

The language of contracts: choice, prevailing version and interpretation

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The choice of a contract's language is a legal decision before it is a matter of convenience. Swiss law prescribes no language as a condition of a contract's validity: an instrument drafted in English, Arabic or Portuguese binds the parties in the same way as one drafted in French, subject to the requirements of notarial form, which the Geneva notary executes in French. Interpretation, on the other hand, depends on the language. The Swiss judge first seeks the true and common intention of the parties and, failing that, the meaning that each could and should reasonably have attributed to the other's declarations under the principle of reliance.¹ Where the contract is drafted in English and governed by Swiss law, the English terms must be tied to the institutions of Swiss law: *warranty*, *indemnity*, *best efforts*, *consequential damages* or *time is of the essence* correspond only imperfectly to the warranty, liability, diligence, indirect loss or default of the Code of Obligations.

This difficulty is not theoretical. A cocoa supply contract drafted in English according to trade usage, governed by Swiss law and containing an arbitration clause with its seat in Geneva, brings together three worlds: market usage, expressed in English; substantive law, conceived in three national languages; and arbitral procedure, conducted in the language chosen by the parties. The drafting must anticipate these frictions. A definitions clause tying the English terms to Swiss notions, a precise governing law clause and a clause on the language of the proceedings avoid costly arguments about the meaning of words.

Multilingual contracts add a further layer. Where an instrument exists in two versions, the prevailing-language clause designates the one that is authoritative in the event of divergence. Without such a clause, the judge or arbitrator must reconstruct the parties' intention from two equally authentic texts, a perilous exercise where the versions were translated at

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different times or by different people. Geneva practice recommends designating a reference version, having the translation reviewed by a lawyer who commands both systems, and dating the versions. In dealings with French-speaking Africa, the French version is often the authoritative one, which gives Geneva drafters an advantage: they draft in the reference language, without passing through a translation.

Situation	Drafting recommendation
Contract in English governed by Swiss law	definitions clause tying the English terms to the notions of the Code of Obligations; governing law clause; language of the proceedings
Bilingual French–English contract	prevailing-language clause; cross-review by a bilingual lawyer; dated versions
Geneva notarial deed	executed in French; certified translation for use abroad; apostille where necessary
Contract with a party from French-speaking Africa	French version authoritative; references to the OHADA uniform acts where relevant
Proceedings before a Geneva court	documents in a foreign language accompanied by a translation if the court so requires; costs anticipated

1 Notes

1. Art. 18 para. 1 of the Code of Obligations (CO) (droit-bilingue.ch): “When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement”. ↩

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