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INTERPRETATION OF ENGLISH LANGUAGE CONTRACTS UNDER GERMAN LAW

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NJW 31/2004

English is the common language of international commerce. However such contracts may be subject to German law by choice or by connection. In such cases, German and English legal understand collide. German jurisprudence solves this tension in a one-sided way, by orienting itself on English legal understanding. In the authors' view, this is not a very nuanced solution.

Contracts are complicated enough, but entering into a contract in a foreign language is even worse. Despite how obvious this is, parties in international transactions seldom deal with the problem in a conscious way. If the language is English but the applicable law German, it is often unclear how an English concept or an English language clause in the context of a German contract (Vertragsstatuts) should be interpreted. Should one be oriented on English legal understanding or should the view of German law, which is modified by the clause or expanded by it, be deciding?

There are three typical variations:

- neither of the parties to the contract comes from an Anglo-Saxon country. English is a foreign language for both parties. But it is the one common language of the parties;
- one party comes from an Anglo-Saxon country, with a German on the other side;
- neither of the parties comes from an Anglo-Saxon country, but their legal representatives do.

Each of these variations has its own problems:

- Translation of legal texts – In reading and writing English, Germans overestimate their understanding of foreign legal terms. Sometimes a contract translated from German to English can be understood only when it is translated back into German. Sometimes even not then.

  Even if well translated, the terms used in English may have no German equivalents in the German legal system. For example "Prokura." An explanation of the term is needed in the English text. Sometimes the German thinks he understands the English term but does not. Germans not only do not have English as their mother tongue, they also have no background in common law.

  Even if the two negotiating parties are native English speakers, problems may arise when the contract is before a German court. If the judge requires a translation into German, the risks arise again.

- Standard English langtiage agreements – Standard English language agreements may be found in big law firms or in encyclopedias of forms. These are based on Anglo-Saxon legal systems. If one simply switches the governing law to Germany problems arise. Often legal concepts arise which German law does not have. Or undertakings are entered that are not enforceable in the other system due to vagueness.

Rules of Interpretation

Applying English or German law can lead to completely different results. German techniques for interpretation are not known in the English or US legal systems. Attitudes differ as to how strictly one follows the language of the contract. Can the meaning be determined by factors outside the contract (parol evidence)? German law is much more ready to look outside the contract.

Under German law, Art. 32 I, Nr. 1 of the EGBGB (Introduction to the German Civil Code) provides that the law applicable to a contract is determinative for its interpretation. However there is a difference between German law and German legal understanding. Application of German law does not mean application of German legal understanding. German law requires that the understanding of the parties, not necessarily German understanding, be applied. How did the parties themselves understand the contract?

German courts have determined that "typical" English clauses and legal concepts be interpreted in accordance with English law, despite the choice of German law for the contract.

In instances where application of English understanding is not simply seen as natural or in the interest of a logical interpretation of the agreement, the theory behind use of English understanding is that English legal concepts and clauses which are oriented to English law are typical for English legal understanding. From this flows the following:

- The parties are assumed to have intended the use of the clauses in the English legal sense.
- The meaning of such typical clauses are fixed in the English legal practice and have been taken over into international practice with the English understanding.
- The courts see the importance of the unified, consistent interpretation of these clauses in international commerce.
- An exception is made if the parties intended a different meaning.

The author is not convinced that the above described system is correct and notes the following.

- International arbitration and English courts see the matter differently. English courts do not apply English legal understanding to international banking concepts.

They apply neutral concepts, i.e. ones that flow from themselves. And English courts faced with Scottish legal concepts do not look to Scottish legal understanding for their meaning but rather English understanding of the Scottish concept.

- It is not true that all parties intend English legal understanding to apply to the interpretation of English legal concepts. Look at the three different situations described at the beginning of this paper. Some of the parties understand English legal concepts and others do not.
- Often the use of English has nothing to do with the English legal system. Often there is simply no other language available. Whether the concept is "typical" or not makes no difference here. Certainly one of the parties may have no idea of the special meaning a concept has in the foreign legal system.
- The theory that parties take over the legal concept with its complete background is only sometimes correct. If both the legal representatives are English lawyers, then this is true, But if the legal representatives are not both English, then the non-English lawyer may have no real idea what is behind the English legal concept or intend that it become part of the contract.
- The uniform, objective interpretation concept is also rejected. UK law focuses on the plain meaning of the contract, not the intention of the parties.

Practical problems resulting from the current German policy include identifying "typical" English clauses, English vs. US legal understanding,

Determining what is a "typical" English clause is not very practical and may not apply in individual cases. A "typical" English indemnity clause in one contract may be un-typical in another. In certain contexts, indemnification may be typical for the non-English legal system (German), but the parties simply use the English words. To avoid interpretation as a "typical" English clause, the parties would have to (a) come up with a new English term, (b) decide on new definitions of the old English terms or (c) insert the closest German concept in parenthesis. The first of these is impossible. The second is fraught with risks that the parties may not develop full definitions for the terms. The most likely is the 3rd solution. But all this assumes that the parties are even aware of the language problems and the need for additional clarity.

Also, why do the German courts assume English and not US legal understanding apply. Despite their closer relation, the different jurisdictions (including 50 US states) apply the same concepts and clauses differently. Furthermore, the US is the much greater economic power and therefore has greater international influence. If one uses English concepts in some cases and American in others, the goal of international consistency is lost.

In addition to these practical questions, note the English concept of "depacage" whereby individual legal questions are interpreted in accordance with a legal system other than the one applicable to the contract as a whole. Related are the separate questions of enforceability and interpretation, which may be in accordance with two different systems.

So it is not enough to have a policy whereby "typical" English clauses are interpreted in accordance with English law although in a contract under German law. For the proper interpretation, the facts of the individual case are more important in deciding the interrelationship of contract language and applicable law.

- Only if both sides of the contract had native English speakers as lead negotiators should the old German policy (interpretation of typical English clauses in accordance with English law) apply.
- In other cases, the concepts must be interpreted in accordance with German law. This result is most clear when the contract was originally in German and then translated into English. One cannot assume the parties intended to change their agreement merely by switching languages.
- German law must also be applied if the parties have voluntarily selected German law. Then it is clear that the parties have thought about this issue and made a decision. The fact that they have expressed their agreement in English should not override their choice of law.
- But also in cases where the contract is originally drafted in English and even where one of the two parties comes from an Anglo-Saxon country the interpretation should be in accordance with the law chosen in the contract. English jurisprudence has recognized this. The understanding of the parties has to be set forth in accordance with the law they selected, and this includes German legal understanding (not just statutes).
- The logic of this position is clear if neither of the contract parties comes from an Anglo-Saxon country and they pick English only as the common language. Since English and US law play no substantive role, that leaves only German law and legal understanding. Why should this result change just because one of the parties comes from England or the US? The fact that the US or English party knows US or UK law should not give it an advantage.
- For these reasons, the parties should insert the German concept in parenthesis when using English concepts which may be different. The parties should also insert a detailed provision regarding contract interpretation. In UK/US contracts it is typical to insert not only a provision regarding applicable law but also contract interpretation. Such a provision could read as follows:

  > *This Agreement and its terms shall be construed according to German law. If the English meaning differs from the German legal meaning of this Agreement and its terms, the German meaning shall prevail.*