

Language clauses and the prevailing version

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A contract may be drafted in one language only, in one language with courtesy translations or in two or more versions that the parties sign together. The simplest solution is a single authoritative version, with translations produced for information and expressly declared to be without legal effect. This solution concentrates the risk of misunderstanding on the party that does not master the contract language, and that party should therefore protect itself through independent advice in that language. In practice, the single-language contract in English is the standard form for international transactions involving Basel companies.¹

Where both parties need a version in their own language, they can sign two versions and declare one of them to prevail. A typical clause states that the contract is executed in English and German, that both versions are binding and that the English version shall prevail in the event of any inconsistency between them. The clause seems simple, yet it raises questions of its own. A court must decide what counts as an inconsistency, whether a mere difference of nuance suffices and whether the prevailing version also governs where the subordinate version is clearer or where it reflects what the parties actually discussed. Under Swiss law, which gives priority to the real common intention of the parties, a prevailing language clause is itself an element of interpretation. It does not prevent a court from finding that both parties understood a term in the sense of the subordinate version.²

Parties sometimes declare two or more versions to be equally authentic. This solution respects the equality of the parties and their languages, which explains its popularity in public law agreements, treaties and some joint ventures. In private contracts it is risky, because it leaves open what happens if the versions diverge. International law has developed rules for such cases, which the final sections of this chapter discuss, and the UNIDROIT Principles of International Commercial Contracts contain a

default rule for contracts drawn up in two or more equally authoritative language versions. Under Article 4.7 of the Principles, in case of discrepancy between the versions, preference is to be given to an interpretation according to a version in which the contract was originally drawn up. The rule identifies the version that most likely expresses what the parties agreed, since the other versions are usually translations of it.³

The risk of conflicting versions is greatest where the translation is prepared late, by persons who did not take part in the negotiations and under time pressure before signing. Even a careful translator cannot always find an equivalent for a legal term. A translation that chooses the nearest word in the target language may introduce a concept that the drafters never intended. Experienced drafters therefore treat the language clause as part of a wider process. They decide early which version will be the working version, keep the translation aligned with every change during the negotiation and have the translation reviewed by a lawyer qualified in the governing law who also commands both languages.⁴

A language clause should also address documents that follow the contract. Notices, reports, certificates, requests for payment under a guarantee and the documents produced in a dispute raise the same questions as the contract itself. A well-drafted clause states that all notices and communications under the agreement are to be in the contract language, that documents in another language must be accompanied by a translation and which version controls if a translation is inaccurate. Where the contract provides for arbitration, the language of the proceedings should be stated separately because arbitral rules leave the choice to the parties and the tribunal, as discussed below.⁵

1 Notes

1. On language clauses in international contracts, see the practitioner literature on boilerplate clauses, for example commentaries on standard clauses in international commercial contracts. Specific titles to be verified. ↩
2. On the effect of prevailing language clauses under Swiss law, see the commentaries on Art. 18 CO and the literature on the interpretation of multilingual contracts. To be verified. ↩
3. UNIDROIT Principles of International Commercial Contracts 2016, Art. 4.7 ("Linguistic discrepancies") and official comment. To be verified. ↩

4. On the practical management of translation risk in contract negotiations, see the practitioner literature on legal translation and drafting. To be verified. ↩
5. On language provisions for notices and ancillary documents, see standard precedents for boilerplate clauses in international contracts. To be verified. ↩

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