illusions of being a smart guy, but I was just a chronic underachiever, and with a marked aversion to jumping through hoops, and education is largely jumping through hoops. And a disinclination to do other people’s work.

There can be a tendency for people to pathologize things, but I’ve observed in myself and in others, it’s no joke. It can reach a marked dread of attending class, and various parts of my education consisted of me just not showing up, either in fact or as a figure of speech, in pretty dramatic ways.

I cheerfully managed to attend very good schools and all, and I got through it, but it was just … something was off. And so it was revealing that all of a sudden at thirty-five, some sort of light would go off. And I say, this is for me.

And why contract language? Well, because for me a part of this syndrome—I don’t know what to call it—is a need for order, to have control. I’m the kind of guy who picks up litter, other people’s litter. My family calls me ‘the society policeman’, and I
just … at different levels, I need control, and I can get quite agitated when I don’t have it. So it was something of a natural fit in terms of observing this field of randomness and chaos and waste, for me to say, perhaps I’m going to try and tidy this up.

[00:14:03] And one day—we had returned from a few years in Geneva, Switzerland, at the time I hadn’t yet found a job, transitioning from international took a bit of time—we were living with my in-laws. One day I set myself up at their dining room table and I said, I am going to write a book on contract drafting. And to their credit, they didn’t say, ‘You bum, go and find a job’, or whatever. They said, ‘Oh, all right’. And that turned into my first book, published in 2001, that was really a precursor to the ABA book. And so that’s how it played out. But those tendencies still live with me.

People have had occasion to observe that if I’m challenged in a way that I don’t think is fair, I get agitated, and my family can observe that agitation. I’ve calmed down a little, but I still react. I just … in measured ways, I react strongly to the extent some people think I’m a massive jerk. I try to keep the jerk part of it toned down, but even someone as gentlemanly as Mark Anderson once, just inadvertently, kind of trod on my toe or something, and I responded. I took it down and I made amends. That was one time when I overstepped rather.

I’m not going to go on about this, but it is just … these things are called disorders—attention deficit disorder. I think that’s appropriate, but in my case, it’s something of a tradeoff, in that I can look back to some serious futility, but on the other hand, this view of the world, this way my brain functions, what the heck, it has allowed me to create something that no one else has come remotely close to addressing, and I’ve been able to bring to bear a kind of idiot savant level of semantic acuity, that sometimes I sit back and say, ‘Gee, you know, that’s quite something’. And it has allowed me to engage with people all over the world.

That kind of smarts was necessary for me to have meaning in my life. It sounds—I don’t know—sappy movie or something, but it’s just, without that I had no legitimate way to connect. And there was just a hole and that I knew I was a smart guy wandering around without any manifestation of those smarts.

[00:16:48] So I have that. And furthermore, it is not utterly defining. It is at an important level, yes, it’s very defining, but I’m able to bring to bear a level of appreciation, it’s the engine that takes me where I need to go, but I’ve just more easy going attributes that are along for the ride. Anyone who shows me that I’m wrong in anything I do will find in me a friend forever. People will find me alarmingly accessible. They call me up, I say, ‘Hi’, they say, ‘don’t you have people that answer your phone?’ ‘No, no’. So it has worked out well.
LOUISE: It’s interesting to hear you talking about your self-awareness. It sounds like you’ve done quite a lot of thinking about your own character, which everyone should be doing and perhaps quite a lot of people have been doing that throughout the COVID period.

I always view this ... your greatest strength on the flip side is your greatest weakness. Often the things that we love about people are also the things that we hate about them, because they’re just two sides of the same coin. And so your love of having control has pushed you to develop this incredible book, this incredible code, that’s helping so many people, but then on the flip side, if someone maybe calls you out or you see something that is disorder and because it’s so important to you, you then react quite strongly, but clearly you’re aware of it and sounds like you’re a big softie underneath it all.

KEN: [00:18:26] Yeah—some people are saying, ‘Yeah, right!’ . Yeah. I try.

CATEGORIES OF CONTRACT LANGUAGE

LOUISE: [00:18:31]Lets actually talk about your categories of contract language. Listeners out there, it might sound a bit complex at the beginning but it’s not, it’s very straightforward. And so if you listen very carefully and you adopt these rules, I guarantee your contracts are going to be a lot clearer. Your clients are going to love you if you follow these rules.

So Ken, tell us about your contract drafting language categories.

KEN: All right, yeah, enthralling.

For me, it’s the foundation of controlled drafting. The idea is that every sentence is going to fall into one of a series of categories: language of performance, obligation, discretion, prohibition, declaration, policy, and a few more. Each of those categories expresses a particular kind of meaning.

And I’ve created the framework such that for each category, there’s a particular verb structure. So it’s a human creation, not something handed down by the grammar gods. It’s based on standard English, tweaked to reflect how contracts work. The idea is that in traditional contract drafting, you don’t have that kind of framework. You have utter chaos.

Chapter three of my book deals with categories of contract language. It has a bunch of tables for the different categories of contract language, and each table has an optimal option, with a couple of check marks and then all the alternatives you see in the wild with an X or a couple of Xs to indicate exactly how undesirable they are.
LANGUAGE OF DISCRETION: MAY

KEN: [00:20:24] For example, for language of discretion, it comes in different variants, but the primary one is where you use *may*. Well, there are all sorts of alternatives to *may*. Instead of *Acme may appoint*, you can say *Acme is authorized to appoint*, *Acme will be entitled to appoint*. And it gets worse from there: *Acme is empowered by Widgetco to appoint*, *Acme is hereby granted the authority to appoint*, and perhaps fifteen alternatives in total. And I keep finding new ones. *This agreement allows Acme to appoint*, for example. So, it sounds like categories of contract language, it should be work, but it actually it simplifies things.

LANGUAGE OF OBLIGATION: SHALL

KEN: [00:21:13] It’s always very easy to make the random choice, but you pay a serious price in terms of the randomness. It just creates uncertainty. It creates a fog for the reader. For example, overuse of *shall*, *shall* being used in all sorts of places.

I use it to impose a duty on the subject of the sentence: *Acme shall purchase*. We could spend an hour talking about that by itself, but it’s a choice that I am utterly at peace with. The idea is that instead of the uncertainty, the chaos, the potential for confusion, and for fights that comes from the random approach to verb structures, instead you have finite choices.

CHOOSING THE CATEGORY OF CONTRACT LANGUAGE

KEN: [00:21:58] First, you say what category of contract language is this? What kind of meaning am I trying to convey or rather what category of contract language should this be? Since you have to rehabilitate whatever language you’re working from. And then once you’ve decided what you’re trying to say, then you pick a verb structure and the categories of contract language—my framework—will offer you that. In terms of, Okay, it’s a language of policy with respect to a contingent future event, then use *will*.

You need to train your neural pathways for that. And I just make it clear to anyone who’s exploring this, that it’s the process of asking yourself the same questions over and over again.

Regarding *shall*, for example, I invite people to do the ‘has-a-duty test’, which itself is relatively nuanced. I did a blog post about it, so if you search for ‘has a duty test’, you’ll find it [here]. At its easiest, you replace *shall* with *has a duty to*, and if it doesn’t make sense, then, you do something else. *This agreement shall be governed by New York law*. ‘This agreement has a duty to ...’? No, that doesn’t make sense. So we have to do something different. In other contexts, you have to bring to bear an awareness of the context. *The arbitrator shall notify ...*. ‘The arbitrator has a duty to notify ...’? The arbitrator isn’t a party to the contract so they can’t have a duty, so no, we do something else.
It ends up itself being a subtle kind of test. But you get used to the context and you decide accordingly.

And then beyond that—beyond choosing the category of contract language—and then going to the verb structure, once you’ve chosen the category of contract language, the verb structure that goes with it is simple because the book offers you just a shortlist of alternatives.

Once you’re used to asking yourself those same questions constantly, for every sentence, you get used to it. So ultimately it moves from being a kind of labored, ‘Hmmm... you know, does this pass that has-a-duty test? Let me think for twenty-five seconds’, it ultimately goes by in a flash. And you see the same dysfunction over and over, so it becomes second nature, ultimately.

[00:24:28] There’s some more subtle areas where … hey, I’ve, wrestled with how to approach it. A couple of months ago, I think, I did a post about what category to use when you’re talking about the timing of submitting an invoice. I wrote a total of three blog posts about that, the most recent one exploring the seven possible ways you can address that [here] and I ultimately threw in the towel and said, hey, let’s just go back to the simplest, let’s go back to the starting point, because you don’t want to open the can of worms that is encouraged by all these alternatives. I think by now I’ve, exhausted all, well, all obvious permutations. So it’s known territory now.

**RECAPPING CATEGORY OF CONTRACT LANGUAGE**

LOUISE: [00:25:12] So you keep coming back to the same categories. So you covered a lot of information there. So basically, you have analyzed so many contracts and then you’ve looked at different types of contract clauses and said, within each of these clauses, there’s a particular purpose. There’s going to be a clause that presents an obligation. A clause that just presents an agreement.

KEN: Yeah. That occurs only once in the lead-in to the contract. So I hardly ever consider it—The parties therefore agree as follows.

LOUISE: Okay. There’s language of discretion that you mentioned, it’s not an obligation, it’s an ability to do something. And then what you found is that, there are these set purposes for a particular clause, but instead of there being order and people following a very orderly language structure, they’re using all kinds of language. So instead of saying Acme may do whatever, you’re seeing Acme is authorized to do. Acme is allowed to do. Et cetera, et cetera. Even in the same contract, using different ways to express this one concept.

And what you’re saying is—stop doing this disorderly way of writing, because it creates uncertainty, it creates ambiguity. If you’re trying to say one particular thing in your contract and, where you’ve got an obligation, in one part of the contract, you’re saying shall in another part you’re saying is obligated to, in another part, you’re also...
using *shall* where there’s not an obligation, it’s going to cause confusion for the parties. It could end up in litigation. It’s dangerous to use this disorderly language.

So in chapter three of your book, you deal with the categories. You go through all of the examples of how you can use your categories very clearly, giving examples of variants and then the single verb structures that you can use, to follow, to make your contracts orderly.

**CATEGORIES OF CONTRACT LANGUAGE QUICK REFERENCE**

**LOUISE:** [00:27:32] It’s so simple, listeners. It probably sounds a little bit complicated and a bit abstract because you’re not seeing anything, but Ken has got an amazing resource, which is a categories of contract language quick reference PDF [here], I’ll leave a link in the show notes for you to download.

You know, if you haven’t come across this idea before and you look at it, you may not get it straight away. In which case get Ken’s book, or look at his blog, because Ken, you’ve got so many blog articles where you explain and you go into more detail about things.

There’s so many free resources on your website. It’s very helpful. And listeners, start using this language. As Ken mentioned, it might be a little bit … at the beginning, you might have to do the whole, what’s the purpose of this particular clause? Therefore, what’s the category of language? It might take you twenty seconds of thought at the beginning, but then it’s going to become natural.

**WHAT FEEDBACK DO YOU GET ON YOUR BOOK?**

**LOUISE:** [00:28:36] I know, Ken, that lots of people, like law firms are adopting your [A Manual of Style for Contract Drafting] as their style guide for drafting contracts. Alex Hamilton, I spoke to recently, at Radiant Law, they’ve adopted it. What kind of feedback do you get from the firms that have adopted this?

**KEN:** It’s early days yet. A couple of years ago, someone suggested that my book and my goal had failed because you just don’t find enough evidence that it is being adopted. And I observed that, hey, in a copy-and-paste world, change is very slow to come.

What matters to me is that, hey, plenty of people are buying the book and they’re buying it for a reason. And I hear plenty of anecdotal evidence. For example, someone recently said that not only do they use it, but they require their outside law firms to use it as well. That’s the kind of sign of progress that I like to see.

Then I’ll hear from, oh, you know, the real estate department of a big law firm observing that they have monthly training sessions where they go through the book chapter by chapter with groups of junior lawyers required to do presentations. So what the heck, it’s catching on.
But one of my tasks is that, when I set off down this road, umpteen years ago, I thought if we’re going to turn contract drafting into a commodity, we have to have a set of sensible guidelines for contract language.

Turning something into a commodity sounds ...oh, it sounds too modern. Sounds mechanical or some such. But contract drafting is precedent driven. It’s not creative writing. So we might as well find a way to capture the precedent nature effectively rather than endlessly copy-and-pasting from precedent contracts of questionable quality and relevance.

It is great that individuals are using the book. It is great that organizations are using it as a way of helping everyone be an informed consumer of contract language, but ultimately, to really scale up quality language, quality contract content, you have to find some way to replace copy-and-paste.

So, that is my next big challenge. I hope it doesn’t take twenty-five years, but in that regard, the book is a means to an end, rather than an end in and of itself. So we’ll see.

**WHAT IS YOUR END GOAL?**

**LOUISE:** [00:31:26] What’s the kind of end goal? The contract-drafting utopia?

**KEN:** Hey, it’s always going to be work, but it doesn’t have to be as dreadful as it is now. The idea is exceedingly simple. Instead of creating a template by some drafting-by-committee process where people of markedly imperfect awareness sit around debating what conventional wisdom they wish to incorporate, instead you can log onto a library of automated templates created by editorial committees of subject-matter experts complying with guess who’s guidelines for contract language, and you answer an annoyingly long questionnaire—because hey, what the heck, you’re creating your master services agreement of your dreams or whatever it is, so you can afford to invest two and a half hours, compared with the eighteen months of drafting by committee.

And you go through and you look at the questions, you consult the annotations, you make a choice. The questionnaire is logic driven, so it says, Oh, you like that choice? Well, then we’ll give you some other related choices, and you work your way through. And when you’re done, you have something that is highly customized and a vastly superior quality all around than anything you could create yourself.

And once you have that sort of resource in broad use, you clear the decks, and everyone gets used to a more sensible way of doing things, rather than the current arrangement, which is relying on copying-and-pasting endlessly. You’re relying on the most preposterous conventional wisdom that the gatekeepers nevertheless cling to for reasons that truly continue to escape me.
[00:33:29] So is this a foregone conclusion? Is this going to happen? It’s not clear, because there’s no single organization that has the stomach for that sort of thing. So I keep looking at alternatives, keep having different kinds of conversations. We’ll see.

The ultimate goal that I had in mind when I started out way back when—it’d be nice to be able to get at least something halfway there at some point, rather than in effect, just having the blueprint, which is what the book is.

I don’t want this approach to contract language to be accessible only to those with the fortitude to tackle, to self-educate, I’d like just exposure to quality contract language to do a lot of the work, and to just have quality contract language be the option, like you’d have to go out of your way to access bad old contract language if that’s what you wanted.

So, so we’ll see.

LOUISE: Well, if there are any listeners out there who, can help Ken achieve his ultimate goal, do get in touch with him, of course on LinkedIn search for Ken Adams or, via his blog www.adamsdrafting.com.

DEFEND, INDEMNIFY, HOLD HARMLESS

LOUISE: [00:34:46] So you were talking a little bit there about people cling to this conventional language. Now, there was an article a while ago on LinkedIn about an indemnity clause, which came up and was talking about this particular type of language in an indemnity clause, for example, it was talking about the differences between defend, indemnify, and hold harmless.

Now, I’m a big proponent of plain English. And I really appreciate everything in your book. And anyway, I read that article and I had a lapse in my plain English approach. And I was like, yeah, that sounds interesting.

But you commented on it and were like, ‘No, what are you doing! Stop!’ We got on the wrong side of Ken Adams!

KEN: [00:35:28] That’s part of me patrolling the marketplace of ideas, rapping people on their knuckles. I don’t know whether ... I think people might not appreciate it, but it’s just, I consider it part of my … part of my job. And, oh sure, obviously it appeals to that side of me. I try and do it politely, but people just—law firms in particular—will trot out this nonsense.

Now I prefer not to talk about ‘plain English’, to use that term, because, oh, the legalistic minded will say, ah, that’s dumbing stuff down, we are professionals versed in the nuances. In fact, that ain’t it. So I refer to ‘standard English’.

And once you look at this stuff, oh, hey, we could spend an eternity talking about individual examples. I used to have a kind of military metaphor I’ll dispense with now,
the video game analogy will do—just the eternal video game of tackling these usages that are unhelpful.

[00:36:35] So we could talk about, ooh, the notion that best efforts is more than reasonable efforts, you know, preposterous. And I published a law review article last year that just cheerfully demolished that notion forever for anyone except those who are just happy to traffic misbegotten conventional wisdom. We could talk about represents and warrants, which loomed large in my life until, again, in 2015 I wrote a law review article that just looked for any trace of sensible function in that phrase and found nothing.

But indemnify and hold harmless stuff, that’s simple. People will trot out these rationales for using the two phrases, but it’s an artifact of the legalistic mind in two ways, two self-defeating ways. One is, ‘Hmm, let’s come up with alternatives, let’s indulge in redundancy because we’re risk averse. Do I use indemnify? Do I use hold harmless? I don’t know! Let’s use both!’ And then the legalistic mind says, ‘Well, they’re both here and they can’t mean the same thing because we wouldn’t use two phrases, so we have to retrofit some sort of subtle distinctions in there with the result that indemnify and hold harmless results in fights all over, with different courts in different jurisdictions attributing different meaning to the different components, with a court in Ontario saying, ‘Hmm, we think hold harmless is broader than indemnify’, a court in Delaware, with a gratifying display of rationality, saying, ‘Oh, welcome to the world of redundancy. We have these two phrases expressing one meaning, not two separate meanings’.

But ultimately, using indemnify and hold harmless might gratify the legalistic, copy-and-paste mind, but it’s an invitation to a fight. And you have the power, you have the responsibility, as a drafter, as a reviewer, to say what the deal is instead of trafficking in misbegotten code.

[00:38:44] So indemnify is a term of art we could say something simpler, like will be liable to Widgetco for, but it’s a safe term of art, it’s accepted. So what the heck, let’s stick with indemnify—Acme shall indemnify Widgetco against ... what? The ‘against what’ part is what matters. That’s where you say what the deal is, and that takes away from the verbs whatever mystery function people will look to them for if you don’t adequately say what’s going on. So, defend, the same idea. Defend? Whatever defend might mean, it’s not up to the task. So if anyone wants more about that, they can search on my blog for the phrase, ‘My Indemnification Language’, because a few years ago, I put up my indemnification language [here]. My readers beat me to a pulp for shortcomings in my indemnification language, and I crawled away and retooled it. People might find it a helpful starting point. Multiply that analysis by 327 and that’s kind of what the book is. That’s what my life is, so …
RECAPPING DEFEND, INDEMNIFY, HOLD HARMLESS

LOUISE: [00:39:52] Okay. So, to recap what you said. So for listeners, defend, indemnify, hold harmless is an example, as there are so many examples as Ken mentioned out there, of just language which is being used just because from a legalistic point of view, lawyers have the tendency to use language as it has been used, when actually, one person might interpret it to be ‘Oh yes. There’s a difference between this language.’ Another person might say, ‘Oh, they’re exactly the same.’ And the same goes for, if this language goes to court, okay, it’s actually very, very risky.

Instead, cut the legal jargon, start expressing what you actually mean. Forget these verbs that are supposed to have these special meanings and instead, for example, in an indemnity clause, yes, Acme indemnifies Widgetco against … and then detail exactly what you are indemnifying, that’s the most important part. Don’t get hung up on, ‘Well, should I use ‘indemnify, hold harmless’, whatever. The answer is no. The most important point is what you are indemnifying. Be clear about that.

As Ken mentioned, there’s loads of examples of using indemnify in his own language that he would use on his blog. So check out those articles.

[00:41:25] And what I love about Ken’s blog is that it’s been going for so many years, that there’s so many articles on the same topic that you can kind of follow Ken’s train of thought, where his views have kind of developed on particular topics. So it’s not like you’re going to go there and there’ll be one article on indemnification, there’ll be a fair few, very informative, with example language that you can use, however, don’t copy and paste it! That’s not the idea. It’s the idea that you can use these examples to understand how you should be using language, and then go to your contract, understand the purpose, and use Ken’s categories of language and a better understanding of how to use language, to actually draft your particular clause. So thank you Ken.

MARK ANDERSON AND KEN ADAMS: DIFFERENT PERSPECTIVES

LOUISE: [00:42:17] Now, another question. You’ve mentioned Mark Anderson, I’ve spoken to Mark Anderson recently. Mark is an English lawyer working in England, and of course you grew up in England, but you’re now based in the US, I would say you’re more of a US perspective.

So very often I like reading comments on your blog or on LinkedIn and you two have very productive discourse, and as well, as you mentioned, disagreements sometimes. You two have got different personalities, but at the end of the day, you’re both providing a really helpful discourse on contract drafting language.

What do you see as the difference between you and Mark?
KEN: [00:42:58] He’s more of a gentleman than I am, for one thing, just as a matter of temperament, but I think we share—I’m not sure ‘outsider’ is the right term, because I’ve benefited too much from different kinds of privilege to use that term, but we’re both skeptical and we’re wary of the entrenched.

Ultimately from different starting points, we end up having our Venn diagram circles overlap considerably in that respect. Mark has his own law firm. He is steeped in … in what it takes to just get the deal done. That is a very different sort of activity to what I do. I have the luxury, if one can consider that, of being in the stands, the bleachers, at the game. I sometimes actually think of it more like being in a cave in the Himalayas, sometimes, in terms of just the level of detachment that’s involved. Deal-making is pressurized, expediency-driven, utterly not the sort of thing my mind is geared to. So I have the luxury of taking the time, and taking positions, without actually having to live with them.

[00:44:28] I do my best to just keep an eye out on the practical implications. For example, on Twitter—I fritter away time on Twitter—I had an exchange with people about this agreement, small a—oooh, revolutionary! This Agreement is used as a defined term in contracts. You put little quotation marks around it. And it’s senseless. The fact that you have this in there, as a semantics clue, it shows that it is preposterous. Essentially all you’re doing is slapping a capital A on something and attributing significance to it. It has zero significance, yet somehow it is the most controversial of my recommendations. And people commented despairingly, ‘Yeah, I tried it. and no chance.’ So does it matter? No. Other than adding clutter to a contract and making it harder to read with this Agreement, capital A, its main significance is as a monument to semantic failure. It is just pointless.

It’s pointless, yet it is clung to. That’s the system we’re in—people who have no agency other than riding the copy-and-paste-train and making themselves feel better about it by invoking whatever conventional wisdom, as a substitute for rational thought.

Yeah. So, Hey! I do battle against that sort of thing. And at one level, what the heck, I think I’m equipped to tilt at windmills. Bring it on. I’ve been at this for, oh for a long time, and my spirit hasn’t broken. I am equipped to just keep fighting, just cause that’s how I’m badly wired. But on the other hand, it’s silly and it’s a waste. There are so many more useful ways of devoting one’s energies than clinging to idiocy.

I’m playing a long game. A game that’ll continue after I’m in my dotage, but I will do my best to see if I can accelerate things in the meanwhile.

LOUISE: [00:47:00] When I graduated from university, I worked for a radical environmental lawyer who was trying to make ecocide a crime, which was considered to be mass destruction of the environment, there was some specific definition of it.
Anyway, she had this particular vision and was absolutely dead set on achieving that. And you really need people like that. I kind of see you’re in that category of people who are, I use the word vision, but have this idea of how things can and should be, a way to improve things that’s different from the status quo. And with that, there’s always going to be people who disagree with you.

And you’re able to put in the thought time here, which is incredibly important because perhaps people working in the field don’t necessarily have the time to do the analyzing of the contract language. And then it’s important to have practitioners who are actually implementing this, but maybe with your goal of your questionnaire-automated-ultimate-Ken-Adams-drafting techno machine, it can become much more mainstream.

The norm will be well-drafted contracts instead of this complete dysfunction and disorder.

KEN: [00:48:27] Yeah. It’s not that, difficult to imagine. What’s required is will, and nothing is going to happen if you just end up telling people to take their medicine, instead, you have to make life demonstrably easier for people.

And that should be easy to achieve as well. So we have the means, it’s just the willpower. And as regards, people disagreeing with me, my daughter in fact did a little cartoon of a tombstone, my tombstone, with the epitaph ‘People didn’t always agree with him.’ And that’s just cause I hear that all the time.

But from my perspective, I say this isn’t rocket science. The difficult task was marshaling the evidence, the recommendations that follow—straightforward. So, basically, I’ve been kicking this stuff around long enough, made enough adjustments, that I say, what the heck, I’m right. Disagreeing with me about stuff doesn’t make sense as a reason not to go down the path I’m proposing. Instead, it’s mostly just a challenge for me to see if I can marshal the resources and we’ll see where that heads.

LOUISE: Well, good that you’re able to stand strong and, fight those battles.

LISTENER QUESTION #1: HOW IS SHALL USED IN CONTRACTS?

LOUISE: [00:49:44] So I had a couple of questions from followers on social media, but we’ve kind of covered them. The first one was, ‘How is shall used contracts?’, from Mariana Baigorri from Argentina, but we kind of covered that. I mean, Ken, you recommend using shall as language of obligation if there is a party to a contract.

KEN: Yeah, to impose a duty on a party that is the subject of the sentence: Acme shall purchase …. I joke that if shall didn’t exist, I’d want to invent it. If you want further details on shall there is an article from 2015 called something like, Not Using Shall in Business Contracts: Throwing the Baby Out with the Bathwater [here]. And it
explains how those who are most enthusiastic about getting rid of *shall* tend to also be people who don’t understand the broader problem with verb structures.

I’m not interested in a cosmetic fix. I’m interested in a comprehensive fix. And *shall* has a useful role to play, in that it frees up *will* and *must* to be used in other ways, with the general principle being, you don’t want to have the same verb structure expressing very different meanings.

**LOUISE:** [00:51:04] So, do check out Ken’s blog posts, there are lots of them. I’ll leave a link in the show notes, but the general idea is, use *shall* as language of obligation where the subject of the sentence is performing the obligation. Don’t use it for things like a governing law clause, don’t use it for third parties. If you want more detail, check out these articles.

**KEN:** And if you search for ‘quick reference’ on the blog, that’s the quickest way of finding the post [here](#) that has the link to the four-page chart in my book that just says here’s how the categories of contract language work, and you’ll see how *shall* fits in. That’s the simplest ‘here’s how to do it,’ and the chapter itself gets into all sorts of nuances.

**LOUISE:** Super helpful.

**LISTENER QUESTION #2: IS THERE A UNANIMOUSLY ACCEPTED FORMAT FOR DRAFTING CONTRACTS WORLDWIDE?**

**LOUISE:** [00:51:51] Then there was one last question, which … difficult question: ‘Is there a unanimously accepted format for drafting contracts worldwide?’ and that was from Mojtaba Kazemi from Iran.

**KEN:** Mojtaba, the answer is a massive no! And it depends what you mean by format. I mean, are you talking about the look of a contract? Well, there’s zero uniformity about anything. My book happens to have a couple of enumeration schemes, with only really one of them being the one I use any longer, the hanging-indent enumeration scheme. If you search for ‘hanging-indent enumeration scheme’ on my blog, you’ll find it. But there is zero uniformity anywhere. And that’s part of the problem: people saying the same things with endless variety, and most of it dysfunctional. So, hey, that’s great. We battle against it.

**LOUISE:** So a resounding no! But you can, if you start adopting Ken’s concept, then, maybe we’ll get to that world.

Ken, thank you so much for coming on the show.

**KEN:** My pleasure.
CONNECT WITH KEN

LOUISE: [00:53:06] Do check out Ken’s blog, www.adamsdrafting.com. You can connect with Ken on LinkedIn. He’s also on Twitter—as Ken mentioned, he spends a lot of his time on Twitter!

KEN: Pathetic!

LOUISE: But the thing is they’re really helpful. Especially if your first language isn’t English and you’re looking for some interesting content to follow, follow @AdamsDrafting on Twitter. And I checked the page today and sure enough, there was a pizza cover, which I just saw ...

Also you often put up pictures of contracts that you’ve analyzed, and this will be really helpful for you, listeners, to actually see real examples and to see what’s wrong with them and really to learn from Ken. So definitely do that. He’s also got a LinkedIn group which is called ‘A Manual of Style for Contract Drafting’. Check out that group. And if you don’t have the book go and get it, it is really a very helpful book. It’s well worth it. It’s going to transform your contract drafting. A Manual of Style … it should be called THE Manual of Style … A Manual of Style for Contract Drafting.

KEN’S ONLINE COURSES

LOUISE: [00:54:29] And Ken you mentioned your courses? Have you got non-native English-speaking lawyers?

KEN: Yeah, you better believe it. Yeah. Basically, anyone who is working with English language contracts is going to need to be able to handle themselves. So if you can’t handle my course, you shouldn’t be working in contracts.

I will, in fact, starting 2021, I will be running series of the course in different countries and regions of the world, just because it’ll work for time zone purposes, for one thing. And also I think it just can be nice to say, okay, everyone in the course will be from this particular region, just an added shared background.

LOUISE: Super helpful! So, if you’re interested, checkout Ken’s courses, go to https://courses.adamsdrafting.com/. He’s there to help you improve your contracts, to transform them dramatically, which will bring incredible value to you and to your clients. So do check it out.

ENDING

Send me your comments about this interview to louise@studylegalenglish.com or of course, connect with me on social media. Just search for @legalEnglisher. So thanks for listening and see you next time.