

Pitfalls of English as a Contract Language

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I. THE GROWING PREDOMINANCE OF ENGLISH AS A CONTRACT LANGUAGE

1. English – the Universal Language of Business and Finance

The language spoken by business people in our globalized world is generally also the language used when they enter into contracts. Thus, there is a natural progression from the language used in business to the language used for conducting negotiations and, ultimately, the language used for contracting. Regardless of whether or not one believes the British Council's estimate that *one out of four of the world's population speaks English to some level of competence; ...*³, it cannot be denied that a substantial share of the business transacted in our global economy is handled in English. After all, nearly half (approximately 227) of the companies listed in the Fortune Global 500⁴ are headquartered in an English-speaking country (Australia, Britain, Canada (not counting Quebec), Ireland or the USA).

Furthermore, two of the world's main financial centres are firmly seated in English-speaking territory – London, the traditional centre of finance, and New York. Even where neither London nor New York plays a role in a particular financial transaction, the English language frequently still does. The following example where none of the players involved is a native English speaker illustrates this:

A German company financed by a German lead bank / arranger acquires a target company in Germany. The German bank, eager to share the credit risk with other banks, brings in other lenders (this is called syndication). The facility agreement for the German acquiring company, often also the working capital of the German target, will be syndicated in Luxembourg. Any attempt by the German company to insist on the German language being used for the documentation would be flatly refused with the *floodgate* argument, that is allowing German to be used would lead to allowing lots of different languages to be used. As a result, syndication in Luxembourg is only possible in English although it is a foreign language for all of the parties concerned!

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³ <http://www.britishcouncil.org>

2. English - the Language of Convenience

Many European lawyers like drafting contracts in English since it is a cosmopolitan language in which they feel at home even though it is not their first language. Many naturally feel some closeness to their native tongue. Germans and northern Europeans feel at ease with the Germanic grammatical structure⁵ and many Germanic words in the English language. Our French colleagues detect French roots in many English words⁶, especially in English legal terms.⁷ Italian and Spanish lawyers are happy to discover the common Latin roots of English legal terms and also find terms and maxims in Latin.⁸ Indeed, half of the English vocabulary is derived from Latin, be it directly or indirectly through French.⁹

Other foreigners are attracted to English due to its inflectional simplicity and natural gender without realizing the price they have to pay for it, namely greater ambiguity¹⁰ which can only be avoided by a rigid word order.

Languages of continental Europe have lost the battle for the prevailing contract language to English. The dominance of legal English and common law is increasing. The battle for the governing contract law has been discontinued in Europe, since Anglo-American firms have merged with continental firms. But common law is still outside the gates of Continental Europe.¹¹ More importantly, the largest player in the

⁴ <http://money.cnn.com/magazines/fortune/global500/2006/countries/A.html>.

⁵ English language family: Indo-European, Germanic, West Germanic, Anglo-Frisian, Anglic and English (http://en.wikipedia.org/wiki/English_language).

⁶ Over 10,000 French words were adopted into the English language during the Middle English period. Of these about 75 percent have survived to the present day (see Baugh & Cable, *A History of the English Language*, 5th ed., London, 2002, at pp. 170 and 178).

⁷ Mellinkoff, *The Language of the Law*, 1963, at p. 15 states: "a vast section of the language of the law stems from French sources" and gives a list of legal terms of art derived from Norman French. This is, of course, not surprising since French was the language of the lawyers and the courts from the Norman Conquest until 1362; Baugh & Cable, *op. cit.*, at pp. 146, 170.

⁸ A civil law lawyer is surprised to find many Latin terms and maxims in common law which he does not find in civil law, even though it is based upon Roman law. Nonetheless, the Latin maxims used differ. The reason is that the civil law lawyer is familiar with classical legal Latin, whereas English law has adopted many medieval and new Latin expressions (see Mellinkoff, *ibid.* at pp. 71–82). For example:

- *Res ipsa loquitur* ≠ *prima facie*
- *Quid pro quo* ≠ *do ut des*
- *Nemo dat quod non habet* ≠ *nemo plus iure transferre potest quam ipse habet*.

⁹ See Baugh & Cable, *op. cit.*, at p. 11.

¹⁰ English developed from a synthetic to an analytical language (see Baugh & Cable, *op. cit.*, at pp. 166, 167).

¹¹ Common law has various meanings: If contrasted with civil law, it covers the legal systems which are based on English law; if contrasted with equity, it means the set of rules developed by the Court of Chancery; if contrasted with legislation, it means judge-made law. In this essay common law is contrasted with civil law.

Also on the Continent common law gains ever more dominance, especially under the threat of finance. Most countries with English as their primary language are governed by common law, first and foremost the US and England (exceptions are Scotland, South Africa, Zimbabwe, Sri Lanka and the State of Louisiana). A third of the world's population live in countries with a common law system.

global economy, the USA, and the two most prominent financial centres, New York and London, are English-speaking and are governed by common law.

Nolens volens civil law lawyers have to accept that English is the international contract language. And common law lawyers have to become accustomed to their civil law brethren drafting and negotiating contracts in a type of English which is different to the English they are accustomed to at home.

As a warning to civil law lawyers, it must be said that it is a fallacy to think English is an easy language. It may well be easy to gain quickly a modest – *au pair* - level of proficiency in English, but in fact English, in particular written English, is rather a difficult language. This is all the more true when it comes to legal English.

II. UNITY OF LANGUAGE, FORUM AND LAW

This essay puts forward the following propositions:

1. English as a contract language is difficult to master, even for common law lawyers. Problems exist even where there is harmony between language, forum and law, that is to say where a dispute arising under a contract written in English and governed by English law (or the law of another common law jurisdiction) is brought before common law judges or common law arbitrators.¹²
2. Even more difficulties are encountered in those situations where there is no unity of language, law and forum. There will be a higher degree of uncertainty and a greater scope for misunderstandings where a contract written in English and governed by English law is to be adjudicated by civil law judges or arbitrators who have to decide how the contract should be construed or which meaning of an ambiguous term should prevail.
3. The situation is even more precarious where the governing law of a contract written in English is that of a civil law country. Additional ambiguities will arise where an English term of art or an ordinary word may have another meaning under a civil law system. Civil law lawyers using English as a contract language must be on guard, even when their native law governs the contract. But also common law lawyers encounter difficulties in understanding a contract written in their native language but drafted by civil law lawyers.

Each of these three situations is dealt with in detail below. In this essay, English law has been chosen among the common law systems and German law among the civil law systems.

¹² It is self-evident that common law lawyers and judges, who are both bred in an English-speaking environment and trained in a common law system, will be more competent to draft, advise and decide on issues arising in connection with a contract that was written in English and is governed by English law than civil law jurists and judges.

III. ENGLISH CONTRACTS UNDER COMMON LAW

1. English Contract Language and Historical Common Law

Legal English is inseparable from common law

Civil law lawyers should be warned: An English contract governed by English law can only be understood within the context of English law. English law, like common law in general, developed in England after 1066, and is a historical law. Legal English and common law grew up together. Many English legal terms and concepts can only be understood against a common law background. Only common law jurists know their full significance. Without a thorough knowledge of common law and contract practice, it is impossible to fully grasp the full content, ambit and proper use of these terms of art and concepts.

Here are examples from land law¹³. The meaning of the term *fee simple* cannot fully be conveyed by using the term *property*, as the Roman concept of *dominium* was never received into English law. *Mortgage* cannot be considered identical with the German *Hypothek*. In the case of an English mortgage there is a transfer of an interest in land subject to an equity of redemption.¹⁴ A *Hypothek* is just a legal (not an equitable) charge on the immovable property of another. A lease under common law gives the lessee an interest in the leased property, not merely a contractual licence (like a *Mietvertrag* under German law).

Equity is a set of rules developed by separate courts in England. It is important to know whether rights and remedies derive from equity or law because the requirements for and the legal consequences of the two are different.

Common law terms with no equivalent in civil law

There are many English legal terms of art, words with a special legal meaning,¹⁵ for which there is no equivalent in civil law systems. There are many others which cannot be translated into another language at all or only as broad approximations even if these terms originated from Norman French or from Latin.¹⁶ Many common law legal terms have a forensic and not a scholastic origin since they were developed by the courts and not as the result of abstract considerations in academic circles.

To name but a few examples where there is no civil law equivalent:

- **Deed:** A deed is a written document that must be signed, sealed and delivered. A deed must make it clear on its face that it is intended to be a deed and validly executed as a deed. Before 31 July 1990, all deeds required a seal in order to be validly executed. This requirement was abolished by the Law of Property (Miscel-

¹³ For a civil law lawyer, the key to understanding common law is to understand land law. Other branches of common law developed much later. See Zweigert/Kötz, *Einführung in die Rechtsvergleichung*, 3rd ed. Tübingen, 1996, at pp. 177 et seqq.

¹⁴ Such a construction would be impossible in a legal system – like the German legal system – which does not distinguish between a common law and an equitable system.

¹⁵ Wydick, *Plain English for Lawyers*, Carolina, 5th ed. at p. 19, defines a term of art as a short expression that (a) conveys a fairly well-agreed meaning, and (b) saves the many words that would otherwise be needed to convey that meaning.

¹⁶ This could well be due to the fact that judges are drawn from the ranks of senior barristers.

aneous Provisions) Act 1989. A promise contained in a deed is a covenant and is binding even if not supported by consideration. The advantage of a deed over an ordinary contract is that the statute of limitations period is 12 rather than six years and no consideration is required in order for the deed to be enforceable.

- *Trust* is the ingenious invention of the concept of equity. Rights and obligations arising out of a trust find no equivalents under civil law.
- *Consideration* is the benefit to the promisor or detriment (loss or disadvantage) to the promisee. Consideration is an essential part of a contract under common law, unless the contract is made in the form of a deed. Reference to it in the recitals under common law is ineffective and superfluous. Reference to consideration under civil law is pointless because there is no equivalent for it in civil law: *in consideration of ...* does not mean *with regard to...* and *in consideration of* should not be translated in the sense of *having regard to*.
- *Registered office* is a concept of English company law denoting an address where certain documents must be kept for inspection by the shareholders and where documents may be served.¹⁷ German company law does not yet¹⁸ have an equivalent to this concept, but has developed the notion of *seat (Sitz)* which is the place of a municipality.

Lawyers use many common law words that they invest with a special meaning. This can confuse the layman or foreign lawyer. However, many of these legalese terms will be given up for the sake of clarity and plain English.

The procedural nature of some common law terms poses interesting issues of categorization: How will a German court deal with a procedural common law term whose equivalent under civil law is a matter of substantive law? Many common law terms have their background in procedural and not substantive law. These include:

- *Remedy* is a term of procedural and not of substantive law. It is noteworthy that in common law contracts the clause following *Representations and Warranties* is generally a provision headed *Remedies for Breach* and not *Rights for Breach*.¹⁹
- *Specific performance* is a discretionary secondary remedy developed in equity to grant performance of a contract in circumstances where damages are not adequate.

¹⁷ See sect. 287 Companies Act 1985; see also Triebel/von Hase/Melerski, *Die Limited in Deutschland*, 2006, at pp. 20-21.

¹⁸ There is a reform of the German law of private limited companies (*Gesellschaft mit beschränkter Haftung*) pending where this Anglo-Saxon concept will be introduced into German company law (see Triebel/Otte, 2006 ZIP 1321, at p. 1326.); Otte, Das Kapitalschutzsystem der englischen private limited company im Vergleich zur deutschen GmbH (2006), at pp. 178-180, 192-193.

¹⁹ *Anspruch* (the right to request from the other party to do or omit to do something – see sect. 194 German Civil Code (*Bürgerliches Gesetzbuch*)). Common law has not – like Windscheid has done for German law – developed the concept of substantive law right and separated it from procedural remedies.

- *Limitation* is a procedural defence and not a matter of substantive law. It is the remedy and not the substantive right which becomes time barred upon expiration of the limitation period.
- *Interest* is classified under common law as a matter of procedure and not of substance.

Common law contract style

The style of common law contracts is influenced by a variety of factors including the legal tradition of judge-made law, the lesser emphasis on codifications and the rigid rules of construction developed by the courts.

Contracts are mostly drafted in more concrete terms than their civil law counterparts: With general parts and general concepts as civil law systems have developed them; with only few types of contract with yielding statutory provisions thus necessitating writing into contracts many details; more rigid rules of construction. Since they may end up being void for uncertainty if drafted too broadly, it is no wonder that common law contracts tend to be more concrete and less abstract. Thus, the court in *National Trust v. Midlands Electricity Board*²⁰ held that the omission of any concrete criterion made the contract uncertain and void:

No act or thing shall be done or placed or permitted to remain upon the land which shall injure, prejudice, affect or destroy the natural aspect and condition of the land except as hereinafter provided.

Common law lawyers seldom draft a contract from scratch, but avail themselves of form books, standard forms, precedents²¹ and model contracts²². The common law-world is drowning in such precedents. They give common law lawyers a degree of security: By using tried and tested standard forms, common law courts will presume that the parties relied on the established practice and interpretations by the courts.²³ However, they should be used judiciously and sparingly and should not be the draftsmen's masters²⁴, rather their servants. Simply slavishly copying and pasting without giving each sentence due consideration can be fatal.²⁵

The traditional structure of English sentences in contracts is different from that of German ones. The structure of an English contract goes back to land law deeds dealing with conveyancing, leases and trusts set the pattern of contract drafting in the

²⁰ *National Trust v. Midlands Electricity Board* [1952] Ch. 380.

²¹ The word *precedent* itself is misleading, as it has at least two meanings: (a) a binding court decision; and (b) a model form (contract) (see also Mellinkoff, op. cit. pp. 193, 194).

²² The best known precedent book for contracts in England is Butterworth's "Encyclopaedia of Forms and Precedents" which comprises more than 90 volumes. The tyranny of the precedent books has a long history and goes back to before 1873 when the forms of action were abolished in England. West's Legal Forms and Warren's Forms of Agreement are commonly used in the USA. EDGAR, the electronic system used by listed companies to file their documents with the Securities and Exchange Commission (SEC), is frequently used today by lawyers experienced in this field.

²³ This has been confirmed in many insurance contracts and charter parties (see Butt & Castle, *Modern Legal Drafting*, Cambridge 2001, at p. 56).

²⁴ It can indeed be embarrassing for a lawyer if his client finds a clause in a contract between two companies entitling either party to rescind the contract if the other should die or become mentally ill.

²⁵ Butt & Castle, op. cit., at pp. 7–12.

common law world. Following an old legislative tradition²⁶, the confining circumstances for an action and the conditions come first followed by the subject and the action.²⁷ The order of the typical English sentence in contracts is: where/when A²⁸ – and if B – then (C=legal subject + D=legal action), such as: *Where the Buyer has not paid the purchase price by and if the Seller has set a time limit in writing for payment and the Buyer has not complied with it,(then) the Seller may rescind the contract except when E and F.*²⁹ As translators from English into German will know, a typical German sentence begins with the statement followed by the circumstances, conditions, qualifications and limitation.

Clarity

The Plain English Campaign also encroached upon legal English in all parts of the common law world culminating in Clarity, an international organization of lawyers devoted to improving legal drafting.³⁰ The effects have been felt over the full range from procedure³¹ to consumer and commercial contracts.

Many traditional common law terms should be replaced by familiar words, for example:

- *Alienate* by *transfer*
- *Avoid* by *cancel*
- *Execute*³² by *sign a contract*
- The archaic *joint and several*, though still widely used, by *together and separately*
- *Instrument* by *legal document*
- *Of course* by *as a matter of right*
- *Provided*³³ *that*, as it is used, is often ambiguous: it may introduce (a) a condition where it should be replaced by *if*, (b) an exception where it should be replaced by *except* or *however*, (c) a limitation where it should be replaced by *in any event*, and (d) an addition where it should be omitted.

²⁶ The famous treatise of George Coode, *On Legislative Expressions; or, the Language of the Written Law*, 1843.

²⁷ See Daigneault, *Drafting International Agreements in Legal English*, Vienna 2005, at pp. 58 -61; Asprey, *Plain Language for Lawyers*, 3rd ed. Annandale, at pp. 111-115.

²⁸ Which is called the *case*.

²⁹ Modern English contract writing, however, suggests a different order: putting circumstances, conditions, exceptions and limitations at the end (see Wydick, *op. cit.*, at p. 44).

³⁰ See Butt & Castle, *op. cit.*, at pp. 61 et seqq.; Asprey, *op. cit.*, at pp.11–78.

³¹ Under the Woolfe Reform the new Civil Procedure Rules of 1999 replaced legal jargon by more common words: *plaintiff* by *claimant*, *ex parte* by *applications without notice*, *discovery* by *disclosure*, *pleadings* by *statement of case*, *writ* by *claim form*, *subpoena* by *witness summons* etc.

³² The word *execution* is ambiguous, as it has several meanings: (a) it is legal jargon for *signing* a contract; (b) it is a term for performing a contract, and (c) when carrying out a criminal sanction.

³³ *Provisos* have an old history in English statute which usually stated *provisum est* meaning *it is provided that*.

- *Quiet enjoyment by uninterrupted possession*: When a landlord promises a tenant *quiet enjoyment* he promises he will not default under the mortgage or do anything else that might cause some third party to try to remove the tenant
- *Restraining order by injunction*
- *Save by except.*

2. Ordinary English as the Contract Language

Words and phrases judicially defined

Not only English legal terms, but also ordinary English words in contracts may give rise to problems. This is reflected by the fact that common law courts have often been called upon to interpret English words and phrases which are not terms of art. Thus, the courts have given many words of ordinary English a special, often more precise meaning. Many common law lawyers are lulled into a feeling of precision when they see how a court has construed a word or phrase. For the precise meaning not only of legal terms, but also of ordinary English expressions there are voluminous books such as *Words and Phrases Judicially Defined*.³⁴

Vague words and phrases

There is a difference between ambiguity³⁵ and vagueness. Ambiguity arises when a word or a phrase may have two or more inconsistent meanings. This should be avoided at all costs in contract drafting since certainty is the ultimate aim. Vagueness, however, is a matter of degree.³⁶ Too much vagueness may render a contract void. Vague words receive their contents from their context and the circumstances of the case without the sanction of nullity.³⁷ There are many of these that common law lawyers use both because of, and in spite of, their flexibility well realizing that complete precision cannot be achieved.

Needless to say, vague words and phrases are constantly litigated. Here is a sampling of vague words lawyers use:

about, adequate, as soon as possible, due, excessive, fair, few, just, forthwith³⁸, immediately and without any delay³⁹, material, substantial⁴⁰,

³⁴ See *Words and Phrases Judicially Defined*, Rowland Burrows, general ed., London 1943, 1946, 5 volumes; *Words and Phrases*, Permanent Edition, St. Paul, 1940–1973, 90 volumes.

³⁵ Ambiguity comes in three forms: semantic (because words may have more than one meaning), syntactic (the uncertainty resulting from the arrangement of words in a sentence), and contextual (where different provisions of the same contract say contradictory things; see Child, *Drafting Legal Documents*, 2nd ed., St. Paul, 1992, at pp. 315–342).

³⁶ Child, *op. cit.*, at p. 304.

³⁷ Adams, *A Manual of Style for Contract Drafting*, 2004, at p. 85 et seq. – distinguishes between two kinds of vagueness: where the meaning of the vague word is derived from an objective and a subjective assessment of the context.

³⁸ Butt & Castle, *op. cit.* cite cases (at p. 107 fn. 33) where *forthwith* has been held to extend to 14 days, but also where a notice to be entered on Friday, but given on the following Monday was not *forthwith* (see also Asprey, *op. cit.*, at pp. 176 et seq.).

³⁹ There is a vast collection of cases in which *forthwith* was litigated. There is a general view that *immediately* is somewhat stricter (see Mellinkoff, *op. cit.*, at p. 311).

sufficient, necessary, on demand⁴¹, practicable, proper, reasonable (alone or in its many combinations, like *reasonable doubt*, *beyond a reasonable doubt*, *consent not be unreasonably withheld*,⁴²) reputable, satisfactory, suitable, whenever possible.

Auxiliary verbs⁴³

The proper use of auxiliary verbs is a constant source of confusion:

- *Shall*⁴⁴ can be present imperative (*You shall do as I say*) or future indicative (*I shall contact you shortly*). In legal documents *shall* is generally not used to express future time but to express obligation. However, there is authority that *shall* necessarily implies futurity.⁴⁵ Thus, there is ambiguity.⁴⁶ In Wydick's eyes *shall* is the biggest troublemaker; he recommends: *Don't use shall for any purpose – it is simply too unreliable*.⁴⁷ For the future tense, *will* and not *shall* should be used.⁴⁸

Lawyers tend to use *shall* all the time without thinking, just in case the present imperative is the appropriate one. In fact the present tense and not *shall* is appropriate in definition clauses because a declaration is being made.

- *Must* denotes all required actions, whether or not the subject of the clause performs the action of the verb. Hence, *Notice must be given within 14 days* and *The employee must give notice within 30 days*.⁴⁹ *Must* is sometimes preferable to *shall* since it clearly imposes an obligation.
- *May* is permissive and conveys discretion. Hence, *The seller may ship by air, truck or rail*.
- *May not* can express a prohibition, but is ambiguous: *May not transfer shares* may mean (i) may possibly not transfer, (ii) is authorized not to transfer, and (iii) is not authorized to transfer.⁵⁰ Thus it is better to use *must not*.
- Use of the correct tense - language of performance: When drafting a document, it should not be overlooked that documents normally become operative on execution by both parties or on exchange. At the time of drafting the document the action covered by it is in the future. However, the document should

⁴⁰ Under common law *substantial performance* may entitle a party to claim from the other the price subject to a claim for compensation.

⁴¹ See Asprey, op. cit., at pp. 177 et seq.

⁴² See Mellinkoff, op. cit., at pp. 301–304 et seqq.

⁴³ See Adams, op. cit., at pp. 20 - 49. He distinguishes between the languages of obligation, performance, discretion, prohibition, policy, condition and representation. See also Asprey, op. cit., at pp. 193-204.

⁴⁴ For the historical development of *shall* and *will* see Baugh & Cable, at pp. 279 et seq.

⁴⁵ Re Walker [1930] 1 Ch 469.

⁴⁶ See Butt & Castle, op. cit., at pp. 99–104.

⁴⁷ Wydick, op. cit., at pp. 63 and 64.

⁴⁸ See also Butt & Castle, op. cit., at pp. 150-152.

⁴⁹ Garner, *A Dictionary of Modern Legal Usage*, 2nd ed., Oxford 1987, at p. 941.

⁵⁰ See Adams, op. cit., at p. 36.

speak in the present tense regarding matters happening at the time of exchange or execution. The agreement to buy or sell, or to lease, or mortgage, is a present agreement at the date of execution. It is easy for the draftsman to express these in the future tense when drafting the document, for example *the mortgagee will agree to lend the sum of \$10,000*. The correct expression should be *agrees to lend*, as that is occurring on execution of the document. Similarly, where an agreement deals with a period of time commencing from its date of execution and continuing throughout its operative term, it is preferable to use the present tense. For example, in a partnership agreement, in defining the partners' mutual obligations, it is better to say that they agree to be honest and faithful, rather than that they *shall be honest and faithful*. That obligation operates from the moment of execution, being effective for the duration of the transaction. In these cases the present tense should be used instead of a modal auxiliary verb.

And and or

The connectives *and* and *or*⁵¹ may add more ambiguities. At first sight the difference between the two words might appear obvious – *A and B* means both of them and *A or B* presents a choice between them – but in some cases it is not that easy. For example, the sentence *Husbands and fathers have special rights* does not necessarily mean that a person must be both a husband and a father to enjoy special rights. Using the singular form can make the sentence clearer; assuming the intention is that it is sufficient to be either, it is better to write: *A person who is a husband or a father has special rights*.

Sometimes *and* has been construed as meaning *or*, usually to rescue faulty drafting as in *Re Capital Fire Insurance Association*.⁵² More frequently the difficulty is to determine whether *or* includes *and*, as when a will empowers trustees to apply trust income *for religious or educational purposes*. Almost certainly, the trustees can apply the income for purposes which are both religious and educational or partly in one way and partly in the other, and are not compelled to apply the whole of the income to a purpose which is religious but not educational or educational but not religious.

Difficulties such as these have led to an increasing use of the hybrid conjunction and disjunction *and/or*, but most authorities agree that *A or B or both* should be preferred.⁵³ There is not always agreement as to what *and/or* means especially where it is used to link more than two nouns or adjectives. Even in the case of *A and/or B*, which probably means *A or B or both of them*, *A or B* is usually sufficient, and in case of doubt it is not unduly burdensome to write in full *A or B or both*. Frequently when a draftsman writes *A and/or B* closer analysis shows that he means *A with or without B* and does not in fact intend to refer to *B* alone. Unintended combinations are more likely when *C* or *C and D* are introduced.

When a positive statement is turned into a negative statement, it is usually, but not always necessary to change *and* to *or*. This is something that foreigners are often unaware of. Take for example, the statement *The company will pay a dividend and a*

⁵¹ For a historical analysis see Mellinkoff, op. cit. at pp. 147–152.

⁵² (1882) 21 Ch. D. 209, at p. 214.

⁵³ See Mellinkoff, op. cit., at pp. 306–310.

bonus. In negative form, depending upon the circumstances, it should probably read, *The company will not pay a dividend or a bonus*. To say *a dividend and a bonus* after *not* leaves open the logical possibility that one or the other, although not both, may be paid. In other cases *and* is appropriate, as when articles of association provide that where capital is paid up on shares in advance of calls the shareholder is not entitled to receive interest and to participate in profits. The words *both* and *either* can be used to increase clarity in such situations.

Also *every* and *each* must be used carefully: *Every* refers to all members of a group while *each* refers to the individual members of the group, singly. Thus *A may buy /every/ /each/ painting exhibited in the house* may mean two things: (i) *A may buy no fewer than all paintings in the house* or (ii) *A may buy one or more of the paintings in the house*.

A frequent source of misunderstanding is the misconception among many German speakers that the word *beziehungsweise* ("bzw.") automatically means *respectively* in English. Depending on how it is used it can mean four different things. It can actually mean *respectively*, as when one says *John and Mary were given apples and pears respectively*, in other words John received apples and Mary was given pears. On the other hand, it could mean *or* or it could mean *or* and *and*.⁵⁴ Finally, it can be used to simply narrow down what it is the speaker is trying to say and have the meaning of *that is to say, more specifically or more precisely*.⁵⁵

Singular v. plural

As a general rule, it is preferable to draft in the singular rather than the plural. For example: *Each purchaser shall pay the purchase money in respect of the shares that he is purchasing*. is better than *The respective purchasers shall pay the respective purchase moneys in respect of the shares that they are respectively purchasing*. To use the plural without *respective* or *respectively* as the case may require is to risk, among other things, the inadvertent creation of joint rights or obligations and problems of survivorship. Language of permission (may) compound difficulties. Thus: *The shareholders may notify the company* may mean any of the following: (i) *Any shareholder may ...* (ii) *No fewer than all shareholders may ...* and (iii) *The shareholders acting collectively may*

Expressions of time

Particularly in the case of expressions dealing with time, it is suggested that vague expressions – unless chosen intentionally – should be avoided, such as *forthwith*, *immediately*, *as soon as possible*, *within a reasonable time* or *within a substantial or short period of time*. It is better to specify a period in days or months within which the conduct should occur.

When referring to a point in time, it is often unclear whether the day in question is included or excluded. There are conflicting court decisions as to whether the preposi-

⁵⁴ *Du kannst mich anrufen bzw. schreiben* can mean *you can call or write* or probably both *call and write*.

⁵⁵ *Ich komme aus England bzw. London*. In this case the *bzw.* means *I come from England or to be more exact London* and the use of *respectively* would be totally incorrect.

tions denoting the beginning of a point of time *from*, *after*, *starting* and *on* and the prepositions stating the ending of a point in time *until*, *to*, *on*, *before*, *through* and *by* do exclude or include the given day. To achieve clarity, *inclusive* or *exclusive* should be added.⁵⁶ The following are some alternative methods of ensuring certainty.

- From 12 March 2000 to 25 March 2000, both days included (or excluded).
- Until and including (or not including) 25 March 2000.
- On and from (or on and after) 12 March 2000.
- Commencing with (or on) 12 March 2000 and ending with (or on) 25 March 2000.

The preposition *within* denoting a span of time can have two meanings; such as in the sentence: *The buyer may exercise the option within ten days of the first anniversary of this contract.* This could mean the period after or before the first anniversary or both. Clarity would be achieved by saying *within seven days after the first anniversary* if a forward-running period is intended.

The use of common terms like *month* and *year* can be problematic since these terms are defined by statute and may have different meanings in English and German law.⁵⁷ If some terms are defined differently, the applicability of the statutory aid as a whole may be jeopardized.

The importance of word order

Inflectional simplicity, the lack of cases as well as only a natural but no grammatical gender⁵⁸, often cause syntactic ambiguity. This can only be avoided by adhering to a rigid word order. The simplest rule is: Keep the subject, verb and object close together. However, there are modifiers, limitations, conditions and so on which may cause syntactic problems in attempting to ascertain the exact meaning of a particular statement.

English grammar rules require the modifier⁵⁹ to be put next to what it modifies (antecedent rule). A modifier may precede or follow or occur between an enumeration leaving it open whether it refers to only one, several or all of the words. If the modifier follows a group of words, the rule of English grammar is that it refers only to the last word (rule of the last antecedent). Depending on the positioning of the adverb of time, a sentence can have two different meanings:

If this contract is terminated, the Agent shall be [immediately] instructed to cancel all outstanding work orders. (The Agent must be instructed immediately).

If this contract is terminated, the Agent shall be instructed to cancel all outstanding work orders [immediately]. (The Agent must cancel all outstanding work orders immediately.)

⁵⁶ See Adams, op. cit. at pp. 135 et seqq.; see also Asprey, op. cit., at p. 179.

⁵⁷ According to the Interpretation Act 1978 "month" is to be presumed to mean calendar month in Acts of Parliament; the Law of Property Act 1925 provides similarly for deeds and other written documents. At common law a "month" was a lunar month (28 days).

⁵⁸ Case marking has just about disappeared from the language and survives mainly in pronouns.

⁵⁹ A modifier is a word, phrase or clause that changes the meaning of the word to which it is related.

The word *only* is a notorious troublemaker in English contracts. In the following sentence the word *only* could go in any of seven places and produce five different meanings:

Only she said that he shot her.
She only said that he shot her.
She said only that he shot her.
She said that only he shot her.
She said that he only shot her.
She said that he shot only her.
She said that he shot her only.

Punctuation

What importance should be given to punctuation?⁶⁰ We Germans have strict rules, the English less so. Mellinkoff even says: *A characteristic lack of adequate punctuation (in the English language) is a major obstacle of precision in legal writing....*⁶¹ The old view is that the sense of a document should be gathered from the words and the context rather than from punctuation.⁶² The well-known judge Sir Robert Megarry once said: Punctuation is a servant and not a master of substance and meaning. Yet Sir Robert Caseman was hanged because of a comma (virgule) in the old English Treason Act of 1351!⁶³ An Australian court was called upon to analyze a worker's insurance policy describing the employer's business as *fuel carrying and repairing*. The question was: Did the policy cover an employee who was injured when driving the employer's vehicle carrying bricks? The court interpreted the policy in the employee's favour by construing it to read either *fuel, carrying, and repairing* or *fuel carrying, and repairing*.⁶⁴

Punctuation can remove ambiguities by using commas and distinguishing between *that* and *which*: *The inventory that was acquired during the relevant period* is a restrictive clause; *The inventory, which was acquired ...* is an unrestricted clause. Omitting the comma in the first sentence probably converts the restrictive into a non-restrictive clause.⁶⁵

Interest in punctuation has been revived considerably in Britain in recent years where a book on punctuation has become a best-seller⁶⁶ and the BBC has produced a number of programs (quiz shows) testing the participants' knowledge of grammar.

Plain (=Standard) English

The attractiveness of English as a contract language has increased with the trend towards plain (= standard = modern) English. Many English-speaking people have

⁶⁰ For a historical analysis of punctuation see Mellinkoff, op. cit., at pp.152-170.

⁶¹ Mellinkoff, op. cit., at p. 366.

⁶² So Sir William Grant MR in *Sandford v. Raikes* (1816) 1 Mer 646; Robinson, *Drafting*, London 1980, at p. 61 suggests to insert a construction clause in contracts: *In construing this document, full effect is to be given to the marks of punctuation....*

⁶³ See Mellinkoff, op. cit., at pp. 167 et seq.

⁶⁴ *Manufacturers' Manual Insurance Ltd. v. Withers* (1998) 5ANZ Insurance Case 60-853.

⁶⁵ See Adams, op. cit., at p. 153.

⁶⁶ Lynne Truss, *Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation*, (Profile Books, 2004).

digested Fowler⁶⁷ and Gowers⁶⁸. Over the last fifty years the Campaign for Plain English has influenced written English and recommended the avoidance of verbosity, the passive voice, synonyms and abstract words.

Good drafting now seeks to avoid lawyerisms, unnecessary legal jargon and wordy phrases. Circumlocution can be avoided by substituting *as* for *having regard to the fact* and saying *where* or *if* instead of *in the event that*. Similarly, *binds* can be substituted for *is binding upon*, *if* can be used instead of *in the event that*, *before* can be substituted for *prior to*, *under* used instead of *under the provisions of* and *with reference to* can be replaced by *about* or *concerning*.⁶⁹

Doubling, that is to say the use of several terms to describe a single concept, where a single term would be adequate for that purpose should be avoided. Doubling is misleading, as it has the appearance of added certainty or suggests some additional meaning which does not exist. The following are examples of doubling: *agreed and declared*, *all or any*, *do and perform*, *goods and chattels*, *null and void*, *sell and assign*, *by and between* and *due and payable*, *each and every*, *from and after*, *have and hold*, *power and authority* and *true, correct and complete* (instead of *accurate*).⁷⁰

Archaic words can be omitted or replaced by modern ones: *said* can be replaced with *the*, *that* or *those*, *same* can be replaced with *it*, *he*, *him* and so on and *aforesaid*, *hereunder*, *hereinbefore*⁷¹, *such*⁷² are mostly simply superfluous.⁷³

It is no longer customary to write after the recitals leading into the operational part of a contract: *NOW, THEREFORE, in consideration of the premises and the mutual covenants set out herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged the parties hereby agree and acknowledge as follows:...* Instead simply: *It is agreed as follows: ...* is sufficient.

Short sentences are preferable to long ones. These make it easier for the reader to comprehend the message contained in the document. The active voice should be used in preference to the passive voice. It is grammatically impossible to draft in the active voice without disclosing the legal subject of the sentence. Where a sentence is expressed in the passive voice the legal subject is disclosed only by implication unless a phrase beginning with the word *by* is incorporated. Usually the context indicates the legal subject, but a draftsman who uses the active voice does not need to rely on the context. Needless to say, expressions used in a document should have a consistent meaning throughout the document.

However, plain English, like many simplifications, can be dangerous. Thus advocates of plain English recommend replacing the prolixity *in connection with* by *under*, *with*,

⁶⁷ Fowler, *Modern English Usage*, 3rd ed. Oxford 1968.

⁶⁸ Sir Ernst Gowers, revised by Sidney Greenbaum and Janet Whitcut, *The Complete Plain Words*, London 1986.

⁶⁹ See Adams, op. cit., at pp. 208–210; Asprey, op. cit., gives a full list of words and phrases to be avoided and suggests alternatives at pp. 220–226. See also Wydick, op. cit., at p. 11.

⁷⁰ For more examples see Adams, op. cit., at p. 205.

⁷¹ Most *here* words may create a syntactical ambiguity, as it may be uncertain what *here* refers to in a contract of phrase.

⁷² *Such* is ambiguous, as it may mean “of this kind” and also be a demonstrative, like *this*, *that*, *these*, *those*.

⁷³ Daigneault, op. cit., at pp. 123–125, shows a table of archaic words to be replaced by simple and familiar words.

about or *concerning*. This also narrows the scope of an arbitration clause by excluding tortuous claims and issues affecting the underlying agreement.⁷⁴

3. English Canons of Construction

An important peculiarity of a common law contract, which often is overlooked, is that the canons of construction/interpretation are different from those under civil law. Thus the same legal term, the same phrase in a contract may be given a different interpretation depending on whether the contract is construed under English or German law.

Plain meaning rule

For centuries English courts applied the "plain meaning rule": the ordinary, literal, lexical, dictionary meaning of a word was decisive. To find out the lexical meaning of an ordinary English word⁷⁵ resort to an English dictionary must be had: like the American Webster or the Oxford English Dictionary (=OED).⁷⁶ The latter is the best starting point for a semantic search, as it gives in a chronological order all uses and meanings a word has had from about the year 1000 to the present day. It thus recognises that words may acquire a new meaning, that their meaning may change, become restricted and enlarged.⁷⁷

Needless to say, common law lawyers apply the rules of English grammar when drafting a common law contract. They are often rigid in applying the antecedent rule and relate a modifier only to the nearest word it can possibly qualify.

Punctuation

Even today punctuation plays only a minor role in construing a contract.

*Noscitur a sociis*⁷⁸

Nonetheless, a term is to be seen in its contextual setting. General words may be restricted by surrounding words.

Expressio unius

English law has rules on interpretation, some of which are known by Latin expressions, such as *expressio unius est exclusio alterius*.⁷⁹ Will excessively detailed definitions prove dangerous? Will the cautionary rider *unless the context requires otherwise* overcome this difficulty?⁸⁰

⁷⁴ See Russell/Sutton/Gill on *Arbitration*, 22nd ed., London 2003, at pp. 59-61.

⁷⁵ To find out the meaning of a term of art, be it a legal or technical one, special dictionaries must be used. For legal terms there are plenty of legal dictionaries available and also the books of *Words and Phrases legally defined*.

⁷⁶ Oxford English Dictionary, 2nd ed., Oxford 1963.

⁷⁷ See Baugh & Cable, op. cit., at pp. 307–311. An illustration is *escrow* a document signed and sealed, but not yet delivered; upon delivery it becomes a deed. Originally *escrow* was used as a security in conveyancing of land, but has now been extended to mean all kinds of security including retention money laid into a trust account.

⁷⁸ *It is known from its associates*.

⁷⁹ The rule is that "express mention of one thing implies the exclusion of another".

⁸⁰ This rule in Continental methodology reminds of the argumentum e contrario (*Umkehrschluss*).

Eiusdem generis

Where specific words, like *apple, pears, plums* belonging to a class (genus), are followed by general words, like *other goods*, the latter will be construed narrowly under the *eiusdem generis*⁸¹ rule. In an attempt to avoid this effect common law draftsmen insert words like *without affecting the generality of the foregoing* (what is the foregoing?) *without limiting the generality* and *including without limitation*.

Every word has a meaning

Under common law canons of construction every word must be given a meaning and nothing should be treated as superfluous.⁸² Therefore, the use of synonyms⁸³ may be dangerous, as synonyms may be given unforeseen meanings.

Contra proferentem

There is a common law rule of construction that ambiguous and unclear words should be construed against the party who chose them.⁸⁴ This rule exists in German law only where standard terms are involved.

Commercial or purposive interpretation

Under English canons of construction, the purpose of the contract and its commercial intention cannot be taken into account. This is significantly different from the position under German law where the purpose is of such importance that it can be given greater weight than the actual text of the contract.⁸⁵

However, the commercial or purposive interpretation has now been introduced in England. In *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd*⁸⁶ the House of Lords, by a majority of three (among them Lords Steyn and Hoffmann, both of whom come from South Africa⁸⁷), overturned the rule that evidence about the factual circumstances in which a notice had been served should, generally speaking, be ignored. Instead the court held that the purpose of the wording should be considered (commercial interpretation).

⁸¹ Where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. See *McBoyle v. United States* [1931], 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816.

⁸² See Adams, op. cit., at p. 206.

⁸³ The mixture of Old English, Norman French and Latin produced many synonyms which, though banned by the Plain English Campaign, are often found in English contracts, also in those drafted by non-common law lawyers (for a list of doublets and even triplets see Mellinkoff, op. cit. pp. 120 – 125, 345 – 366).

⁸⁴ To negate this rule of construction, parties often agree on the following clause: *Each party has participated in negotiating and drafting this contract. Any ambiguity is to be construed as if the parties had drafted this contract jointly, as opposed to being construed against a party for drafting one or more provisions of this contract.*

⁸⁵ Under German law, the purposive interpretation goes back to Rudolf von Jhering, *Der Zweck im Recht*, 1877.

⁸⁶ [1997] AC 749.

⁸⁷ The legal system in South Africa has elements of both Roman-Dutch law (civil law) and English law (common law). This may well have affected their Lordships' approach.

The case concerned a "break clause"⁸⁸ in a lease which permitted the tenant to terminate that lease on 13 January 1995. The tenant served a break notice on the landlord. Unfortunately for the tenant, that notice stated that: *Pursuant to Clause 7(13) of the lease we as tenant hereby give notice to you to determine the lease on 12 January 1995.*

The notice was clear and unambiguous. The semantic and syntactical analysis left no doubt. If applied rigidly and formalistically, the notice would have failed. However, knowledge of the background against which the notice was given clearly showed that the wrong date had been inserted. The House of Lords found that the break clause had only one purpose: To inform the landlord that the tenant wished to determine the lease in accordance with its terms. The House of Lords ruled in favour of the tenant and overruled precedents established over centuries.

Recitals

What meaning will a civil law court give to the Recitals/Preamble⁸⁹ /Background/Whereas⁹⁰ Clauses which commonly set out the facts, background information, context (narrative or context recitals) and parties' intentions, purpose (purpose recitals), simultaneous transactions and lead into the main body, the operative part, of the contract? English courts regard recitals as subordinate to the body of the contract and place lesser weight on them in construing the contract as a whole. Where there is a contradiction between the recitals and the body of the contract (a contextual ambiguity), the meaning of the operative words will prevail.⁹¹ German courts regard the recitals as *Geschäftsgrundlage*, that is to say as the basis of the entire contract.

Rules of English grammar and punctuation

Apart from the rules of construction, what about the rules of grammar and punctuation? Are English contracts that are governed by a civil law to be construed according to the rules of English grammar? Does the modifier relate only to the nearest word it can possibly qualify under the antecedent rule? How can one resolve the ambiguities caused by *squinting* modifiers that may qualify what precedes them or what follows? How should German courts deal with English rules of punctuation? May a German judge pay as little attention to punctuation as English judges do?

Contract history

⁸⁸ "The Tenant may by serving not less than six months notice in writing on the landlord or its solicitors such notice to expire on the third anniversary of the term commencement date determine this Lease and upon expiry of such notice this Lease shall cease and determine and have no further effect ...".

⁸⁹ *Preamble* sounds strange to an Anglo-Saxon contract lawyer who would expect this term to denote the background to a statute or a treaty.

⁹⁰ *Whereas* has more than one meaning: (a) *but on the contrary*; (b) *given the fact that*. It is in the latter sense that *whereas* is used in recitals.

⁹¹ *Leggott v. Barrett* [1880] 15 Ch D 306 at p. 311; see Butt & Castle, op. cit., at p. 163.

The abovementioned decision of the House of Lords regarding the break clause does bring the canons of interpretation under common law closer to those of civil law. However, there are still marked differences when it comes to the details. The most striking is contract history. What was said during contractual negotiations and after execution of the contract may be used in German courts as evidence as to how certain words and phrases should be understood. Such parol evidence is still not admissible in English courts, although it is admissible in German courts. As is evident from this difference, the question of which country's canon of interpretation govern can be of vital importance.

Interplay of implied terms, frustration and good faith

The interpretation of contracts cannot be seen in isolation from other legal concepts and doctrines. It is surprising that common law applies the concept of implied terms so sparingly, and this despite the lack of codifications in the continental sense and with only little statutory yielding law (*ius dispositivum*). The same applies to the doctrine of frustration which plays but a minor role compared with the civil law doctrines of *clausula rebus sic stantibus* (and the *Geschäftsgrundlage* in Germany).⁹² Again, there is a reluctance to invoke good faith in common law.⁹³

There is thus an interplay between the importance of the wording of a contract on the one side and canons of interpretation and the application of the doctrines of implied terms, frustration and good faith on the other side: Where contracts are construed narrowly and judges are less willing to rewrite the contracts under the guise of implied terms, frustration, good faith and other concepts, the exact wording of a contract becomes vitally important. No wonder that MAC-clauses (Material Adverse Change) are an invention of common law.⁹⁴

4. Common Law Contracts before Civil Law Judges and Arbitrators

Judges and arbitrators know their native language best

What will a German judge or arbitrator do when construing an English legal term under common law? He might have recourse to Christine Rossini's "English as a Legal Language"⁹⁵ or another English legal dictionary.

If an English phrase is obscure or in dispute between the parties, the German judge or arbitrator may play it safe and request a translation under section 142 (3) of the German Code of Civil Procedure (*Zivilprozessordnung*) which states that:

⁹² The doctrine of frustration allows the contract to be automatically discharged when a frustrating event occurs so that the parties are no longer bound to perform the obligations under it. A frustrating event is an event which takes place after the contract has been formed.

⁹³ See Triebel/Hodgson/Kellenter/Müller, *Englisches Handels- und Wirtschaftsrecht*, 2nd ed., Heidelberg 1995, at pp. 65–67, 79–82.

⁹⁴ A material adverse change clause gives a party the right to withdraw from an agreement/transaction before completion if certain detrimental events occur. It is standard market practice for takeover offers to be conditional upon there being no 'material adverse change'. This is designed to enable a bidder to terminate the offer in the event of a MAC in the business or prospects of the target company in the period after the takeover bid is announced.

⁹⁵ Rossini, *English as a Legal Language*, 2nd. ed., The Hague 1998, explains common law terms and also contrasts them with civil law.

The Court may request a translation of a document written in a foreign language. The translation must be done by a translator authorized under the guidelines of the Land agency for the administration of justice.

Of course, there are many excellent translators. However, when it comes to a legal English term it is debatable whether a judge can rely on a linguist alone with regard to what is often a question of construction.

Foreign Terms - Law or Fact?

A German judge is put into a difficult position when a contract which was written in English is governed by English law (or the law of another common law country).

Foreign law is in common law jurisdictions not a matter of law, but of fact. Thus an English judge when construing a German term of art will rely on the expert evidence of German lawyers, and often each party will provide opinions containing contradictory views.

In contrast, German law provides in section 293 of the German Code of Civil Procedure:

The law which is in force in another state, customary law and by-laws require proof only to such extent as they are unknown to the court. In the establishment of these legal norms, the court is not limited to the evidence brought forward by the parties; it is empowered to make use of other sources of knowledge and to order whatever is necessary for the purpose of such utilization.

Thus, for a German judge English law is a question of law and not a question of fact. He is free to look up the meanings of English legal terms in law dictionaries. He need not rely on the evidence brought by the parties, but may resort to other sources and make the appropriate orders. In practice, the German judge will usually ask a university institute to prepare an opinion.⁹⁶

A judgment of first instance may be reversed in the second instance. But there is no appeal on questions of foreign law to the third instance, as an appeal may only be based upon a violation of German federal law or a violation of a legal provision which is also applicable in Germany outside the district of the appeal court. However, if a judge violates his procedural duty to ascertain the foreign law, this procedural issue may be subject to an appeal to a court of third instance (see section 545 (1) of the German Code of Civil Procedure).

⁹⁶ See Kegel/Schurig, *Internationales Privatrecht*, 9th ed., Munich 2004, at p. 501.

IV. ENGLISH CONTRACTS UNDER CIVIL LAW

1. Different Canons of Construction / Interpretation

More ambiguities will be created when an English contract is governed by civil law. One reason, which often is overlooked, is that the canons of construction- / interpretation are different in common and civil law. Thus, the same legal term, the same phrase in a contract may be given a different interpretation depending on whether the contract is governed by English or German law. These differences of the methods of interpretation pose many questions and uncertainties as to how a contract written in English but governed by civil law is to be construed:

Does the plain meaning rule apply? Has an English word the meaning given in the English dictionaries and in the thick volumes of *Words and Phrases Judicially Defined*? Most probably so: For where English is used as a contract language, English words have to be given the meaning the words have in that language.

Are English contracts governed by civil law to be construed according to rules of English grammar? Where the meaning is not clear from the context, does the modifier relate only to the nearest word it can possibly qualify under the antecedent rule? Most probably so: For by using English also English grammar has been chosen. How should German courts deal with English rules of punctuation? May a German judge pay as little attention to punctuation as English judges do?

Do English legal rules of construction prevail, even if they lead to a different construction if German rules applied? What about *noscitur a sociis*? And what about *expressio unius* and the *eiusdem generic* rule? Is a German judge forced to give every word a meaning? Will a German judge construe a phrase against the party who had chosen it (*contra proferentem*), even if no standard terms are at stake?⁹⁷ If the contract is governed by German law, also German rules of construction should apply and not English ones.

Does purpose, which played such an eminent role in the construction of statutes and contracts in Germany since the day of Jehring, have a wider impact than under common law?

Must German Courts ignore the recitals where the operative part of the contract is beyond doubt? Or must it apply the doctrine of *Geschäftsgrundlage* which are often stated in the background provisions? This question should be decided in conformity with the choice of law.

Should contract history be ignored under the parol evidence rule? Certainly not, if German procedural law is applied. But what about the entire contract clause which does not allow adducing statements made outside the four corners of the contract?

⁹⁷ So called *allgemeine Geschäftsbedingungen*, see sect. 310 German Civil Code (Bürgerliches Gesetzbuch).

2. Legal Terms of Art

Common law terms

Common law terms will ring a bell with a common law lawyer, but are unlikely to do so with a civil law lawyer. Likewise, civil law lawyers will recognize civil law concepts and terms which escape a common law lawyer. Often legal terms of one system of law have an equivalent in another system; however, the borders of their meaning are hardly ever the same. Rossini rightly warns: Using English terms with a specific meaning under common law to describe a similar civil law term may produce a comparative law nightmare.⁹⁸

Thus, there are common law terms with no equivalent in civil law systems, like terms in land law (fee simple), deed, and consideration. When used in a contract governed by civil law, these terms of art may denote the nearest equivalent in civil law terminology (fee simple for dominium, deed for notarial document might be meaningless and not to be understood at all (like consideration)).

More dangerous are common law legal terms with some counterpart in civil law terminology, however, often with a different reach, ambit, and content in detail. It is to be recognized that exact transpositions of legal terms and concepts are impossible to achieve.⁹⁹ There are plenty of examples. The question always is: Is the common law term to be understood as under common law or is it to be given the meaning under civil law?

- An outstanding example is the English legal term dead freight, which has a German counterpart, *Fautfracht*, which is regulated by sections 580 et seqq. of the German Commercial Code (*Handelsgesetzbuch*). In a case decided by the German Federal Court of Justice¹⁰⁰ (BGH) a German shipper terminated a contract of affreightment (carriage of goods by sea) entered into with an English carrier. The parties agreed that the German shipper should pay *deadfreight* of 50,000 pounds (instead of the contractual freight of 100,000 pounds). German law governed the contract. A dispute arose as to whether deadfreight should be given the meaning under section 580 of the German Commercial Code or whether the meaning of the English technical term should prevail. The German Federal Court of Justice gave the term its meaning under English law and ignored German law on the basis that an English technical term had been used!

¹⁰¹

- A similar reasoning is found in an international arbitration case where the meaning of *will cause* in a Memorandum of Understanding (MoU) governed by Indonesian law was at stake. The question was whether these words were legally binding or not. The Arbitral Tribunal relied on English authority: *Although English law is not the governing law, the MoU is drafted in English. The English cases, which gave rise to much more careful debate, as to the nuances of per-*

⁹⁸ Rossini, op. cit., Preface, at p. XXI.

⁹⁹ See Karen McAuliffe, *Translation at the Court of Justice of the European Community*, paper delivered at the Language and Law Conference 17-19 May 2006 in Düsseldorf.

¹⁰⁰ BGH TransportR 1988, at p. 199.

¹⁰¹ See Triebel/Balthasar, *Auslegung englischer Vertragstexte unter deutschem Vertragsstatut – Fallstricke des Art. 32 I Nr. 1 EGBGB*, NJW 2004, at pp. 2189–2195.

*intent expressions, are therefore instructive as a reference point for the purposes of establishing the intention of the parties as expressed in the MoU.*¹⁰²

- *Force majeure* is a clause which causes great confusion under German law. Its effects are well settled under English law: It will excuse performance where events outside the control of a party make performance impossible. Such a clause makes sense under English law where – generally speaking - contractual liability is strict and not dependent on fault of a party.¹⁰³ Under the fault regime of German law¹⁰⁴, however, such a clause is meaningless and may be distorting: fault often requires more than just an event outside the control of a party; a *force majeure* clause may jeopardise the fault principle.
- This phrase appears often in contracts: Time is of the essence which under English law entitles the other party not only to compensation but also to withdraw from the contract. The meaning of this is uncertain under German law.
- Similarly dangerous is the use of words which have been judicially defined under common law but are vague and difficult to translate into civil law.
- *Reasonable/best efforts/endeavours/good faith efforts*¹⁰⁵ are somewhat less than an absolute duty, but difficult to define under common law¹⁰⁶ and even more so under civil law.
- *Negligence* has various meanings. Negligence as a tort may overlap to some extent with pre-contractual breach (*culpa in contrahendo*) in German law. As reproachable conduct when breaching a contract it is often expressly described or implied as a duty to act diligently.¹⁰⁷ However, common law does not recognize the continental distinction made between gross and slight negligence. Reckless, wanton or wilful negligence are difficult to classify in civil law.
- *Vicarious liability* - under German law, an employer will only be vicariously liable if he was at fault in selecting or in supervising an agent.
- *Without prejudice* may be a matter of evidence and of contract drafting: As a rule of evidence in common law it has no equivalent in civil law. The basic meaning is 'without loss of any rights'. A letter marked 'without prejudice' cannot later be used as evidence in court proceedings if the settlement negotiations

¹⁰² Yearbook of International Arbitration, vol. XXV at p. 202.

¹⁰³ Triebel/Hodgson/Kellenter/Müller, op. cit. at p. 76.

¹⁰⁴ Sect. 276 German Civil Code (*Bürgerliches Gesetzbuch*).

¹⁰⁵ There is a downward graduation from an absolute obligation to best endeavours and reasonable endeavours. Butt & Castle list judicial decisions of these expressions over a two-decade period (op. cit., at p. 107, footnote 31, see also Daigneault, op. cit., at pp. 64 et seq.).

¹⁰⁶ See Adams, op. cit., at pp. 88–94.

¹⁰⁷ Anglo-Saxon lawyers will often insert a duty in contracts to act *with all due care and diligence*, which will not be necessary under the civil law concept of fault (see Zweigert/Kötz, *Einführung in die Rechtsvergleichung*, 3rd ed. Tübingen 1955, at pp. 488, 489, 502, 503), where the general principle of contractual liability depends on fault (intent or negligence) and is not absolute. An extension of the word *diligence* brought over from America is *due diligence*, an investigation into the affairs of the company by a buyer.

fail. As a matter of contract drafting *without prejudice to* means without affecting another rule or sentence in the contract.¹⁰⁸

- *Knowledge* and its various degrees are vague, if not ambiguous under common law. Thus, there is doubt whether *to the best of its knowledge*¹⁰⁹ requires a higher or lower degree than *to its knowledge*. Often civil law lawyers use *positive knowledge* meaning *actual knowledge* which is to be contrasted with *imputed* and *constructive knowledge*. *Malice* under English law simply means that a person intentionally did something unlawful.¹¹⁰
- *Term* has at least three different meanings in English which can confuse foreigners: (i) term of a contract = condition or warranty (ii) term of art = *terminus technicus*, and (iii) term = the duration, that is the period of time be it fixed or indefinite. Thus *term of notice* = *Kündigungsfrist*.
- An event of *default* is not tantamount to *Verzug*, but precedes a breach and covers instances before that point.

Civil law terms translated into English

A civil law lawyer drafting a contract in English may be tempted to translate terms of art from his native civil code into English which may be incomprehensible to a common law lawyer. The common law lawyer who is used to concrete terms will find the following to be utterly meaningless general terms and misty abstractions.

- *Declaration of intent* being a literal translation of the German *Willenserklärung* or the French *declaration de volonté*.
- *Good faith* (Treu und Glauben) is a concept developed under German law from a *drop of social oil* into an obligation extending to every aspect of the performance of a contract; it has no equivalent in English common law.¹¹¹
- *Notarisation* to a common law lawyer merely means certification of a signature. It does not have the meaning given by the Latin notariat which requires that a document be read aloud verbatim, approved by the parties and signed by them and the notary public in the latter's presence. This function of notarisation in respect of important contracts is fulfilled by the common law deed.

3. Use of Common Law Precedents

Contracts governed by civil law are often written in a highly theoretical style and employ numerous abstract concepts. Common law lawyers often have great difficulties

¹⁰⁸ See below footnote 128.

¹⁰⁹ Sometimes the synonyms or near-synonyms are put together: *knowledge, information and belief*. However, it is questionable that the last two add anything to the first word.

¹¹⁰ Its meaning in everyday English is somewhat different – it means that a person did something with the intent to harm.

¹¹¹ See Zweigert/Kötz, op. cit., at pp. 147-149.

in understanding them. If an abstract civil law term is translated into English, it will often prove to be totally meaningless when read from the perspective of common law. The latter is all the more true since the meaning of the words used in the English translation will often have completely different connotations for the common law reader than those intended by the civil law writer. The general terms used in civil law reflect the degree of abstraction of the legal concepts and terms found in the continental codifications. In view of this, civil law lawyers are more likely to dispense with detailed drafting and to rely on their code for a ready-made solution should a difficulty arise in connection with the contract.

Often in the course of a "battle of forms" a dangerous compromise is reached by cobbling together of the forms of two parties from different jurisdictions. This is a fruitful source of dispute because under common law every word has to be given a meaning. In one case the mortgagee of a ship had taken out an insurance policy to protect himself against loss if the ship was damaged. Old English standard forms going back to the 18th century (sic!) were cobbled together with conditions translated from Swedish. The Court of Appeal found it very difficult to determine the plain meaning and the commercial background of the two inconsistent texts.¹¹²

What happens more often is: a typical common law contract is taken out of the form books dealing with civil law and only minor amendments are added to the contract leaving its substance unchanged. Sometimes the many common law terms and concepts go unnoticed and cause no dispute regarding their meaning, but often they are a fruitful source of disputes leading to "correcting" amendments or eventually even litigation.

Anglo-American contract practice has brought many different kinds of pre-contractual documents to Europe. We Europeans use their English names as loan words, like: *Heads of Agreement*, *Letter of Intent*, *Letter of Comfort* and *Term Sheet*. Whether these pre-contractual documents are binding or not under common law is not settled, whether they bind the parties if civil law governs them is even less clear.

Contractual documents with English names are also used in Europe: *Memorandum of Agreement*, *Memorandum of Understanding* and *Letter of Agreement*. Where they are governed by a continental law, there is also ambiguity as to whether they are binding. Common law lawyers distinguish clearly between two kinds of *attachments*: *exhibits* to a contract which are stand-alone documents, and *schedules* which are part of the contract and often contain long lists, such as representations and warranties.

Foreign concepts used in M&A contracts governed by German law may be dangerous because they have a meaning under English law but not under German law. Jim Freund¹¹³ speaks of the *horsemen* under US M&A contracts which do not fit into the German legal system, yet they are constantly repeated in transactions governed by

¹¹² The Alexion Hope [1988] 1 Lloyd's Rep 311, 320 (though applying English law); see also Butt & Castle, op. cit., at p. 34

¹¹³ The Anatomy of a Merger, New York 1975; see also Triebel, *Anglo-amerikanischer Einfluss auf Unternehmenskaufverträge in Deutschland – eine Gefahr für die Rechtsklarheit*, RIW 1998, at pp. 1-7.

German law. The terms most frequently used to categorize different types of contractual obligations are conditions, warranties, representations and covenants.

Conditions¹¹⁴ are obligations which are regarded as essential to the main purpose of a contract, whereas warranties refer to the less important terms that are collateral to the main purpose of the contract and usually means a guarantee by one party that the thing sold is as represented or promised. The main difference between the two is the remedies available in the case of breach. If a term is a condition, the innocent party will be entitled to rescind the contract and to claim damages in addition. The seriousness of the breach will not be relevant. The breach of a warranty, on the other hand, will only entitle the innocent party to claim damages. By categorizing the terms of a contract as conditions or warranties, the parties define how important they are and the consequences of a breach.¹¹⁵ As already discussed above, English courts will focus on a written contract when interpreting its provisions and not look at the circumstances surrounding it due to the parole evidence rule. Thus, the parties should be aware of the significance of their labelling a term in a certain way. To what extent German courts will take the above into account is unclear.

The word *representations* is frequently used to define terms concerning the disclosure of information. A representation is a presentation of fact made to induce the other party to enter into the contract; a false representation, a misrepresentation, entitles the other party to rescind the contract and to claim damages or both.¹¹⁶ This is particularly important because there is no general duty to disclose information or act in good faith when entering into or fulfilling a contract under English contract law. The principle that prevails is *caveat emptor*, in other words *buyer beware*. Where a representation (statements of facts upon which a party relies) is made and proves to be false, it will be considered a misrepresentation and the remedies available will depend on whether it was fraudulent, negligent or innocent. The injured party may be entitled to damages or rescission.

Covenants are promises contained in a deed. Their main purposes are to avoid the need for consideration, but they will have no effect unless they also fulfil the formal requirements for deeds. In effect the use of the term covenant in a simple contract is merely a contractual obligation to do or not to do something.

4. Standard Provisions / Miscellaneous Clauses / Boilerplate Language/ Household Provisions and Definitions

Household provisions as used in common law contract practice may have an unexpected impact on the construction of a contract. In addition to the choice of law and

¹¹⁴ The term *conditions* is ambiguous, as it has many meanings: (a) an operative fact, one on which the existence of some particular legal relation depends (so in Restatement (second) of Contracts § 224 (1989)); (b) Coode distinguishes between *cases* and *conditions*; (c) conditions for closing as opposed to conditions for the effectiveness of a contract.

¹¹⁵ There is in fact a third group of terms called innominate terms or intermediate terms. These are terms which cannot be categorised as either conditions or warranties. The remedy for the breach of an innominate term will depend on the seriousness of its nature. If the breach is fundamental, that is to say the injured party has been deprived of substantially the whole of the benefit of the contract, he will be able to rescind the contract and claim damages. Otherwise he will be entitled to damages only.

¹¹⁶ So under the English Misrepresentation Act 1977.

service of notice clauses, there are many others which may cause misunderstandings when read by civil law lawyers:

- An integrated contract (US) / entire agreement (UK) / four corner clause may exclude contract history even where it would be permitted under German law of evidence!¹¹⁷
- Severability: The "blue pencil rule" allows an English court to decide whether to sever an invalid provision from the rest of a contract and regard the remainder of the contract as valid. This test is also applied under German law. However, the typical clause under German law also imposes a duty on the parties to fill in gaps and omissions in a contract. Under common law such clauses could be void for uncertainty.
- Waiver clause: A failure to assert rights does not constitute a waiver – this may be similar to the common law doctrine of estoppel, but it is different from the German doctrine of *venire contra factum proprium*.
- It has become usual to put "autonomous" definitions at the beginning of a contract and to put "integrated" definitions in the body of the contract. Defined terms may be dangerous. Autonomous definitions are usually made by using the word *means*;¹¹⁸ the definition can then be enlarged by adding the word *including* or restricted by adding the word *excluding*.

V. SOME RECOMMENDATIONS AND WARNINGS TO CIVIL LAW LAWYERS

1. Civil Law Terms in Brackets

Several attempts have been made to protect a party who enters - without English advisors - into an English contract when English is not his/her native tongue. In earlier times when contracts were not that long (often with one party from a previous communist country) bilingual contracts were drawn up (with or without provisions determining the prevailing language). However, bilingual contracts are largely a thing of the past as modern, complex contracts encompass hundreds of pages.

Instead of bilingual contracts it has become usual to insert the civil law term in brackets to avoid the meaning of a common law legal term of art or the lexical meaning of an ordinary English word. So, for example, where in an M&A transaction the parameters of a variable purchase price are to be determined by a chartered accountant, his legal role will be difficult to describe in the English language: as arbitrator, expert or

¹¹⁷ A typical common law entire agreement clause contains three elements: (i) the entire agreement statement; (ii) previous agreements superseded; and (iii) no reliance on other representations (see Daingneault, op. cit., at p. 117).

¹¹⁸ It is ugly and wrong to write *shall mean* instead of the present tense, as neither the modal nor the future meaning of this verb is appropriate.

valuer. German legal terms in brackets (*Schiedsrichter* or *Schiedsgutachter*) would bring clarity.¹¹⁹

2. Inclusion of Construction and Language Provisions

Since common law has strict canons of construction, simply putting the civil law terms in brackets and adding a choice of law clause may not be sufficient to protect the parties against surprises when it comes to the construction of a contentious provision in the contract. As shown above, a simple choice of law may not be sufficient to guarantee that a civil law judge or arbitrator will ignore these strict rules and apply the wider canons of the chosen civil law. It might well be wise to insert a clause that provides that the contract not only be governed, but also be construed under the chosen law.

The language problem is actually even more difficult. To protect one party or both parties, it is important to recognise that there are different English languages and dialects: not only British and American English, but also new kinds of English, world English shaped as much by non-native as by native speakers,¹²⁰ even a Euro-speak¹²¹ and UN-speak. Furthermore, there are many non-native speaking lawyers who use English as a world language or as the Lingua Franca.¹²² These different kinds of English may warrant a different approach when construing a contract written in a particular kind of English.

To avoid unpleasant surprises and disputes, civil law lawyers drafting a contract in English but based on civil law must ascertain the meaning of English legal terms, know the meanings of ordinary English words and consider the effects of English rules of grammar on the interpretation of a contract. This is rather cumbersome. They may wish to clarify that English is not the native tongue of both parties or of one party (which puts the other at an advantage!).¹²³ They may want to state in the contract that they have selected the English language as a language of convenience or as a concession to the other party. They can insert a provision, preferably as part of the choice of law clause, into the contract which could read as follows:

This contract including any issues arising out of or in connection with it is governed by [...] law. This contract, its words and phrases are to be construed under [...] law paying regard to the use of English as language of convenience [concession]. Terms in brackets shall have their meaning

¹¹⁹ To make assurance doubly sure a reference to the provision in the civil code should be made, such as to sect. 317 German Civil Code (*Bürgerliches Gesetzbuch*) for a *Schiedsgutachter*.

¹²⁰ See Baugh & Cable, op. cit., at p. 404.

¹²¹ "Euro-speak" is a kind of international English, which developed rapidly since the UK joined the EU in 1973. McAuliffe: "Euro-speak is, quite simply, a new language". It has been severely attacked, as it contains an abundance of mistranslations and word creations derived from other European languages. Rossini (op. cit., Preface at xxii) speaks of *ridiculous Euro-speak language evolved in Brussels ... (whose) aberrations appear to have inflicted irreversible damage to the English language*.

¹²² Andrew Hammel, *The Role of Plain English in Legal Translation*, a paper delivered at the Language and Law Conference 17-19 May 2006 in Düsseldorf.

¹²³ A useful criterion is to start with the language and law facilities of the parties and their agents and advisors to a contract: whether all or only one side come from an English and common law background or none rather than impose the lexical meaning of a common law term to a non-English party (see Triebel/Balthasar, op. cit., at pp. 2192 et seq.).

under [...] law without recourse to English or any other law. English is not the native language of the parties and of their advisors [one of the parties and its advisors]. The parties have agreed to English in the contract as a language of convenience [party x has agreed to English as contract language as a concession to party X].

Such a construction and language provision protects against a common law construction of the contract. However, it may create ambiguities other than those derived from common law construction: Which meaning is to be given to a common law term or an English word if not the lexical English meaning? What other rules of grammar will determine uncertainties arising from a squinting modifier? However, such a construction and language clause may come nearer to the ultimate aim of every interpretation: the intention of the parties.

It is a difficult question whether other construction clauses, which are often employed by pedantic common law lawyers, should be recommended. Some of these clauses are useful, others harmless or even pointless, yet most of them are clumsy. Adams¹²⁴ sets out some of these:

- To avoid the many murky *hereofs, hereto*: *Any reference in this Agreement to a section, article, schedule, or exhibit is to a section, article, schedule, or exhibit in this Agreement.*
- To negate the stringent *enumeratio unius* rule: The words *include* and *includes* are to be read as if they were followed by a phrase *without limitation*.
- To clarify whether *or* is used in its inclusive or exclusive sense: Unless the context clearly requires, *or* is not exclusive.
- To solve the many ambiguities of *shall*: The word *shall* means *has the duty to*, *must* means *is required to*, and *may* means *is permitted to*.

3. Warnings

It may not be very encouraging, but it is necessary to conclude with some warnings to civil law lawyers who are confronted with contracts drafted in English, even if these contracts are subject to their laws:

- Experience shows that young lawyers all over the world adopt the old fashioned, archaic style and expressions used by previous generations readily and without thinking through their meaning and function. The unthinking use of common law precedents is all the more dangerous when civil law is to govern the contract. In international law firms there is a great temptation to use common law precedents without considering the governing law. In long contractual negotiations, the governing law is frequently left open until the very end with the result that there is then no time to check each clause for its compatibility with the governing law. Attempting to save effort by cobbling a contract together from forms from different jurisdictions is to say the least even more dubious.

¹²⁴ Adams, *Legal usage in Drafting Corporate Agreements*, London, 2001, at pp. 115 -121.

- Many contracts are drafted in poor English which can only be understood by retranslating it into the writer's native tongue or not at all. Some mistakes may be harmless¹²⁵, others are dangerous¹²⁶. Many misunderstandings will be avoided if simple propositions are employed correctly: *Notwithstanding*¹²⁷, *subject to*, *without prejudice to*, *except*, *when*, *where*, *if*, *then*. It astonishes what difficulties those small, but frequently used words cause to non-English speakers. The wrong use of these conjunctions often distorts the intended meaning.¹²⁸
- Avoid vague terms which have frequently been the subject of common law litigation (*best endeavours* and *forthwith*) and which are even more uncertain against a civil law background.
- Avoid specific common law terms with no equivalent in civil law, such as *deed* and *consideration* and be careful with the terms which have a meaning in both common as well as in civil law.

¹²⁵ The following examples may be regarded as harmless:

- The Director of x-company *from time to time* as contrasted with *for the time being*: the former case x-company may appoint a Director more than once, the latter means the Director at the relevant time.
- *To dismiss an employee for (important) reasons* simply does not make sense in English: *to dismiss him for cause* is the right expression, the employer may (be bound to) give grounds (= reasons which may be important) for doing so.
- Where a contract is just between two parties the preposition *between*, not the clumsy *by and between* and in no event *among* should be used. The latter is reserved where there are more than two parties.
- *Hereby* indicates the very act achieved by the contractual provision and *herewith* refers to an enclosure.
- If both parties sign a contract, it is an original, and there is no difference in other legal systems. However, counterpart is an original only signed by the other party.

¹²⁶ The following examples may be regarded as dangerous: *exclusive* and *sole* in agency, distributorship and licence agreements: A principal who appoints an *exclusive* agent in a territory undertakes not to appoint another agent nor deliver itself into the territory; a *sole* agent is not protected against deliveries by the principal.

- *To rescind* a contract means annulling the contract from the beginning, *cancelling* or *discharging* a contract only refers to the future.
- What sounds strange to a civil law lawyer is that a contract may be *discharged* both by *performance* and by *breach*.

¹²⁷ *Notwithstanding* is dangerous if used in phrases like *notwithstanding the foregoing* or *notwithstanding anything herein to the contrary*, as it may cause syntactical ambiguity.

¹²⁸ *Notwithstanding* means the rule overrides another inconsistent with that (for a fuller analysis see Mellinkoff, op. cit., at p. 85; Adams, *Legal usage in Drafting Corporate Agreements*, London, 2001, at pp. 161 - 163); *subject to* has a contrary effect and means the rule is affected or an obligation negated by another rule. A second meaning refers to a rule of evidence: the without prejudice document or statement cannot be used as evidence, *if the negotiations fail or the proposal is not accepted*. *Except that* means that the rule has no effect on another rule, *where* and *when* introduces and restricts the rule to the stated circumstances (the *case* in the sense used by Coode), *if* introduces a condition; *then* may introduce the general rule (see Daigneault, op. cit., at p. 75).

- Avoid semantic and syntactical contextual ambiguities, legalese and superfluous words and so on and so on.

VI. CONCLUSION

This essay is - in the first place - directed at civil law lawyers. They must realize the possible fallacies which even common law lawyers have to overcome and, on top of that, appreciate the additional pitfalls if the contract is governed by civil law.

Common law lawyers know best how to deal with pitfalls of their language. But once they meet civil law lawyers and subject their contract written in English to civil law, common law lawyers will be confronted with new and other pitfalls. Common law lawyers should understand the way civil law lawyers draft contracts under their system to understand what they want to express.