

Concepts that do not translate

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The deepest difficulty of multilingual drafting lies in legal concepts that have no exact equivalent in the other language because they belong to a different legal system. A word may be translated correctly in the dictionary sense and still carry a different legal content. The examples that follow are those that arise most often in contracts between parties from Switzerland, Germany, France and the common law world. They show why the translation of a contract is a legal task that requires knowledge of both systems, a point that the Federal Supreme Court and German courts have recognised when they treat the meaning of foreign legal terms as a question of the governing law.¹

The first example is the pair of *Treu und Glauben* and good faith, which the preceding section discussed. A second concerns warranties. Swiss and German sales law provide a statutory regime of liability for defects, the *Gewährleistung*, with rules on notice, rescission, price reduction and limitation. In a Swiss sale, Articles 197 to 210 of the Code of Obligations govern liability for defects, require the buyer to examine the goods and notify defects promptly and set a limitation period of two years for movable goods. English practice in share and asset purchase agreements uses representations and warranties, which are contractual statements of fact whose breach gives rise to a claim for damages and, in the case of representations, possibly to remedies for misrepresentation. When parties to a Swiss-law share purchase agreement use the English terms, a court must decide whether they intended to create an independent contractual regime or to modify the statutory warranty, with consequences for the notice requirement and the limitation period.²

Swiss practice has largely resolved this question by drafting. Share purchase agreements governed by Swiss law usually state that the representations and warranties form an exclusive and independent regime, that Articles 197 to 210 of the Code of Obligations do not apply and that the buyer's

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claims are subject to the notice periods, caps, thresholds and limitation periods agreed in the contract. A drafter who translates an English template into German must preserve this structure. Translating representations and warranties simply as *Gewährleistungen* risks reintroducing the statutory regime that the English drafting was intended to exclude, because the German term is the name of that very regime.³

The third example concerns penalties. Swiss law permits contractual penalties, the *Konventionalstrafe*, under Articles 160 to 163 of the Code of Obligations. The court may to reduce an excessive penalty at its discretion under Article 163 paragraph 3. German law allows the court to reduce an excessive penalty under section 343 of the Civil Code, although section 348 of the Commercial Code excludes that reduction where a merchant has promised the penalty in the course of business. English law has traditionally refused to enforce penalty clauses. In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* in 2015, the Supreme Court reformulated the rule: a clause is penal if it imposes a detriment on the contract-breaker that is out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. English drafters therefore speak of liquidated damages and frame them as a genuine pre-estimate or as protection of a legitimate interest. A German *Vertragsstrafe* translated as penalty sounds unenforceable to an English reader, while a liquidated damages clause translated as *pauschalierter Schadensersatz* may trigger the restrictions that German standard terms law imposes on lump-sum damages.⁴

The fourth example concerns guarantees. Swiss law distinguishes between the contract of suretyship, the *Bürgschaft* under Articles 492 to 512 of the Code of Obligations, and the independent guarantee under Article 111. A suretyship is accessory to the principal debt, whereas the guarantee creates an independent obligation to answer for the performance of a third party. The distinction matters greatly because suretyship is subject to strict form requirements. Under Article 493, it requires a written declaration by the surety stating the maximum amount of the surety's liability, and where the surety is a natural person and the amount exceeds a statutory threshold, the declaration must be made by public deed. Article 494 requires the consent of the spouse in certain cases. Because a guarantee under Article 111 is not subject to these requirements, the Federal Supreme Court has developed criteria to distinguish the two when the parties have not been clear.⁵

English law uses the word guarantee for an accessory obligation similar to the Swiss suretyship and the word indemnity for an independent primary obligation. Under section 4 of the Statute of Frauds 1677, a guarantee must

be evidenced in writing and signed by the guarantor, whereas an indemnity is not subject to that requirement. The English term guarantee therefore corresponds roughly to the Swiss *Bürgschaft*, while the English indemnity comes closer to the Swiss *Garantie*. A translator who renders the English guarantee as *Garantie* in a Swiss-law document reverses the meaning. If the document is in substance a suretyship, the result may be a contract that fails for want of form. Banking practice in Basel avoids this trap by using standard forms for first demand guarantees that make the independent character of the obligation explicit, often with reference to the ICC Uniform Rules for Demand Guarantees.⁶

The fifth example is the trust. Swiss law has no domestic law of trusts, although Switzerland has recognised foreign trusts since it ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition, which entered into force for Switzerland on 1 July 2007 together with new provisions in the Private International Law Act. Swiss law knows the *Treuhand*, a fiduciary relationship under which the fiduciary holds assets in its own name for the account of the principal on the basis of a mandate. French law introduced the *fiducie* in 2007. German law knows various forms of *Treuhand* without a codified general regime. Translating trust as *Treuhand* or *fiducie* therefore suggests a similarity that does not exist. A trust divides legal and beneficial ownership and creates proprietary rights for beneficiaries that a contractual fiduciary arrangement cannot replicate. Part E of this book and the literature on private client work describe the practical consequences of this difference for wealth planning.⁷

Many further examples could be cited. Consequential loss in English law refers, according to a line of authority going back to *Hadley v Baxendale*, to losses falling within the second limb of the remoteness rule, while the German *Folgeschaden* and the Swiss notion of indirect damage have different boundaries. Best endeavours and reasonable endeavours have acquired graduated meanings in English case law that the German *nach besten Kräften* does not reproduce. A condition precedent, a material adverse change clause and the equitable remedy of specific performance each carry a body of case law that a single-word translation cannot transport. The drafter's task is to identify these terms early, to decide whether the contract should use the concept of the governing law or define the borrowed concept expressly and to ensure that all language versions use the same defined term consistently.⁸

1 Notes

1. On the problem of legal concepts without equivalents, see the literature on comparative law and legal translation, for example Zweigert and Kötz, *An Introduction to Comparative Law*, 3rd ed., 1998, and the literature on legal translation theory. To be verified. ↩
2. Arts. 197 to 210 CO on warranty for defects in sales contracts; on the limitation period, see Art. 210 CO as revised with effect from 1 January 2013. On representations and warranties in Swiss M&A practice and the applicability of Art. 201 CO, see the case law of the Federal Supreme Court and the Swiss M&A literature. To be verified. ↩
3. On the drafting of exclusive warranty regimes in Swiss share purchase agreements, see the Swiss M&A practitioner literature, for example commentaries and handbooks on *Unternehmenskauf*. To be verified. ↩
4. Arts. 160 to 163 CO; § 343 BGB; § 348 HGB; § 309 no. 5 and no. 6 BGB on lump-sum damages and penalties in standard terms. *Cavendish Square Holding BV v Makdessi*; *ParkingEye Ltd v Beavis* [2015] UKSC 67. To be verified. ↩
5. Arts. 111 and 492 to 512 CO, in particular Arts. 493 and 494 CO on form and spousal consent. On the distinction between *Garantie* and *Bürgschaft*, see the case law of the Federal Supreme Court and the commentaries. Threshold amounts to be verified. ↩
6. Statute of Frauds 1677, s. 4. On demand guarantees, see the ICC Uniform Rules for Demand Guarantees (URDG 758), 2010 revision. To be verified. ↩
7. Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, in force for Switzerland since 1 July 2007; Arts. 149a to 149e of the Swiss Private International Law Act (PILA, SR 291). On the French *fiducie*, see Arts. 2011 ff. of the French Civil Code, introduced by the *loi n° 2007-211 du 19 février 2007*. To be verified. ↩
8. *Hadley v Baxendale* (1854) 9 Exch 341. On the meaning of consequential loss and endeavours clauses in English law, see the English case law and practitioner literature on contract drafting. To be verified. ↩

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