Need a dual language contract? Here's how

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1. Introduction

Having managed legal and contractual matters in multiple jurisdictions, I have heard many professionals based in the US and UK raise this question.

Let's say you are planning to support international expansion of your business into Spanish speaking or other countries, but you're concerned about drafting and negotiation in multiple languages. If you are a global head of contract management or general counsel of a US or European multinational, you likely want to know the obstacles and how to avoid them.

Indeed, if we advise companies with operations across multiple geographies or with several business units in the world, we usually face the need to draft, review and negotiate contracts in other languages. For example, you could be doing this when closing sales with foreign companies, appointing sales agents or distributors who need agreements drafted in other languages rather than

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English or when acknowledging services or employment agreements with parties that perform services overseas.

This article explores contract drafting and negotiation in multiple languages, from the perspective, mainly, of Spanish-speaking countries. It includes awareness of cross-cultural and language differences, and explores the appropriateness of undertaking a dual language contract model. It does not include legal advice or propose a 'right answer' for all purposes, because each must be decided case-by-case.

2. Be accurate – errors cost money, trust!

Recent IACCM research reveals several areas where unintentional but substantial misunderstandings can occur, if we are not aware of cultural norms or expressions. It can be embarrassing and costly. In fact, an article in Tim Cummins' blog *Commitment Matters*stresses the need for clarity in communication during negotiations. Particularly when dealing internationally, misunderstandings happen easily.

3. Plain language makes translation easier

Wholeness of the message, its presentation, accuracy and consistency are all more than relevant, but the main benefit of a well-written contract is its clarity.

Business leaders don´t speak technical-legal language, so it is important to draft contracts in terms that are easy to understand, using plain language and avoiding legalese. If this is done, translation into a local language will be much easier.

Keeping paragraphs short, dividing the contract into sections with clear sentences, preferring active voice over passive, avoiding multiple negatives etc- all help with clarity in contract drafting, including for translation purposes.

4. Beware of cross-cultural differences

In his article, David James, author of *Cross-Cultural and language training* states "Global competition is too great to wing it when you go abroad. Savvy business people learn about the specific cultural differences for each country where they do business. And the differences are significant."

When managing cross-border functions in multinationals, we must be prepared to explore diversity in multi-disciplinary teams, identifying the impact of cultural differences in drafting and negotiating international agreements. For instance, contract management professionals need to have cross-cultural understanding and training to properly manage choice of law and arbitration and understand how to deal with translations of contracts into foreign languages.

But, recent IACCM research indicates that many American companies fail to focus attention on local culture or language differentiation when expanding into new regions. Worse, during turbulent economic periods, companies often cut the language, international business and cross-cultural training programs once offered to employees.

We must understand the mindset of the people and companies we deal with overseas, and always get local advice on whether or not local laws require mandatory provisions in certain circumstances.

5. Contract Management in Latin America – its growth and current impact

Lately we have seen contract management beginning to emerge as a recognized profession in Latin America, although still in the early stages of development. Contract management roles are not common in South America. In general, project management, procurement or sales perform these functions. Lawyers manage the drafting and negotiation phase if the company requires in-house support. Otherwise, it becomes the responsibility of the finance jurisdiction.

That said, small or medium size companies that assign contract drafting to external lawyers are exposed to risks when they must negotiate a contract in a foreign language, such as English. These lawyers probably do not know the business as they should, even without 100% domain of the English language.

I have seen this happen with small organizations in Spain and certain Latin American countries. The contract template brought by the supplier from the US or Europe, in its English version, is taken overseas. Then customers in Latin America or Spain - who anticipate reviewing and negotiating in English - find they cannot. Result? An incredible waste of time creating translations, unexpected costs, extra work, having misunderstandings and experiencing the need to review a contract already reviewed.

6. Narrowing the legal gap – the good news

The legal system adopted in Latin American countries – as well as in France, Italy, Germany, Spain and other countries - is civil law, also known as the Continental European Law system. Its foundation is the French Napoleonic Code and the old Roman system, as opposed to thecommon law of the Anglo-Saxon community.

With this traditional gap narrowing, Latin American practitioners have been developing new business models that recognize the increasing importance of common law. The gap no longer affects us as much. Obviously this is a great help when negotiating international contracts.

7. Choice of language – the challenge

One of the first things you must evaluate when doing business with foreign parties is whether the agreement should be in English, or the foreign language or both. American corporations doing business abroad require English as the official language for the contract. But English is not always the best choice. For instance, if our goal is to have a potential dispute resolution in a jurisdiction or arbitration forum where arbitrators do not conduct proceedings in English, then without any doubt the choice of contract language will be the other language, not English.

8. Avoid dual language if possible

Multilingual contract models can be extremely dangerous and we could run severe risks when transplanting and adapting foreign legal concepts. I would always try to avoid dual-language contracts.

My first choice would be to migrate Spanish customers to English, depending on the customers' size and structure and the circumstances of the transaction. Are we selling to a small or medium client? How big are we? Are we buying or acknowledging an alliance partner agreement?

It's critically important to make a comprehensive assessment and then decide to either migrate them to English or create a dual-language system.

If we migrate customers to English we can still discuss issues in local language (via phone, face-to-face meetings, email) while keeping contract templates and reviewing other parties' concerns exclusively in English. In this case, both parties must understand that only the English language will dominate, because only one version of the contract exists in English. The other language will be a translation for information only.

If this option does not match the other party's expectations, we have no choice but to implement the dual-language model.

If a dual language contract is necessary, companies with overseas operations sometimes use a two-column, side-by-side format in the contract, depending on the country. This type of contract is common when dealing with customers, vendors or partners with subsidiaries or operations in Spanish-speaking countries, as well as Chinese, Korean, Arabic, Ukrainian, Russian and other Eastern European local languages and, to a lesser extent, Italian and German.

9. Which language controls?

First, in case of conflict between both languages, it is essential to consider which will have priority. The question is which language is the official one? Which is binding? Which will control? The agreement needs to be extremely clear. It should state that the original version is in a certain language (eg English) and if a conflict or discrepancy occurs between the languages, one of them shall prevail and take precedence over the other.

For example, a clause might have the following wording: “This agreement is in both languages, English and Spanish. In the event of any inconsistency, the English version is the original language and the Spanish version is a translation for information purposes only. Then in case of conflict, the English version will prevail and will therefore be the binding version for both parties…”

10. Applicable law

It is best if both the English and foreign language versions of the contract state which of these versions controls. If neither version states which one controls, then the foreign language version will normally prevail in a local court and the local law will apply if different interpretation criteria or discrepancies occur. Regardless of what the English language version states, always be aware of what the foreign language contract says as well.

11. Conduct a clause-by-clause review to ensure translation quality

Recent exchanges in our IACCM forum show the importance of making sure about the quality of translation. You must ensure that you have an accurate translation of the contract. One of the two options below can be used to perform a clause-by-clause review:

- Proven independent law firms with international network connections and domain in multiple geographies or
- Official translation companies or individuals with demonstrable experience in translating legal terms and conditions.

A case in point …

Some years ago I experienced the following incident in Spain proving the importance of quality in translations. The relationship and negotiations were in Spanish. The subsidiary drafted a Spanish version of the contract by literally translating into Spanish the English version of the terms and conditions.

A secretary (non-lawyer) performed the translation. But unfortunately, and by accident, the negotiators signed the contract with a provision that stated the need to conduct arbitration in Houston, Texas. The contract was between two legal entities based in Spain, and had no contact point in Texas!

Fortunately, no conflict or discrepancy occurred, but many complications could have resulted. A conflict would have generated additional non-expected costs and time. The company had no opportunity to remove a clause. Also, in Texas, a translation of a foreign-language document would only have been admissible in court or arbitration proceedings if the document had been accompanied by a sworn affidavit from a qualified translator. The affidavit would be required to specify the translator’s qualifications and attest that the translation was fair and accurate

12. Conclusion – keep this as a checklist

Clarity in communication and plain language is essential in contract drafting, especially when dealing internationally. We must pay attention to cross-cultural and language differences.

- Evaluate if the agreement should be in English, the foreign language or both.
- Try to avoid dual-language contracts. Insist on a “migration” of non-English speaking clients to English, but keep meetings, phone calls, conversations and follow-up procedures in the local language. If you must implement a dual-language model, state which language controls and governs.
- Consider both choice of law and jurisdiction at the beginning of negotiations.
- Find out if the contract provides for dispute resolution, choice of forum or jurisdiction or international arbitration. If no provision exists, assess which legal forum is best for the business. If it is a non-English-speaking forum, assume that the foreign language prevails.
- Consider the objectives and agree on the contract language that makes sense with such a dispute resolution clause, if any.
- Use an in-house contract manager or legal counsel who understands both languages. Either get external legal advice to review the contract according to local law or hire a translation company or professional with expertise in technical-legal vocabulary.
- Consider the time and legal fees to be spent in drafting dual language contracts.
- Specify the currency to be applied to the contract and consider that local specific issues can impact contract performance.
- Remember to state that the language that controls will also be the official language during the post-award contract management stage. The controlling language must be stated as the language of subsequent change requests between the parties.
- Finally, have the contract signed by both parties. If it is a dual-language model, each party signs each version.