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ROUTLEDGE

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2014
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

*Routledge is an imprint of the Taylor & Francis Group, an informa business*



*British Library Cataloguing in Publication Data*
A catalogue record for this book is available from the British Library

*Library of Congress Cataloging in Publication Data*
A catalog record for this title has been applied for

ISBN: 978-1-138-79080-3 (hbk)
ISBN: 978-1-138-79082-7 (pbk)
ISBN: 978-1-131-57639-8 (ebk)

Typeset in Times New Roman by
Delta Typesetters, Cairo, Egypt


Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

# The Legal Environment of Translation

Translation is subject to a complex and unique set of legal rules that govern its various practical and intellectual aspects. These rules derive from very different legal areas, such as intellectual property and labour law. While useful from a strictly legal point of view, the heterogeneity of sources operates as a major hurdle in terms of understanding the overall legal framework within which translation operates.

This book offers a general overview of the legal rules applicable to different aspects of translation, allowing translators and other interested parties to form a broad and coherent picture of the rules applicable in this area. It draws on the provisions of the main legal systems of the world, as well as the basic international agreements relevant in this area, thus offering both a comparative perspective of the legal issues involved and a guide to relevant national legal rules. In addition to a description and analysis of the legal issues and rules involved, the book also presents hypothetical cases, with a discussion of the problems they pose and possible solutions. It explains the theoretical structure of the rules under discussion as well as their practical implications.

The language and methodology of the book are sufficiently accessible to allow lawyers, translators and those who require translation work but do not have a formal legal background to follow the arguments presented.

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# Preface

## Translation from a legal point of view

All human conduct may be examined from a legal point of view. It may be considered illegal, criminal, valid, void; it may be viewed as the source of additional legal relationships or as the exercise of a legal right. Translation is no exception to this general rule.

The legal analysis of translation is of special interest for several reasons. Translating is a complex activity, with distinctive features (Bellos 2011, Venuti 1995a) and as such it creates special legal issues. Generally, the legal aspects of translation have been examined from the point of view of copyright law (Venuti 1995b); however, as this study will show, there are several other legal dimensions to translation, related to the complexity and peculiarities of this activity. Thus, we are dealing with an area of the law defined not only by its content and users, but also by the specific issues it raises and the legal solutions that have been developed accordingly.

In addition, translation is a vast and permanently changing business. The value of translation work is enormous, from an economic as well as from other viewpoints, and this huge endeavour is possible only within the framework of specific legal rules. The investments made by translators – in terms of their work and of their training – and by the persons acquiring their services and products are only possible if such services and products are reasonably protected and not open to unauthorized use by persons who have not participated in the translation process or in its financing.

Finally, translation frequently takes place without stakeholders' adequate knowledge of its legal protection and implications. Much of the translation work taking place in the world has a low individual value, although it may be part of a business with a huge total turnover. Thus, it is not possible for the parties participating in this activity – as translators or as users of translations – to engage in lengthy negotiations about their contractual relationships, nor in legal investigations about the scope of their rights. Translation work frequently takes place with the understanding that a "reasonable" set of legal rules governs such work, but without detailed knowledge about the actual contents and meaning of such rules. In more technical terms, the characteristics of translation activities do not allow them to bear high transaction costs, as would result from protracted contractual negotiations or detailed legal research. Hence, translation work frequently takes place on the basis of mutual agreement about the basic aspects of such work, but with one or both parties not knowing the frequently complex legal implications of their agreement. This makes the analysis of such implications particularly important.

This book follows a comparative law perspective. It is not based on a specific national legal system, but rather on the common features of the different national laws. This is possible because there are common or similar solutions, applied by the different national legal systems, to the issues posed by translation. However, the possibilities of this type of analysis should not be exaggerated. There is no coherent world law, in this or other legal areas, but rather a complex system in which hundreds of independent national legal systems coexist with each other and with a rather vague and weak international law. If some uniformity transpires from this enormously complex legal structure, it is because the practical conflicts raised by translations are frequently the same in all the countries of the world, and also because in the area of the rules applicable to translation – particularly copyright – several international treaties have created a fairly detailed common framework, which is generally lacking in other legal areas. But real translation issues do not take place in the abstract dimension of comparative law, but rather in the context of concrete conflicts and relationships governed by specific national rules. Hence, the determination of the actual rules applicable to actual legal conflicts or relationships requires – in the field of translation as elsewhere – going beyond the general outline provided by comparative law. This in turn implies a dual process: determining the national law (or laws) applicable to a given set of facts, and defining the rules governing the case under such law.

## Purpose of this book. Matters to be covered

The problems discussed in this book involve primarily translators and persons using their work. It seeks to provide a general overview of the legal rules applicable to these problems, taking into account the main legal systems of the world. It is not an exhaustive analysis of the rules applicable to translation under such legal systems, a work whose scope would greatly exceed the limits of this work.

In our experience, translation work is frequently undertaken and paid for without adequate knowledge of the legal problems such work poses nor of the possible solutions to such problems. Although, as in other areas of the law, the actual answer to concrete legal problems requires a detailed description of the different factual elements involved and of the national or other legal provisions applicable to such set of facts, it is possible to be aware of the main legal issues raised by translation work, and of the basic legal framework applicable to such issues, by means of the general principles applicable in the field. This possibility is strengthened by the fact that international treaties require, in the areas of copyright and intellectual property protection, compliance with certain minimum international standards. But the actual solution for real legal problems raised by translation will always require knowledge of the national rules applicable in each case.

No prior knowledge of copyright law or of any specific national legal system is required to follow the analysis included in this book. Familiarity with the issues and practices of translation is convenient but not necessary. The legal terminology employed is understandable by a non-specialist person fluent in the English language.

The legal analysis will begin, in Chapter 1, with a brief description of the world's legal systems; it is in the context of these different legal systems that the rules applicable to translations exist and are applied.

Copyright has been, traditionally, the principal legal instrument for the protection of translations. Given the importance of copyright protection in the context of the legal environment of translation, the elements of comparative and international copyright protection will be described in Chapter 2, followed in Chapter 3 by a description of the basic rules of copyright protection as applied to translations. Chapter 3 will also discuss other copyright issues of translation, such as the determination of what qualifies as a translation from a copyright perspective, the allocation of copyright on translations, the contents of such copyright, and the legal regime applicable to contracts related to the copyright protection of translations.

Translations may also be protected by means of confidentiality. This type of protection is governed by a complex and peculiar set of rules, to be examined in Chapter 4.

Chapter 5 will analyse the labour law protection of translations. A large proportion of translation work is undertaken in the context of employment relationships, and this context may significantly alter the rules applicable to the translation work as part of an employee's obligations.

Finally, Chapter 6 will discuss the characteristics and effects of contracts related to translations. This discussion reflects the fact that translations are frequently undertaken in a legal context previously defined by the translator and the user of the resulting translations. Such contracts pose multiple legal issues, some common to all types of contract, and some peculiar to translations.

Many countries have enacted special laws and regulations governing translation. These rules apply to matters such as the professional qualifications of translators, the requirements applicable to translations to be used for judicial or administrative purposes, and the remuneration of translators in general or in particular situations such as court work. These special regulatory systems will be described in Chapter 1, and their effects on other legal aspects of translation shall be examined in the following chapters in connection with the different issues on which such regulatory systems have a significant impact.

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# 1. The Legal Framework of Translation

## 1.1 The practical importance of the legal framework of translation

As we noted in the Preface, most translation activity takes place without the parties involved having significant awareness of the legal framework in which they operate. This activity normally takes place according to the informal rules of the trade, regarding such matters as payment, responsibility for inaccuracies or delays and ownership of the translation. In the case of translations produced for publication, the legal framework tends to be more explicit, in the form of relatively simple contracts.

The underlying complexity of the legal relationships resulting from translations becomes evident in cases of conflict. These cases are relatively rare, in practice, but they bring forward multiple legal questions normally ignored by the parties involved in translation. For example:

- Who owns the translation in the absence of an agreement about such ownership?
- Is the translator liable for doing the translation of a work without proper authorization by the person owning the copyright in the work to be translated?
- Is the translator subject to confidentiality obligations in the absence of an express agreement to that effect?
- What payment is due to the translator in the absence of a previous agreement between the parties?
- To what use may the translation be put?
- May the person who ordered the translation revise it or change it?

The legal rules applicable to these questions have a significant impact on the long-term profitability of translation activities and on the way parties structure their contractual relationships in this field. Both the translators and the parties using their services will try to structure such relationships so as to avoid liabilities.

However, many of the legal aspects of translation refer to relationships with third parties, other than the translator and the commissioning agent. Both the translator and the person paying for the translation will normally be interested in protecting the translation from claims by third parties and from the unauthorized use of the translation. It is impossible to enter into contracts with all potential users of a translation, and the legal system has created a set of intellectual property rules which determine the rights of translators with

regard to their works, even in the absence of any contractual relationship with the persons having access to translations.

A translation, once it has been produced, may be distributed and used throughout the world. Obviously, this potential worldwide distribution has significant implications for the value and effects of the translation. This raises a number of major legal questions whose answers bear on the way translation is undertaken, protected and paid for. It is necessary to determine to what extent translations are protected in the different countries of the world, even if they originate – in each case – in only one or a few of them. Also, in the case of a conflict about a given translation – e.g. about its ownership, use, payment, etc. – it must be determined which law or laws will govern such conflict, and which courts or tribunals will have jurisdiction over the case. If contracts are entered into in connection with a certain translation, questions will arise about which law governs these contracts, and to what extent they may be enforced in different jurisdictions.

## 1.2 A brief description of the world's legal systems

Multiple and diverse legal systems are applicable in the world. Hence, the rights and obligations relative to a given translation may be governed by one or more of these systems.

An initial description of these systems can identify so-called international law – sometimes also referred to as public international law – and the national legal systems of each of the states in which the world is divided. International law is the result of customs created by the conduct of states and of international agreements. It basically relates to states, in the sense that it creates rights and obligations in favour of or bearing on states. International law is highly significant in the area of translation, since several international agreements, to which most of the countries of the world are bound, provide certain minimum standards for intellectual property in general and for the protection of translations in particular.

The structure of international law is different, from several perspectives, from that of national legal systems. International law is not created by a central authority – a parliament, a legislature or other similar body – but rather by agreement between two or more states, or by repeated conduct having a customary character due to its acceptance as such by the international community. Multinational bodies, such as the United Nations, have very limited powers with regard to the creation of international law.

There are no central authorities in charge of the enforcement of international law. There are no courts with the power to enforce on states the contents of international law. The international courts that do exist – such as the International Court of Justice – cannot enforce their judgments, by means of public force, in the way in which a national court can proceed to such enforcement

by means of the physical force at its disposal. International courts do have certain enforcement rights, but these must take place through the states which are part of the international community, or through international mechanisms which finally rely on the enforcement means provided by national states. In addition, the international courts that do exist have jurisdiction in very specific domains, and do not have jurisdiction regarding conflicts involving international law in general. Thus, decisions on international law conflicts are to a large extent left to the whims of the individual states which are subject to the obligations created by such law, and enforcement of whatever position is taken in that respect will depend on the effective power of each state. Under these circumstances, it is arguable whether international law is law at all; it certainly works very differently than national legal systems. Its effects, however, can be very significant. In particular, in the area of intellectual property law, it is impossible to understand such law outside of the context created by international law. The contemporary national intellectual property law systems are to a large extent the consequence of international agreements; the enforcement of such agreements may be relatively weak, but they have nevertheless shaped intellectual property laws, throughout the world, in accordance with their provisions.

Each national state has its own legal system. The structure and characteristics of these systems are highly variable. Some are organized on the basis of a written constitution – e.g. the United States – some have constitutional systems not resulting from a single written text – e.g. the United Kingdom – and some do not have an explicit constitutional framework. The relative position of statutory law, religious law, customs and case law varies greatly from one country to another. Also, some countries, such as Germany and Argentina, treat international law – or elements thereof – as part of their domestic legal systems, while other states – such as the United States – require international law to be formally accepted by internal law for it to be fully enforceable under their respective legal systems.

It is possible to classify national legal systems into several groups, based on the existence of common characteristics, legal concepts and traditions (see David and Brierley 1985; Reimann and Zimmermann 2008). Thus, for example, one may distinguish between civil law systems, Anglo-American legal systems, collectivistic legal systems, Muslim tradition legal systems, Chinese legal systems, etc. There is no single classification, and in fact these categories create relatively arbitrary groupings, which can be modified depending on the use being made of the relevant classification. Civil law systems are historically based on Roman law, but the legal systems of Germany and other northern European countries include, together with Roman law elements, rules, concepts and institutions derived from their own historical development. In fact, all legal systems include elements taken from different historical and cultural backgrounds.

There are several basic elements in each legal system which are used for purposes of including such systems in one of the groups into which the world's legal systems are normally classified. The first group of elements relates to the sources of the law, in other words what constitutes law in each legal system. Law may result from such sources as statutes, customs, court and administrative cases, regulations, generally accepted legal principles, or the opinions of legal writers or moral or religious authorities, etc. The various groups of legal systems place different emphasis on these sources. For example, civil law systems place more emphasis on statutory law, which theoretically is the basis of all these legal systems, and on the opinions of legal writers, which are frequently used by courts to "interpret" the statutory law; the Anglo-American legal system gives a broader role to case law, which is considered to be the source of many of its rules, and has developed complex technical instruments to apply, interpret and modify such case law. An example of this difference may be found in the copyright area. Civil law systems provide a detailed and exhaustive statutory list of exceptions to copyright protection, such as those applicable to political speeches or software back-up copies; American law has a broader authorization of "fair use", whose content is determined by a constantly evolving case law.

A second group of distinguishing elements consists of the legal concepts and terminology used by each system. This is not a matter of language, but rather of ideas. Concepts such as equity, laches, corporation or perpetuity have a technical sense under Anglo-American law which has no exact equivalent in other legal systems. Reciprocally, concepts such as juridical act, juridical fact or business association have a characteristic and central meaning in civil law systems, but are non-existent or irrelevant in other systems.

A third group of characteristics used to classify legal systems is based on the historical development of each national law. Civil law systems historically have been based on Roman law and on the civil codes enacted in continental Europe as from the beginning of the nineteenth century; Anglo-American legal systems are based on English common law; legal systems from the Muslim tradition are based on Islamic law, etc.

These classifications should not be used misleadingly when determining how actual national legal systems are created and operate. Contemporary Anglo-American systems have vast and complex statutory laws, though it should be pointed out that the technique used for drafting such laws is different from that used by civil law countries. Countries of the civil law tradition make extensive use of case law, although the techniques applied to determine the contents and limits of such law are somewhat different from those used in Anglo-American systems. Case law is generally based on the *stare decisis* principle, i.e. the idea that courts should apply their previous holdings as to the applicable law to new cases. But this principle is applied with various degrees of flexibility in each national legal system, and enforced through different

mechanisms. English law is especially strict in its respect for precedents; under American law it is possible to "distinguish" new cases from old, and even to explicitly overrule precedents; under Argentine law, a decision inconsistent with previous case law may result in a special decision by all the members of several courts of appeal, unifying the applicable rules for the future; under French law appeals are heard at special courts, with jurisdiction in cases of inconsistency with previous case law.

Most countries, in fact, have built their national laws with elements taken from different cultural spheres. For example, Argentina, which is generally considered as part of the civil law tradition, has a constitutional system based – sometimes verbatim – on U.S. law, while its private law is clearly based on continental European precedents; Israeli law has elements that date back to the use of English law prior to independence, together with aspects drawn from civil law and from religious law; Japanese law includes rules copied from continental European and U.S. sources. Sometimes, the technique of "legal transplant" is used, pursuant to which parts of an alien legal system are introduced into a national law belonging to a different cultural group. In this manner, Japan "borrowed", during the nineteenth and twentieth centuries, laws or codes originating in Germany or the U.S., as part of a general modernization process of its legal system; Turkey "borrowed" the Swiss Code of Obligations, etc.

In addition, the division of national legal systems into "families" or cultural groupings is weakened by the increasing contemporary influence of international agreements and legal sources. For instance, the national laws of member countries of the European Union are increasingly shaped by the need to comply with the requirements set out by European Community law, such as those included in directives and regulations. In other cases, treaties with a potentially universal scope determine to a large extent the contents of national law; this is especially the case in intellectual property matters, such as copyright or patents. Although the individual countries still retain broad powers to shape their own laws, within the limits set by these treaties, these have contributed to a significant degree of homogeneity in intellectual property laws throughout the world.

## 1.3 Determining the applicable law

Suppose that X, a publisher operating in the United States, acquires the copyright on a book written by Y, an author living in Spain. X then contacts Z, a translator living in Mexico, to translate Y's work into English. The different aspects of this set of facts create multiple legal issues; there will be copyright in Y's book, copyright in the translation, a contract between X and Y, another contract between Y and Z, etc. Each of these aspects has contacts with or is located in different countries. In the case described above, copyright over Y's

book has potential effects not only in Spain and the United States, but also in other countries of the world. X, upon acquiring such copyright, will be interested in knowing the extent of the protection it is acquiring in the different countries of the world, and not only in the United States or Spain. Similarly, if X and Z enter into an agreement on the translation of Y's work, both parties will wish to know what national contract law governs such agreement. The parties may include a choice-of-law provision, in which case they will have to determine to what extent such provision is valid and enforceable in other countries. Also, they may enter into the agreement without including a choice-of-law clause, and in that case they will be concerned with what the applicable law will be in case of a conflict related to that contract.

Since national laws give different solutions to a given case, determining what the law applicable to a case will be is an essential element to defining the rights of the parties involved in that case. This determination becomes increasingly important, in practice, due to the frequency of cases having relevant contacts with different countries.

The different national legal systems apply their own rules – called *conflict of laws rules* – to determine what law will be used to decide a case with international elements. There are no rules with global validity for this purpose, although some international agreements do include conflict of laws provisions with regard to specific issues. Therefore, in the case of a possible conflict or litigation with multinational elements, it is not possible to know what the applicable law will be until a determination is made about the court or authority that will decide the case. Once such court or authority is determined, it will apply its national conflict of laws rules to decide what national law or laws to apply to the case. Such conflict of laws rules may refer the case to a foreign law or require the use of the laws of the same country whose conflict of laws rules are being applied.

Even if the conflict of laws rules applied in a given case refer initially to the laws of a specific country, there may be additional obstacles to the use of such law by the court. The foreign law may be contrary to the court's public policy, i.e. the rules and principles which are an essential part of the court's legal system and that such legal system will not allow to be displaced. Courts will normally not apply or enforce foreign rules conflicting with such public policy. Also, the parties involved in the case may have structured their relationships so as to seek the enforcement of a law that would not normally be applicable to such relationships; conflict of laws rules may prevent the use of foreign laws resulting from what may be considered as a fraudulent arrangement aimed at avoiding the effects of the law normally applicable to the case.

In some cases, conflict of laws rules impose express limitations on the effects of foreign laws. For example, country X may not recognize a corporation organized under the laws of country Y if the main activity of such corporation is located in X.

In other cases, the local provisions applied by a court include special rules relative to legal relationships with foreign elements, instead of the court applying rules determining whether foreign or local rules will be applicable to a case. For example, if a foreign corporation wishes to operate in country Z, country Z will impose certain registration, domicile and representation requirements on such corporations, unilaterally determined by country Z's laws, regardless of what national law is applicable to the organization and other corporate matters related to that foreign corporation.

Different conflict of laws rules have been developed for the various types of issue that may arise in the context of cases with multinational elements.[1] In the case of contracts, the parties are generally free to choose the law applicable to their contractual relationships, provided such law has some reasonable contact with the issues raised by the relevant contract and that the chosen law does not infringe the public policy of the country whose courts have jurisdiction over an eventual case. In the absence of choice-of-law contractual clauses, each conflict of laws system includes rules to determine the laws applicable to contractual disputes. Some systems are based on specific characteristics of the relevant contract. For example, some legal systems will apply to a contract the law of the country where the domicile of the party performing the defining obligation of the agreement is located, while others focus on the location where the characteristic or main obligation resulting from the agreement is performed. These systems require additional rules determining what is meant by the "defining" or "characteristic obligation of the agreement". Other legal systems require the courts to examine the agreement as a whole, so as to determine the country with which the agreement has the closer contact, or to decide where the "centre of gravity" of the relevant legal relationship is located.

In international cases involving intellectual property, each country determines the scope of application of its laws – which generally is based on the territory of the country whose law is being applied – and the party claiming protection under one or more national laws will justify their applicability by invoking the violation of rights falling within the scope of protection of such national laws (see Fawcett and Torremans 1998). For instance, if a copyright owner considers that his or her copyright is being violated within France, that owner will claim ownership of copyright under French law, and French law will determine whether the claimed violation falls within the reach of French copyright.

## 1.4 Jurisdiction issues

The effectiveness of the rights related to translations depends on the existence of adequate legal remedies, to be sought before courts, administrative bodies or

[1] See, under U.S. law, Hay, Borchers and Symeonides (2010); under English law, Fawcett, Carruthers and North (2008).