

Translating Contractual Actual Intention

ترجمة الإرادة التعاقدية الفعلية

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Abstract:

This article examines the question of incompatibility between the expressions and statements of the contractual parties and their actual intention along with the challenge of rendering these expressions. Either saying, words and expressions stated in a contract often do not reflect the real will of the parties, accordingly, courts and translators should use their discretion and examine the four corners of the agreement to interpret the contract and pin down the genuine intention. The question that arises is: What are the main reasons behind ambiguity that leads to meaning change of contractual intention also termed meaning shift?

Keywords: contract genuine intention, interpretation, ambiguity, meaning, Translation.

ملخص:

يتناول هذا المقال موضوع عدم التوافق بين الجمل و العبارات الصادرة عن الأطراف المتعاقدة و إرادة المتعاقدين الحقيقية و كذا نقلها إلى لغة أخرى، بصيغة أخرى، لطالما وجد اختلاف بين الجمل و العبارات المذكورة في العقد و مقصد الطرفين الحقيقي. و هذا ما يؤدي بالمحكمة و المترجمين إلى استعمال سلطتهما التقديرية و دراسة الزوايا الأربعة للعقد لتفسيره وتحديد مقصده الحقيقي.

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قادنا هذا إلى طرح الإشكالية التالية: ما هي الأسباب الرئيسية التي تكمن خلف الغموض الذي يؤدي إلى انحراف العبارات عن مقصدها الأصلي و الذي يسمى أيضا تغير المعنى؟
كلمات مفتاحية: الترجمة، الإرادة الحقيقية، التفسير، الغموض، تغير المعنى.

1. INTRODUCTION:

Legal translation is used as a generic term to cover both the translation of law and other communications in legal settings. It can be classified according to the functions of legal texts in the SL:

- Primarily prescriptive, e.g., laws, regulations, codes, contracts, treaties, and conventions.
- Primarily descriptive and also prescriptive, e.g., judicial decisions and legal instruments that are used to carry on judicial and administrative proceedings such as actions, pleadings, briefs, appeals, requests, petitions etc.
- Purely descriptive, e.g., scholarly works written by legal scholars such as legal opinions, law textbooks, and articles, the authority of which varies in different legal systems. The translation of contracts constitutes the bulk of actual translation work for many legal translation practitioners; the object of a contract is to ascertain the intention of the parties. That intention is to be determined from the language used, but by reason of the abstractive nature of language, any writing is bound to express actual intent with some degree of ambiguity, thus it can be said that the ultimate goal of legal translation is to infer the exact meaning. The question that arises is: what are the main reasons behind ambiguity that leads to meaning change of contractual intention also termed meaning shift?

2. Intention definition and types:

Intention can be defined as: “the state of mind of one who wants to bring about a particular consequence” (Martorana, 2014)

It is expressed in two ways:

- a- Explicitly: in this case the intention is laid down by the parties themselves that is to say it is stated by selecting the wording both parties believes it reflects their actual will.
- b- Tacitly: in such situation intention is read into the contract by court on the basis of the nature of the agreement and the parties apparent intention...

e.g: tenancy agreement includes an implied intention that the tenant may use the elevator.

3. Reasons' behind ambiguity:

Ambiguity in contracts is interpreted objectively, when court looks at the wording of the agreement only without considering parole evidence (extrinsic evidence). It is also interpreted subjectively by investigating all the circumstances surrounding the contract such as: post contractual documents, correspondences, during the negotiations, the preliminary agreement...

The Algerian system adopts what is known as reliance theory of interpreting contracts it means that contracts are interpreted objectively and subjectively.

Masson,J (1982) points that: "evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous..., but not admissible to contradict the language of the contract when it has a plain meaning."

As so once the statement is clear, it is prohibited to distort the meaning of words by way of interpretation, if it is ambiguous all extrinsic evidence is used to infer the exact meaning.

A contractual intention is judged ambiguous when it is susceptible to more than one meaning (Martorana,2014)

Lederer Marianne(1994) says: « une phrase est dite ambigüe lorsque le contexte verbal ne suffit pas à imposer aux vocables une signification unique parmi plusieurs autres possibles. »

As so, ambiguity is related to the multiplicity of meanings, and context is not sufficient to select the appropriate and unique choice.

William Empson also says: « the fundamental situation, whether it deserves to be called ambiguous or not is that a word or grammatical structure is affective in several ways at once. »

The main reasons behind an ambiguous intention are: language and the parties of the contract

3.1. Language: Young pointed out that ambiguity may be classified into two types: lexical and syntactic (E. Allan Farnsworth, 1967)

3.1.1. Lexical ambiguity has to do with the degree of semantic equivalence that is “how close given expressions are to having identical meaning” (James Dickins,2003)

Scholars stipulate that there are two degrees of semantic equivalence:

- **Full correspondence:** it suggests that words and expressions refer exactly to the same thing, in other words they cover the same range of meaning, this case of full correspondence is rare, even within the same language mainly when languages are distant and law systems are different. The good news is whenever there is full match (correspondence), ambiguity disappears when it comes to translation.
- **Near correspondence:** at first glance meanings seem to be identical, no nuances have been noticed, but upon deploying semantic analysis all specific meanings immerge. as this example suggests: salaried translated into Arabic by: موظف At first glance this suggestion seems to be a good one, yet a deep analysis reveals the opposite:

Salaried: A person receiving a salary who receives a fixed amount payable at certain times that may be weekly, bi- weekly or monthly.
(pepoleHum, n.d.)

الموظف: هو فرد ذو دخل شهري و يعمل بموجب عقد عمل و يتمتع بحماية قانونية تتمثل في الحماية من الطرد التعسفي، دفع التعويضات و غيرها. (مصطفى، 2020).

These slight differences in meaning may give rise to legal dispute.

- **Polysemous words:** like: **execute a contract:**

Execute:is a polysemous word that means the following:

-To carry (something) out fully: to put (something) completely into effect

و تترجم ب: ينفذ

- To put (someone) to death especially in compliance with a legal sentence

و تترجم ب: يعدم

-To write (something) (Meriam- Webster, n.d.)

و تترجم ب: يحرر

In many cases the context offers clues to select the suitable meaning, if not, it is very likely that translators distort the actual intention of the contract.

- **Hypernym or superordinate and hyponym** (Mona Baker, 1992) hold that: "semantic fields are arranged hierarchically going from the more general to the more specific, the general word is usually referred to as superordinate and the specific word as hyponym." It is a widespread phenomenon in all languages.

In linguistics and lexicography, a hypernym is a word whose meaning includes the meanings of other words. For instance; law is a hypernym of rules and regulations. On the other hand rules and regulations are hyponyms of law, in many cases we noticed that these terms are used interchangeably without showing any sign of ambiguity, however these terms were source of confusion in many contracts, consider the following examples:

- Applicable **law**

In this example law can't be rendered by any of its hyponyms elsewhere the contractual actual intention will be misrepresented.

-A **law** is defined as an assemblage of **rules** and **regulations** that are indispensable and must be followed.

In this case translators have to distinguish between law and his hyponyms.

This is another example from the relation of pronouns between Arabic and English: You: in English serves to address one or more people, it makes also no distinction between the gender of the persons, this pronoun corresponds with five pronouns in Arabic: أنت، أنتما، أنت، أنتم، أنتن

- **Semantic repetition** : All legal drafters use frequently sequences of words such as: act and deed, bind an obligate, claim an demand, fit and proper, loans and borrowings... these expressions are known in the linguistic sphere as: Binomials, or doublets. There are other terms referring to binomials in linguistic studies work like: hendiadys (a classical figure of speech repetition and intensification may be found.

The semantic relationship of word pairs can be categorized into two groups: fully-synonymous, and nearly-synonymous (Dickins & Watson, 1999)

- ✓ **Fully- synonymous**: as explained in the following example: loans and borrowings both words refer to lending this kind of binomials are clear and does not entail any ambiguity ,whether it is rendered by one word سلف و قرض or by two words قرض

- ✓ **Nearly-synonymous:** these are non-synonymous pairs but closely related mainly complementary as in: release and discharge

Release: writing or an oral statement manifesting in an intention to discharge another from an existing or asserted duty. (Black's Law Dictionary)

Discharge: it is a release by operation of law it implies that you were released after all your obligations have been completed, whereas release implies that you have let go, your obligations are not completed (Black's Law Dictionary).

In fact rendering this kind of binomials by one word like إعفاء أو إبراء الذمة

May lead to ambiguity since it does not convey the contractual actual intention, in order to disambiguate the matter it is vital to delimit the semantic scope of each word and convey it accordingly that is, both words are to be rendered.

- **False friends:** it is considered as trap since it leads to confusion. Consider the following example: "Any difficulty pertaining to its construction." It may be translated as follows:الصعوبات الناجمة عن صياغة العقد:

As construction in French and even in English refers to إنشاء و بناء

Yet construction in English can be derived from the verb to construe which means يفسر

Unlike French construction is derived from "construire" which means يبني و ينشئ

(Michel.Ballard, p 37,1994), contractual actual intention may be distorted, which yields an incorrect translation:الصعوبات الناجمة عن تفسير العقد:

3.1.2. Syntactic ambiguity:

In "Cognitive Psychology," authors M. Eysenck and M. Keane tell us that some syntactic ambiguity occurs at a "global level," meaning entire sentences can be open to two or more possible interpretations (Eysenck, M.; M. Keane, M,2005),scholars hold that the main reasons behind syntactic ambiguity are

- Arrangement of words and clauses

Consider the following example:

The contract concluded between the parties with bad intentions,
the sentence is susceptible to two meanings

- The parties with bad intentions concluded a contract.

والتي تترجم ب: أبرم الأطراف ذوو النوايا السيئة العقد

-The contract concluded with bad intentions.

و التي تترجم: أبرم العقد بنوايا سيئة

To avoid ambiguity when rendering this sentence it is necessary to rearrange the sentence.

- Punctuation: it is considered as the major factor responsible for ambiguity:

In the following sentence: The agent Peter shall pay the sum of ...

If the two points are placed after agent, the agent is deemed as a speaker who declares that Peter shall pay the sum of ...

و التي تترجم ب: العميل: يدفع بيتر مبلغ ...

If the sentence is written without any punctuation, here the agent whose name is Peter, pays the sum of ...

و التي تترجم ب: يدفع العميل بيتر مبلغ ...

As so punctuation is a key tool to disambiguate meaning and achieving the actual intention and render it correctly.

3.2. The parties of the contract: if the misunderstanding is resulting from the parties' incautious or reckless action when executing the contract like witty remarks and jokes. In case of mock up agreement or simulation agreement where neither of parties intend to create legal agreement.

4. CONCLUSION: The starting point of judicial interpretation of a contract is the language in usage, however, if the words used cannot mean what they were intended to mean, then they have to be put in their context.

- It goes without saying that understanding the meaning of a word or an expression depends heavily on the linguistic knowledge; the more a translator is exposed to a language and the specialty within which he translates, the more he can easily pin down the meaning.
- Translators should not agonize over the ambiguity, and see it as a theoretical anomaly, but should concentrate on reducing it.

- Translators confront ambiguity twice, once by striving to infer the exact meaning and secondly by drafting a target text clear of any ambiguity.
- Ambiguity may infect even a term that has an apparently precise connotation.
- Once the statement is clear, it is prohibited to deviate from the meaning by way of interpretation.

In many contracts no thought is given by the contractors to many matters that are later to become a source controversy

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