

Legal Translation in Cross-Border Transactions



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Miami, FL
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Disclaimer:

The information presented in this session is for educational and informational purposes only, and should not be construed as legal advice or as an offer to perform legal services on any subject matter.



English is the language of cross-border transactions

English is the language of cross-border communications and the language of business.

Legal translators are linguists, legal scholars, and cultural intermediaries.

Discussion questions: what is the preferred language of choice in cross-border transactions?

Growing demand for translators in cross-border transactions

The demand: American firms lobbied abroad to allow foreign lawyers to practice locally. In banking, finance, real estate, the top firms are not domestic.

In capital market, none of the top 15 firms in China were domestic.

In Japan and Germany, the top M&A firms are not domestic.

Mistranslation leads to financial and legal risks

Case study: Sharp, the Japanese electronics giant, warned shareholders in a statement about its own negative cash flow.

While the original Japanese statement asserted confidence in the company's future despite the liquidity issue, the English version of the statement declared that the company's management held "material doubt" about its future as a going concern.

The corrected statement, issued a few days later, made it clear that the company had "no uncertainties" about its ability to continue. Unfortunately, the damage was already done. Sharp's stock fell by 10% after the mistranslated statement was released.

Types of cross-border transactions:

In general , the cross-border transactions in the global commerce include:

International Sales
Technology Transfer
Foreign Investment

Stages of cross-border transactions :

Stage 1: Pre-Transaction Stage

Stage 2: Execution and Closing

Stage 3: Post-Closing Stage

Phase 1: Pre-Transaction Stage

Documents outline the intentions and terms of a future business collaboration.

Key documents of Phase 1:

Letter of Intent (LOI)

Memorandum of Understanding (MoU)

Non-Disclosure Agreement (NDA)

Due Diligence: Helps all parties involved understand the potential and liabilities associated with the transaction.

due diligence reports containing financial statements, ownership structure, intellectual property documents, regulatory filings

Phase 2: Execution and Closing

Parties sign and execute the finalized transaction terms, exchange of consideration, transfer or acquisition of assets, and completion of the transaction and registration.

Key documents in Phase 2 of IBT:

Who owns what? Documents such as articles of incorporation, bylaws, and shareholders' agreements, Joint Venture Agreements

Who gets what when and how? Sales/Purchase Agreements, Stock Transfer Agreements, Distribution Agreements

Phase 3: Post-Closing Stage

Dispute resolution documents and regulatory approval agreed upon in the transaction documents.

Key documents in Phase 3:

Arbitration Agreements, settlement agreements and correspondence and communications.

A simple case:

A simple example:

John Smith is unmarried.

Unmarried: never having been married v. not having a husband or a wife at the time in question?

Case Study 1:

Affiliates v. Subsidiary?

Background: The Chinese real estate development company was negotiating a joint venture agreement with a US-based institutional investor.

“Three red lines” policy in China: The Chinese real estate industry was going through radical changes at the times. China implemented the policy called “three red lines” to restrict the ratio of debt to cash, equity and assets in the real estate sector. It caused a liquidity crisis.

Case Study 1:

Background: US-China Relations going downhill. US-China is in the process of economic “de-coupling.”

The company is at the execution and closing stage, where it had signed the MOU with the US-based investor and was negotiating and finalizing the deal terms in the joint venture agreement.

Multiple jurisdictions: Washington state, Cayman Islands, Hong Kong

Case Study 1:

Wall Street Journal: The company appeared on the front page of Wall Street Journey, not for the reasons you would hope for.

CREDIT MARKETS

Chinese Developer Modern Land Fails to Repay \$250 Million U.S. Dollar Bond

The green real-estate company had previously sought to extend the bond's Oct. 25 due date

THE WALL STREET JOURNAL.

Case Study 1:

When In-house counsel /translator arrived at the scene.

Meetings with the institutional investors, developer, shareholders, creditors are underway.

How it started

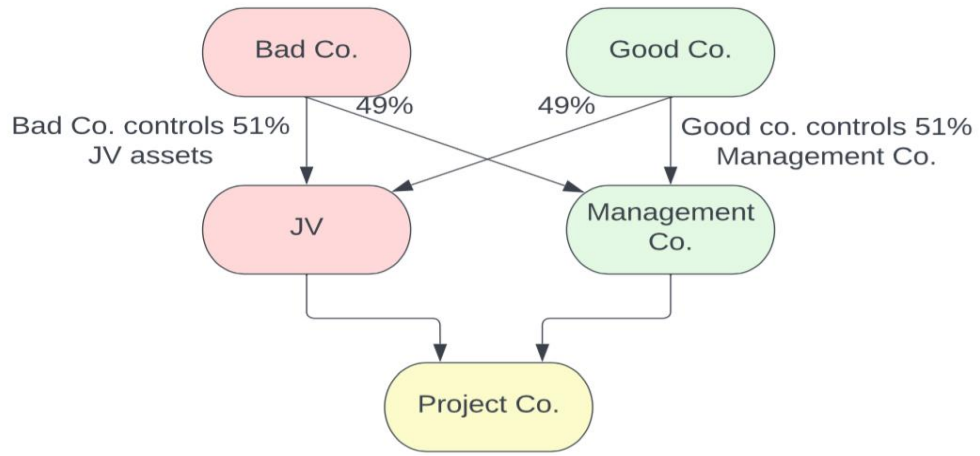


How it's going



Case Study 1:

Are any of your affiliates have any liability issues?



Is Project Co. an affiliate or a subsidiary of Bad Co.?

Case Study 1:

Communication breakdown occurs: because the source message was not initially comprehended (by counsel/ translator/interpreter) without legal advice from HK counsel.

The dilemma: reassurance from the company v. truthful and accurate disclosure

What are the right questions to ask from a legal perspective?

Case Study 1:

Which entities are at issue?

Who owns the entities?

Who manages the entities?

Who controls of the entities?

- Project Co. is owned by Bad Co. but it is not controlled by Bad Co.
- Project Co. is an affiliate of Bad Co. but it is not a subsidiary of Bad Co. (Re: HK law.)
- Project Co. does not inherit Bad Co.'s liability repayment issues. The US-based investment can proceed.

Food for thought

Does what you do becomes who you are?



How to develop streamlined process with legal counsel?

The interpreter's role: communication facilitators, language experts, legal scholar, or all of the above?

Issue spotting: The translation issues occur when the conversation is stuck.

Initial consultation: scope of translation, legal documents involved, timeline, corporate culture, business culture nuances, jurisdiction consideration.

How to develop streamlined process with legal counsel?

Confidentiality and Non-Disclosure Agreements:
Discuss with legal counsel the confidentiality nature of the translation work.

Terminology Alignment: (emphasis added) create a terminology glossary for legal and linguistic purposes. This document includes a list of key legal terms, list of legal documents and their preferred translations or explanations.

How to develop streamlined process with legal counsel?

Reference Materials: corporate structure, organizational chart, list of attendees, legal document templates, and official translations or texts (disclosure), relevant laws or regulations, legal precedents.

Cultural and Jurisdictional Considerations: transactions that cover multiple jurisdictions, indirect mode of communication, ice breaker and humor.

Case Study 2:

An Inaccurate translation that has a price tag of \$2 billion in arbitration award

Background: International Center for Settlement of Investment Disputes (ICSID) ruled in Occidental Petroleum Corporation v. Ecuador that Ecuador to award OPC \$1.76 billion in damages (\$2.3 billion with interest applied), the largest award ever issued by ICSID. Counsel for Ecuador believed that the award would have been significantly lower, had the tribunal had access to a better translation of a key documents.

Case Study 2:

The misleading English translation: The nullity is the legal consequence, generated because in the granting, subscription or manner in which a contract or legal act was celebrated, certain requirements or formalities expressly stated or regulated by law were omitted, the breach of which causes the penalty, one must differentiate between the conditions of existence and the conditions of validity, the first being the will, object, cause and solemnities or legal requirements prescribed by law, those without which the act is not binding for legal purposes and lacks any legal existence...

Case Study 2:

The original Spanish version:

...la nulidad es una consecuencia jurídica que se genera porque en el otorgamiento, suscripción o forma de celebrar un acto o negocio jurídico se ha omitido ciertos requisitos y/o formalidades que expresamente la ley señala o regula y cuyo incumplimiento origina la sanción, debiendo diferenciarse las condiciones de existencia de las condiciones de validez, siendo las primeras las [sic] voluntad, el objeto, la causa y las solemnidades prescritas por la ley, aquellas sin las cuales el acto no nace a la vida del derecho, careciendo de existencia jurídica ... (Emphasis added)

Case Study 2:

Nullity is the legal consequence if a contract or legal act omits certain **requirements** and formalities.

No requirements and formalities → nullity

Solemnities or public deed constitutes a formal requirement for existence.

A contract or legal act does **not exist** without solemnities or public deed.

No solemnities or public deed → inexistence

Case Study 2:

The document mistranslated “solemnidad” as “solemnities or legal requirements.”

The mistranslation mixed up solemnities and requirements, thus it mixed up the legal consequences of nullity v. inexistence.

Case Study 2:

Nullity v. Inexistence

A contract is null when:

Never valid from the beginning;

No effect;

Formed under duress, threats, undue influence, fraud;

Terms with uncertainty or ambiguity.

A contract is inexistent when:

There is no agreement to ratify or validate it;

It's considered inexistent from the beginning;

It's invalidated by the court.

How to develop communication protocol with legal counsel:

Points of contact: counsel, office manager, team leader.

Preferred methods (email, calls, texts, WhatsApp, WeChats, etc.)

Response times: cultural differences

Establish healthy boundaries of communication

Communication and feedback from counsel:

Maintains open lines of communication with legal counsel throughout the course of negotiation.

During breaks of the negotiations: request quick feedback, updates and unaddressed translation issues that arise during the negotiation.

How to mitigate risks and liabilities for translators:

Confidentiality issues: Can I use my previous work with specific client to market myself?

Term of the NDA: The confidentiality obligation of cross-border transactions typically extend beyond the completion of the translation work.

Check translation agreement. Negotiate the time limit for confidentiality.

Obtain explicit written consent from client before using sensitive information.

Mitigating risks and liabilities for translators:

Define the parties involved: Use a legal entity instead of an individual to sign the translation agreement, if possible.

Indemnification clause due to issues with source material: a mechanism to allocate responsibility and mitigate risk in the event of a dispute. If the client makes unauthorized alterations to the translation without the translator's consent, resulting in errors, inaccuracies, or potential legal issues, the translator may seek indemnification.

Mitigating risks and liabilities for translators:

Professional liability insurance: it's required to have the liability insurance in some parts of the world.

Errors and omissions coverage: in case of mistakes or omissions in your translation that led to financial losses

Cost of legal defense: liability insurance covers the expenses associated with legal defense

Q & A





Thank you!