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# Drafting Multiple-Language Contracts\*

By Michelle J. Rozovics



\*When you only speak English

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**T**he first thing that parties must consider when engaging in business negotiations with foreign parties is whether the final contract should be in English, the foreign language, or both. If the contract will be written in more than one language, which will be official? Which will control in the event of a conflict?

The answer, "Why, English, of course!" might be tempting, but this is not always correct. Complex strategic considerations affecting a prudent lawyer's choice of contract language in a cross-border contract include a consideration of the likely claims to arise, likely venue for conflict resolution, and collectibility and enforceability of any judgments obtained.

Unfortunately, in many situations, attorneys write these types of contracts in English with little thought to other languages involved in the transactions. The most common languages for multilingual business contracts are English, Chinese, Korean, German, Spanish, and Russian. Sometimes, at the last second, attorneys think of adding basic boilerplate contract language indicating that English is the "official language" of the contract—essentially acknowledging and dismissing at the same time the fact that the other party is not a native speaker of English. The obvious arrogance and dismissive tone with which this clause is frequently drafted undermines otherwise cordial multicultural business negotiations.

This article suggests that there are reasons for paying much closer attention to the issue of choice of language. From contract drafting through introduction into evidence in litigation, using a multilingual contract shows your clients that you are a savvy lawyer who understands how to look out for their best interests.

### Drafting Considerations

The following are two classic examples of clauses selecting choice of language:

- *This agreement has been prepared in [language 1], and the [language 1] version thereof shall prevail and be binding even though a [language 2] translation may also be prepared.*
- *This agreement has been prepared in both [language 1 and language 2]. In the event of any inconsistency, the [language 1] version shall apply and be binding upon the parties.*

What is the problem with these clauses? Why don't they resolve the problem of priority of language? After all, both clauses reflect that the contract is written in two languages and only one is the binding version. If there is a conflict, the first language will prevail. So there should never be fights between the parties about how to interpret the contracts. There is only one contract that matters, right?

Wrong.

### Poor translations cause loss of precise language.

In many cases a solo or small firm lawyer tries to save costs for the client by using a nonlawyer to translate contracts. Stories exist of people using secretaries to translate contracts ("She speaks Spanish, it doesn't matter which dialect") or using computer programs. Even receiving blanket translations from translation services can cause problems when they do not explain the range of potential translations that might arise from a particular legal phrase. A translator may have to choose between three, five, ten, or zero words in a foreign language for a particular legal concept the attorney originally described in a legal contract. A translator who is not an attorney may not fully understand the goods or services being described, the terms of custom and usage in the industry being used, or the significance of being precise in that description. Unless these are taken into account in making the translation and the legal implications of word choices are understood, the impact of the attorney's carefully drafted contract language may be completely lost upon translation into a second language.

The only way to ensure an accurate translation is to review it point by point, clause by clause for inconsistencies. In an ideal situation, a translation will be conducted by an attorney (either one within your firm or a hired contract attorney, in the foreign country or locally) who can provide a legal opinion regarding the proper language to be used in the translation. In situations where this is not possible, translation companies with experience in drafting legal documents and explaining the implications in word choice should be employed, so that the attorney who does *not* speak the foreign language will be able to make choices about word selection. If the attorney lacks the foreign-language capacity and the client does not wish to engage additional legal counsel to confirm the translation, the client should be warned of the potential for improper translation and the impact on the terms of the contract.

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**The lack of precision in a translation invites problems when none need exist.**

**The problem of enforceability.** It is difficult to enforce abroad judgments that are obtained in U.S. courts. Thus, when working with multilingual contracts, you have to consider where a dispute is most likely to be brought if you have to enforce it. What is your provision in the contract for dispute resolution, jurisdiction, and choice of forum? Is there a provision for international arbitration? Have you considered whether your contracting partner has assets only in its home nation, meaning your best chance for injunctive relief and/or damages in the event of breach is to use the local court system?

If you intend to have the dispute resolved in an arbitration forum where the arbitrators usually conduct proceedings in English, then it does make sense to have English as the official language of the contract. However, if the chosen forum is the local courts of China because that is the only location where your manufacturer-seller has assets, and your best potential for enforcement is to hold the threat of that familiar court system over its head, then you should put the extra time and expense into making Chinese the official language of your contract.

The reason for this is simple: If you

expect to litigate in a Chinese (or any foreign) court, the personnel in that court are not going to speak English. They are not going to read English. Even if they do read English, the court's rules of procedure are going to require that the documents be translated into the local language. If you have already determined that the party with whom you are contracting has no assets outside its own nation, and local court relief is quicker than arbitration proceedings, then why would you ever want to have an English-language contract mucking up those foreign proceedings? The only language the foreign court will care about is its own, and contracts that are in multiple languages will confuse the issue. A single contract in a single language (the jurisdiction's own, which it sees and enforces every day) will make the proceedings quicker, cheaper, and simpler—three words that make clients very happy.

Your client may say to you, "I can't read a Chinese contract. What am I supposed to do with this? I won't know what I have to do. It may be quick, cheap, and simple if we have a conflict in China, but it sure doesn't seem that way to me right now." The simple solution is to provide your client with a translation for its own use and daily reference. Is this the same as recommending that you include a clause in the contract saying that the Chinese version of the contract is official, and the English translation applies unless there is a conflict? No. The English translation is created for reference purposes only—it need not even be provided to the other side, and it need not be signed by them. The single copy of a contract means that there is only one negotiation of language, one negotiation of phrase, and one version of the contract that ever could be in dispute.

**Why is this necessary?** The contract law of most nations follows the familiar principle that there must be a meeting of the minds in order to establish a binding contract. If this does not exist, there is no contract. Each foreign nation has different rules of evidence regarding what is admissible into evidence when proving what the parties understood that they were receiving for the benefit of the bargain. Many laws allow the use of parol evidence. For example, the United Nations Convention

## Common Multiple-Language Contracts

There are numerous circumstances in which solos and small law firms may find themselves faced with a multilingual contract. Among the most common:

- Sales or purchase agreements between U.S. and foreign entities.
- Representation of U.S. manufacturers using foreign sourcing agents to manufacture component parts at a discount.
- Representation of U.S. manufacturers exporting goods, who need contracts drafted to foreign distributors or foreign sales agents.
- Representation of U.S. distributors or sales agents performing services for foreign manufacturers.
- Employment or independent contractor/service agreements where a party performs services outside the United States or performs services for a foreign entity.
- Joint venture agreements between U.S. and foreign entities.
- Globe-trotting clients who marry a foreign individual and desire a prenuptial or postnuptial contract.
- Tort claims against foreign entities where a contract appears to limit liability.

on Contracts for the International Sale of Goods allows courts that are applying it to consider “all relevant circumstances” of the contract—this would apply to both the original language contract as well as the translation (see, e.g., *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998)). Use of parol evidence is even more applicable if the translation was signed by both parties and the translation addressed a subject or scenario that the original language appeared to omit. The unfortunate result is that the courts (or arbitration tribunals) will have to rule on these types of cases because it is less likely the parties will be able to amicably resolve their own disputes. Instead, they will each believe their own interpretation of the contract is feasible and will spend far too much money arguing over that interpretation.

Keep in mind the amount of time it usually takes to draft and negotiate an English-language commercial contract for your client—and the extent to which parties may argue over the inclusion or exclusion of a single word or phrase. In the event two languages are used and signed by a client, the negotiations and issues should extend to both contract formats. If the parties sign a contract and it is considered a part of their agreement, they should be aware of the implications of doing so; their ignorance of the foreign language will not be an excuse.

### Use in Litigation

What can you do with a multiple-language contract in the course of U.S.-based litigation? All foreign-language documents submitted in federal court proceedings must be translated into English. Federal Rule of Evidence 604 provides that “an interpreter is subject to the provisions of these rules relating to qualification as an expert.” The rule has been extended to translators, and therefore they can qualify as experts under Federal Rule of Evidence 702. In many cases, the parties offer up differing translators with opinions asserting that the reliability of another’s translation is flawed.

Some states have adopted specialized rules regarding translations, as well. For example, Texas Rule of Evidence 1009 provides a general outline regarding ad-

mitting and objecting to foreign-language translations as documentary evidence. A translation of a foreign-language document is generally admissible so long as it is accompanied by a sworn affidavit from a qualified foreign-language translator, stating the translator’s qualifications and that the translation is fair and accurate. There are also procedures for serving the document on the other party and objecting to the translation. For states that do not have these types of evidentiary rules, parties may nevertheless wish to refer to the Texas rule as a guideline for establishing a reasonable record about the proffered translation’s reliability.

### Conclusion and Practical Tips

When negotiating with foreign-speaking parties, consider the following in determining whether drafting a multilingual contract will maximize the enforceability of the contract for your clients:

- Think through at the outset which legal forum is the best for this transaction. If it is not an English-speaking forum, then English is not the best language for your contract, and you should consider a foreign language as your primary contract language.
- When working with a multilingual contract (either because the only official contract is in another language or there are two versions of the contract in place), it is best to work with a lawyer who is fluent in both languages. It may be appropriate to hire a local lawyer from the other jurisdiction to review and translate the contract.
- If you cannot have a lawyer translate the contract, make sure your client is aware of the problems that can arise from other types of translations. Proceed with a professional translation from a company that will advise you phrase by phrase, including multiple meanings or difficult translations. You will make the choice for the proper foreign phrase, based on the knowledge of the intent of the contract. It is not the translator’s choice to make.
- Obtain a translator’s certification/

affidavit that the foreign-language version is identical in meaning to the English version, and that it is complete and accurate.

- Make sure each party signs the contract. If you opt for multiple versions of the contract, each party must sign each version.
- In the event that you will use the contract in a foreign country, you may (depending on the country) require an apostille or other government certification. Depending on the nature of the document, where and how the document is intended to be used, some countries require an apostille from a government entity in order to certify, or make a document legal, for use abroad. There are specific procedures for authenticating documents from the U.S. Department of State’s Authentications Office, as well as for streamlined procedures from each state’s Secretary of State in the event the intended country of use is covered by the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Follow your state’s procedures for obtaining certification by apostille, where applicable, often through the Secretary of State.

Parties and their counsel should consider the time and resources (yes, including legal fees) spent in drafting contracts. No attorney would dream of telling a client that the precise language used in a contract “does not matter.” Yet, by failing to check the translations proposed in multiple-language contracts, this is precisely what attorneys do. Parties frequently sue each other over the meaning of a single word in a contract. Contract disputes go up on appeal when there is an apparent conflict between two words, sentences, or paragraphs in a contract. The lack of precision in a translation invites problems when none need exist. **GPSOLO**