

# LEGAL ENGLISH – HOW IT DEVELOPED AND WHY IT IS NOT APPROPRIATE FOR INTERNATIONAL COMMERCIAL CONTRACTS

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The way in which the common law system developed and continues to operate is critical to the use of language in common law contracts. I will begin my discussion by giving a brief overview of the history of the common law itself and will then look at the use of language throughout this historical period. I will then discuss in more detail the language of common law contracts and why it is that I argue that much of the legal English we see today in international commercial contracts is inappropriate in the international setting.

## **(a) A Brief History of the Common Law System**

The *common law*, as we know it, began to develop after the Norman Conquest of England in 1066. With this conquest came the end of tribal rule. And with the end of tribal rule, matters which had always been handled by local courts, slowly began to be handled by the King's court. The King's court evolved over time into a bench of professional justices who were not lawyers but rather royal officials from the civil service who were selected because of their particular learning – they had some training in Canon law and often Roman law.<sup>1</sup> These justices appeared periodically in all the counties around England. It was this moving about the country by these justices that was pivotal as it began the process whereby the custom of the King's court eventually became the common law of England, in other words, the law common to all of England.

There was no written Norman Code at this time, and even though William the Conqueror proclaimed that Anglo-Saxon law would continue in force<sup>2</sup>, what actually happened was that the King's court became "a law unto itself"<sup>3</sup>. In other words, it created the law as it saw fit. Although it preserved many of the English institutions, particularly those advantageous to the King, the private law which it began to develop was very much like the customary law of Northern France<sup>4</sup> but with some variations to accommodate the unique form of English feudalism.<sup>5</sup>

By the end of the Middle Ages (approximately 1450 - 1500), the King's courts were the only courts of justice in England. But in order to bring a matter before these courts a special request had to be made to the royal official, the Chancellor, asking him to deliver a *writ* to the court. This writ would then enable the court to be *seized* of the matter. If a particular type of action was brought before the Chancellor often enough, the *writ* would acquire a *common form*.

Over time the number of permitted forms of writ was restricted with the result that there was a restriction on the types of action which could be brought before the court. As well, over time each type of action developed its own procedural peculiarities which were required to be followed. The prescribed form of writ for each type of action required strict adherence, as did the oral pleadings which were required to follow the form of the writs. If the oral declarations and denials did not correspond exactly to the required form then the matter would fail before the court. An example of this has been given by one writer: "if there is to be a charge of felony, an irretrievable slip will have been made should the pleader begin with 'This showeth to you Alan, who is here', instead of 'Alan, who is here, appeals William, who is there'...."<sup>6</sup> So that slight change in words meant that the action would fail. What ultimately resulted from these forms of writs and pleadings was a system which was very rigid, procedurally-oriented, and highly unsatisfactory.

Because of their dissatisfaction with the *common law* and its system of writs, the people began to appeal to the King (who was seen as the fountain of justice) to provide them with some form of remedy. These petitions to the King were delegated to the Chancellor who in time established his own court, the Court of Chancery (also subsequently called the Court of Equity). In the beginning, decisions handed down by the Chancellor were based in natural justice and derived from moral rules. One writer has also noted that the special remedies which the Chancellor developed were similar to those of Roman law and were most likely inspired by them (eg. specific performance and injunctions [similar to an 'interdict']<sup>7</sup>). Over time, the decisions of the Chancellor became more systematized and the *equitable* doctrines he developed eventually became additions and correctives to the *legal* rules applied by the *common law* courts of the King. This dual structure of legal rules and equitable principles has continued up to the present day and we continue to see the courts applying the rules of *equity* to soften or correct an unjust or harsh *common law* rule. [NOTE that today the term *common law* has a number of different meanings: it can mean the system of law used by English speaking countries or former British colonies; it can mean the law handed down by what were called the *common law courts* as opposed to the *courts of equity*; it is also used to mean the same as *case law*, ie. judge-made law, as opposed to *statutory law*.]

By the time the Tudors came to power in 1485, the Chancellor's courts had become very strong and were beginning to overtake the common law courts.<sup>8</sup> But the common law lawyers fought back and in the end a compromise was worked out which left the common law courts and the Chancellor's courts in a kind of equilibrium of power. The Chancellor's courts were no longer able to encroach on the jurisdiction of the common law courts and if any intervention was needed to correct a defect in the common law, it was now up to Parliament to enact the necessary legislation. At this time there was very little statutory law, but with these new restrictions and with the changing social and economic conditions of the 16<sup>th</sup> century, came the need for the development of statutory law. This development created another role for the courts, that of interpreting and developing the principles laid down in the statutes.

The common law courts and the Courts of Chancery are no longer separate courts. They were fused into one court in the latter part of the 19<sup>th</sup> century (1875 in England but a few years later in the different provinces of Canada), but their rules and principles were not fused. What now happens is a single court administers both *law* and *equity*. The rules and principles developed by the separate courts continue to be separate even though applied by one court – and what you will see in reading the cases is language to this effect. The court will talk about a *rule in law* and then will talk about whether or not *equity* will permit the *rule in law* to dictate the final result or whether *equity* will intervene. You will also see language to the effect that *equity follows the law* but also that *equity prevails over the law* (in other words, an equitable principle can vary the result which would come about by the strict application of a common law rule).

One thing that I have hopefully shown with this very brief overview is that the common law, unlike the civil law, was never a law of the universities nor a law of abstract principles. Rather it is a law that was, and is, shaped by practitioners. This is because in a common law system it is the lawyers, not the judge, who control the way in which a case proceeds before the court. It is the lawyers who examine and cross-examine the witnesses as to the facts in the case. It is the lawyers who present their own expert witnesses. And it is the lawyers who argue what the law is on the basis of the legal authorities they put before the court. This fact - that the common law is shaped by practitioners - is one of the factors that has caused language to play a pivotal role in the common law. I will expand on this shortly.

Another major difference between the civil law and the common law is that with the common law the stress has not been on establishing the truth but rather on resolving disputes. With the resolution of disputes being the focus, the law itself has grown bit by bit, in an *ad hoc* manner, based on what was needed at the time.

As one writer has stated “the law luxuriated in sophisticated detailed rules to meet infinitely various situations but at a very low level of abstraction. Convincing solutions of pressing disputes were preferred to abstract and internally elegant worlds of legal norms.”<sup>9</sup>

With the law developing in such an *ad hoc* manner, there was a lack of uniformity and stability. However, along with the development of written reports of the cases, the courts began to look to previously decided cases which were similar to the one before them to assist them in coming to a decision. Out of this developed the doctrine of *stare decisis* (or binding precedent), whereby lower courts are bound to follow previous decisions of higher courts of the same jurisdiction. By the 17<sup>th</sup> century, *stare decisis* was the practice in the courts of equity as well as in the common law courts.

This doctrine of *stare decisis* is another factor which has caused language to play such a pivotal role in the common law. If the court in a prior decision determined that a certain word or form of words has a particular meaning, then it is necessary to use this word or form of words if you want to achieve that particular meaning. This of course is not unusual as all legal systems have developed their own special legal language which is unique to that legal system, however, I believe that the problems created by the common law are more pervasive and I will be returning to this shortly.

### **(b) The Words Themselves**

What we know today as legal English did not begin its life as English alone, but rather was predominantly French and Latin. It has generally been thought that it was the Norman Conquest that caused French to become the language spoken in the courts of England, however, there is some dispute over this.<sup>10</sup> There is evidence that at this time English was the language spoken by the majority of people in England and it certainly was the language of the common folk.<sup>11</sup> But it was French and Latin that were considered to be the languages of learning. As positions in government, law, religion, and military affairs were held and influenced by those of the educated and upper classes, some argue this is the reason French terminology predominated in these areas.<sup>12</sup> However, it has also been noted that since French was the language being spoken in half the courts of Europe in the 13<sup>th</sup> century it is no surprise that it should be used in England as well.<sup>13</sup>

But regardless of the reason French had such an influence on the spoken language of the law in England, along with the rest of Europe, Latin was the preferred language for writing.<sup>14</sup> For two centuries it monopolized the language of the statutes, however by the 14<sup>th</sup> century French dominated the statutes. It was not until the end of the 15<sup>th</sup> century (following the introduction of the printing press in 1476 and the acceptance of the London Standard as the standard form of written English) that statutes began to be printed in English. (It was also at this time that the law was first written about in English.<sup>15</sup>)

A problem that arose with having French dominate the law was that the uneducated Englishman who had a case before the courts could not understand what was being said, since all court

proceedings were conducted in French. So in 1362, with the *Statute of Pleadings*, came the order that English was to be the language of all court proceedings.<sup>16</sup> (The *Statute of Pleadings*, by the way, was written in French.) Compliance with this order however turned out to be difficult for a number of reasons. The study of law was in French (with some Latin). As well, the prescribed form of writs, which we have seen required strict adherence, could not be translated into English and say exactly the same thing. This was also the case with the oral pleadings which were required to follow the form of the writs. As I noted earlier, if the oral declarations and denials did not correspond exactly to the required form then the matter failed before the court. In addition, the French which was used in the courts had become a very exact and technical language which could not now be parted with.

It took approximately one hundred years before the transition actually took effect and English became the main language spoken in the courts. But this did not mean that all French terminology which had been used up to this time disappeared. Rather, it simply became part of the language which was used by the legal profession.

At the time that this shift in the common law courts was being made from French to English, there was some concern as to whether the words for the same referent had the same meaning. To avoid any problems drafters began to include both terms just to be safe. This combining of synonyms or near synonyms has continued up to this day, most often with pairs of words but sometimes with more. Some of these combinations include: *last will and testament*; *terms and conditions*; *goods and chattels*; *cease and desist*; *null and void*; *save and except*; *breaking and entering*; *free and clear*; *peace and quiet*; *force and effect*; and *right, title and interest*.

Meanwhile, in the courts of equity, which had never been stifled by the required form of the writs and pleadings, English flourished. As one writer notes, "equity pleadings were experiments in written English".<sup>17</sup> Because the applicants were literally appealing to the King for justice, the documents were filled with "an English stockpile of formalized piety and lament".<sup>18</sup>

The form of English being used in England throughout the period after the Norman Conquest and up to approximately 1475 was Middle English. Prior to the dialect known as the London Standard becoming the accepted form of written English, Middle English was developing without standards or rules so that what resulted was a totally disordered language.<sup>19</sup> One writer notes that the development of English in this period took place under conditions peculiar to England, namely that "the native speech [was left] chiefly in the hands of the uncultivated"<sup>20</sup> with the result that "phonetic spelling and varying degrees of literacy made the simplest word an adventure."<sup>21</sup>

It was in this period of Middle English that many words we continue to use today came into being, words such as *notwithstanding*, *aforsaid*, the many *where*, *here*, and *there* words (ie. *whereas*, *whereby*, *wherein*, *whereof*, *whereunder*, *whereupon*, *hereby*, *herein*, *hereunder*, *thereby*, *therefor(e)*, *therein*, *thereunder*, *thereupon*) as well as different collocations, such as *Know all men by these Presents*.<sup>22</sup> This collocation can still be seen today in some documents, even though the old use of the word *presents* is no longer understood by native speakers of English. Also, the use of *recitals* at the beginning of contracts developed at this time. To this day, *recitals* are an important and integral part of virtually all common law contracts.

During the 16<sup>th</sup> and 17<sup>th</sup> centuries regular English was expanding rapidly. And it was during this time that many of the law's technical terms came into being, such as *affidavit*, *alimony*, *corporation*, *subpoena*, all borrowed from the Latin (and all still used today). Scholars were again leaning to Latin but English was also borrowing from Greek (*anonymous*, *autonomy*), French, Italian, and Spanish. One writer notes that this expansion was in part a result of the

strong desire in England to improve English and “to place it on a level with the classic tongues”.<sup>23</sup> The way in which this was done was by the “importation of words from the classical languages, especially Latin, and imitation of the rhetorical effects of the classical writers.”<sup>24</sup>

By the 18<sup>th</sup> century the domination of the law by French and Latin was over and in 1731 a new English-for-lawyers law was passed. However, the wording of this law “repealed too much of the bar’s accumulated learning”<sup>25</sup> and by the time it was to come into effect, in 1733, it had been substantially modified by an amendment which “reinstated the customary law abbreviations and technical words”.<sup>26</sup> One writer, writing in the 18<sup>th</sup> century, noted that the rules of English law were “scarcely expressible properly in English” and that a man could never be a lawyer “without a knowledge of the authentic books of the law in their genuine language”<sup>27</sup> which of course were French and Latin.

A small sampling of the French terminology which today is basic to our legal English vocabulary, minus the French pronunciation of course, includes: *agreement, attorney, claim, contract, covenant, debt, easement, guardian, guarantee, heir, justice, lien, money, obligation, parties, partner, pledge, property, purchase, tort and trespass*.<sup>28</sup> We also continue to use some Legal French words today, such as *estoppel, fee simple, attorney general, laches, metes and bounds, and voir dire*.

But it is important to remember that all these borrowed words must now be understood in the context of the common law. All too often lawyers assume that what appears to be the same word in another legal system will have the same meaning as the one they know. And of course this is not correct. As well, it is important to remember that even within the different common law countries there are variations in the meanings given to some words.

### **(c) Contract law in a common law system**

Although there is a tremendous amount of statutory law in the various common law systems around the world, there are still a number of areas where case law (ie. judge-made law) continues to govern. Contract law is one of these areas.<sup>29</sup>

In the common law, if there is no case law or statutory law governing a matter in question, the law begins with the premise that everything is lawful. As such, the courts try to give every transaction its intended effect, unless it violates some paramount consideration such as being contrary to public policy or public order.

Now applying this principle to the law of contracts, provided you are not violating some paramount consideration and provided there is no case law or statutory law on point, you can write into your contract whatever you want. At the same time however, if you do not include in your contract everything you need and want, you cannot rely on the court to write it in for you. The courts will, in limited instances, imply some terms into contracts, and more and more in commercial matters the courts are trying to comply with what the objectively determined, reasonable intentions of the parties were, however, on the whole, they will not create anew any terms which the parties have failed to include in the contract.

It is often said that the reason our common law contracts are far longer than civil law contracts is because we do not have any code provisions governing the matters in question and it is the contract itself which governs the relationship between the parties. This is of course correct and it certainly affects the structure and the content of the contract, as well as the form of the words

chosen, but I would argue that this is not the only reason our common law contracts are longer. I would argue that it is also because of the two factors I have already mentioned – the doctrine of *stare decisis*, and the fact that the common law itself is shaped by practitioners.

The often very difficult and convoluted language that is regularly seen in common law contracts has come about because of all three factors.

I would like to expand on each of these individually. Firstly, we do not have general code provisions governing the matters between the parties. Because of this everything must be dealt with in the contract itself. One problem that arises from this is that the drafter must include wording which will deal with every situation and cover off every possible contingency that could happen in the future. This becomes particularly difficult if you have a contract that is intended to govern the relationship between the parties for a number of years (such as with a long term joint venture agreement, or a licensing agreement). What is necessary here is language which is broad enough and general enough to include all possible problems that one can anticipate, as well as those one cannot anticipate, but at the same time this language must be precise enough for the parties or a court to be able to determine what is included and what is not. The trick is to make sure that the general language you have used is not so vague that it is impossible to determine what is included and what is not, nor so ambiguous that it is possible to put more than one interpretation on the words you have used.

A writing style that has developed to try to deal with this problem is long, run-on lists of situations whereby the drafter tries to include every possible situation that could arise. A couple of examples of this are from actual contracts I use in my Legal English course:

- i) The term Confidential Information when used herein means and includes all know-how, designs, drawings, specifications, catalogs, data sheets, sales and technical bulletins, service manuals, mechanical diagrams and all other information, whether or not reduced to writing, relating to the design, manufacture, use, and service of the Products, as well as any other information relating to the business of the Company that may be divulged to the Representative in the course of its performance of this Agreement and that is not generally known in the trade.
- ii) If a Partner or any of its Affiliates shall, pursuant to express authorization of or approval by the Partners Committee, pay any amount on behalf of or for the account of the Partnership with respect to any liability, obligation, undertaking, damage or claim for which the Partnership shall or may, pursuant to contract or applicable law, be liable or responsible, or with respect to making good any loss or damage sustained by, or paying any duty, cost, claim or damage incurred by, the Partnership, then the Partnership shall reimburse such Partner or Affiliate for such amount as shall have been so paid by such Partner or Affiliate.

What has also developed because of this problem of needing to cover off every possible situation, is language such as “including, but without limiting the generality of the foregoing” (or the shortened version “including without limitation”). What this particular combination of words does is it allows you to use a general word which will catch many situations, and then give a number of examples of such situations for purposes of clarification, but without limiting the general word to these specific examples. A simple example of this is as follows:

(i) ...all motorized vehicles, **including but without limiting the generality of the foregoing**, all cars, trucks, buses, tractors, motorcycles, and mopeds.

Another example from one of the contracts in my Legal English course reads as follows:

(ii) "...no Percentage Interest or right therein or thereto, or ownership or control over a Partner, may be Transferred except *in compliance with the terms and conditions of this agreement*, **including, without limitation**, satisfaction of the following conditions: (i) no Transfer shall be made other than pursuant to a Third Party Offer; (ii) no Transfer shall be made where the transferor and transferee agree in connection therewith that the transferor shall exercise any residual powers in the Percentage Interest or Partner so Transferred; (iii) no Transfer shall be made if, ..."

In addition to this, there is a rule in the common law called the *parol evidence rule* – the fundamental rule is that if the language of the written contract is clear and unambiguous, then no additional evidence may be put before the court in an attempt to alter, vary, or interpret in any way the words used in the written contract. If the contract as written is ambiguous, then additional evidence can be put before the court to resolve this ambiguity. But this ambiguity must be one that exists in the language of the document itself and not one that is created by the evidence that one party is trying to introduce. As well, this additional evidence cannot alter the contract by adding or subtracting from the terms as written. It can only be used to explain, without contradicting, the language of the contract. So if you have a contract which is clear and unambiguous but the parties have forgotten to include an important provision, the party that wants to rely on the forgotten provision will not be permitted to introduce evidence showing that it originally was the intention of the parties to include this provision.

So this is another reason the drafter must put everything in the document and must try to write it in such a way that the document speaks for itself and does so without any ambiguity. Because this is the ultimate goal of the drafter, there is a lot of internal explanation written within each sentence and within each paragraph. What often results from this is the repetition of a number of words as well as awkward or run-on sentence structures which can be very confusing. In common law contracts this need for precision will always take precedence over any considerations of grammatical elegance. And this is certainly illustrated in the examples we have just looked at!

The second influencing factor I have mentioned, that of *stare decisis*, results in particular wording being included in contracts because of a decision of the court in a particular matter. A simple example is the combination of words "signed, sealed and delivered". This combination of words refers to the situation, many years ago, when it was necessary to make sure that a contract was not only signed and the signor's seal affixed but also that it was delivered to the other party for the contract to be valid. Contracts are no longer sealed (except in those specific instances where there is no consideration (ie. the mutual exchange of something of value between the parties)), and there is no longer the requirement of delivery of the contract for it to be valid, however, in almost every common law contract you will still see the word 'deliver' being used along with the word 'sign' (or the more common 'execute' which, in this situation, means to sign).

Part of the reason the word 'deliver' continues to be used in common law contracts is related to the third factor I mentioned earlier, namely that the common law is shaped by practitioners.

Because the document basically must speak for itself and because it is the lawyers who decide how a dispute will proceed before the court, if there is any possible argument that can be made by a lawyer with respect to any ambiguity at all in the language of the document you can be sure that this argument will be raised. Because of this you will find many decisions containing detailed discussion on the meaning of a particular word or phrase or sentence. (In our law libraries you will find many volumes entitled 'Words and Phrases Judicially Considered' dealing specifically with these.)

A comma in the wrong place can change the intended meaning, a word not carefully chosen can change the intended meaning, and a combination of words not carefully drafted can change the intended meaning. Plus, remember the 'parol evidence rule' - evidence by the drafter as to what he or she intended to say is not admissible. As a result, lawyers are loath to change any words or combination of words or form of words which have been used successfully in the past because of their fear that by changing these 'time-honored' words or phrases they may somehow bring about the wrong legal result: the rationale being – "this has worked in the past without a problem so let's not change it now."

But this is not the only reason that lawyers will continue to use the same language over and over. A big part of the reason is that they simply do not have the time to rewrite every word of their precedents, let alone research the law to ensure that a change will not have an unwanted legal effect. In addition to this, legal drafting is a difficult skill which is not easy to perfect, so you will often find common law contracts which are long, convoluted and very poorly drafted.

#### **d) Why legal English is not appropriate in international commercial contracts**

What ultimately happens then is that there are a lot of outdated and unnecessary words and phrases in our common law contracts. For contracts which are used domestically this is not such a problem because we know which words not to concern ourselves with, such as 'deliver'. However the transferring of all of this excess verbiage into international contracts only creates confusion and error as translators and non-common law lawyers are not privy to this knowledge of which words to ignore, nor do they have the same understanding of these convoluted sentences. This is the main reason that I argue that the bulk of the legal English we find today in international commercial contracts is inappropriate, because these international contracts for the most part use the same language and structure that we common law lawyers use in our domestic contracts. Often it is English-speaking common law lawyers, working in international law firms, who are creating these international contracts and of course they are going to use the language and structure and form with which they are comfortable. But even if it is not this, but rather the drafter is a civil law lawyer who is a non-native speaker of English and the governing law of the contract is that of a civil law country, this language continues to be used because our common law contracts are being used as precedents as they are written in English. In most instances, these non-common law lawyers who are using these precedents do not know what all the words and combinations of words mean, or they put their own interpretation on them (this, of course, being an interpretation which accords with their own legal system). What can result from this is a document which makes no sense at all (and I have seen examples of this), or a document which appears to be coherent but is in fact understood differently by the different parties to it.

What emerged very clearly after a three hour International Bar Association session entitled *English Legalese in Non-English Contracts* held in Barcelona in June of 1998, is that terms



commonly used in international contract practice are not always understood or interpreted by their users, or the courts of their users, in the same way.

Four examples of words or combinations of words that are used all the time in international commercial contracts and which are interpreted and understood differently are: (i) equity; (ii) representations and warranties; (iii) good standing; and (iv) conditions precedent.

### **i) Equity**

We have seen already that the term *equity* has a very specific meaning in the common law when used in a particular context. And it is used regularly in this context in international commercial contracts, often in the form *in law or in equity* (the meaning of which you should now understand), or there will be a reference to *equitable remedies*. This latter term could possibly be translated as *fair remedies* which we now know is not correct. And such a translation could easily create problems if there is a dispute between the parties. I can only surmise how *in law or in equity* would be translated. Since the general rule for legal translations has been to translate literally, a possible translation could be “what is written in law or what is determined to be fair”, which of course is not correct. In the text entitled *The ICC Agency Model Contract, A Commentary* which is written by civil law lawyers and professors commenting on a model agency contract written in English but using the form and language of a civil law contract, one of the writers notes “like other contracts, the agency contract is subject to the principles of equity. In other words: ‘reasonable commercial practice’.”<sup>30</sup> This is certainly not the way a common law lawyer would understand the phrase “principles of equity”.

### **ii) Representations and Warranties**

In almost every common law commercial contract you will find a section entitled *Representations and Warranties*. This is a very important part of the contract. This has also been transferred into international commercial contracts. Because these two words (‘representations’ and ‘warranties’) have different meanings in different legal systems there are often questions raised as to what these words mean in the context of an international commercial contract. At the Barcelona session this question was raised by a civil law lawyer but no common law lawyer was prepared to venture an answer. And after researching this I am still unable to give an absolutely definitive answer. The reason for this is that I have been unable to find a case in which the court was asked to state exactly what these words in this context mean. I can however tell you how practicing lawyers who continually reproduce these words understand them. This section is used by each party to the agreement to provide important information which is known by the party making the representation and warranty but not known by the other party. The party making the representation and warranty is making it in order to relieve the other party from having to try to ascertain this information on his/her/its own. It is also information on which the other party is relying before entering into the agreement. The party making the representation and warranty is basically saying: I am making these statements and I am warranting that they are true. An example:

XYZ hereby represents and warrants to ABC as follows, with effect as of the date of this agreement and as of the Closing Date:

(a) XYZ is a corporation duly organized, validly existing and in good standing under the laws of Finland. XYZ has all the requisite corporate power and authority to execute, deliver and perform the provisions of this agreement, the License Agreement and the transactions contemplated hereby and thereby.

(b) XYZ has all the requisite corporate power (i) to carry on its business as it is now being conducted and to own and operate the properties and assets now owned and operated by it, and (ii) to carry out the provisions of this agreement, the License Agreement and the transactions contemplated hereby and thereby.

(c) XYZ is the owner of all right, title and interest in and to the Technology and has the right, power and authority to grant the Partnership a license in and to such Technology pursuant to the License Agreement. No trade secrets, inventions, license, copyrights, patents or patent applications embodied in the Technology (i) are being contested or infringed upon (ii) would in the conduct of the business of the Partnership infringe upon or violate the United States or foreign patents, trade secrets or copyrights of any other person, and XYZ has received no notice of such infringement.

(d) The execution and delivery of this agreement and the License Agreement by XYZ and the consummation of the transactions contemplated hereby and thereby, will, as of the Closing Date, have been duly and validly authorized by all necessary corporate actions.

What we see in this example are very common representations and warranties.

I mentioned earlier that there are many common law contracts which are poorly drafted. This poses another problem with our precedents being used internationally. The contract that this particular provision has been taken from is a good example of what I would call a poorly drafted contract. Yet this precedent is from an American Bar Association seminar on International Joint Ventures and was provided by one of the speakers at the seminar.

Can you see one of the problems with this example? The second sentence in (a) and the sentence in (d) are saying virtually the same thing.

### iii) Good Standing

*Good standing* is another term which has different meanings in different jurisdictions. And I do not just mean different jurisdictions internationally. Within the United States, different states understand and use this term differently. In the Canadian province of British Columbia (where I was called to the Bar) if a corporation is in 'good standing' it means that it has filed all required documents and paid all annual fees to the Registrar of Companies. This may not seem very important however it is very important because if a corporation is not in good standing it can be struck from the corporate register and if this happens then the corporation does not exist. If it does not exist its assets will escheat to the government, in other words, they will become the property of the government. In some states in the United States 'good standing' can mean this but in other states it means that the corporation has paid all taxes owing by it.

You may think this term is limited to North America, but once again, it is a term you will see used regularly in international commercial contracts. We have just seen how it is used in the example for representations and warranties in (a) and I would suggest that it is highly likely that the American and Finnish parties to this agreement would understand this term differently.

You will also see this term *good standing* being used regularly in legal opinions which the lawyers for each party to the contract are asked to give with respect their own clients. This type of legal opinion originated in the United States, however it is now being used regularly in international commercial transactions and it is another area in which there is misunderstanding. Some may see these documents simply as letters written by the lawyers for the parties (as this is the form in which they are given), however in Canada and in the United States the courts have developed an extensive body of case law around these opinions and there are a number of texts on the subject.<sup>31</sup>

#### **iv) Conditions Precedent**

The last term, *conditions precedent*, again is very common in common law contracts and again has been transferred to international commercial contracts. But how we interpret them and how courts in civil law countries would interpret them are completely different. This clearly emerged from the Barcelona session and it is something that should make every common law lawyer shudder. In the common law, if there is a condition precedent in a contract, then whatever it is that constitutes this condition precedent must be completely satisfied before the contract becomes effective. An example of common conditions precedent are as follows:

#### ARTICLE 1 – CONDITIONS PRECEDENT

1.01 This agreement is conditional upon the receipt by the parties hereto of the requisite approvals (on conditions acceptable to all parties hereto) required to be obtained under the laws of Turkey and the laws of Sweden on or before June 30, 1986 or by such later date as the parties may mutually agree. Such approvals include but may not be limited to the following:

(i) Turkey: - the necessary consent of the proposed increase in capital and amendments of the Articles of Association as per paragraph 3.01 and Attachment 1 hereof:

- the necessary permission for BT's subscription of shares of the Company in accordance with paragraph 3.02;

- the necessary approval of the Amendment to the Agreement regarding License for Manufacture, Assembly and Sales and the Concessionaire Contract as per Attachments 3 and 5 hereof;

- the granting of the incentives (exemptions from customs duties for machinery and toolings and import licenses for metal parts imported as "PKD" for the F10 cab) specified in the agreed Feasibility Study of 1985.

(ii) Sweden: - the necessary approvals of the Central Bank of Sweden for BT's subscription and payment of shares according to paragraph 3.02.

Each party undertakes to use all reasonable effort to obtain such approvals, and will notify the others promptly when the approvals required to be applied for by it have been obtained.

1.02 In the event of all of the conditions referred to in paragraph 1.01 of this Article not being fulfilled within the time period stipulated therein, then this Agreement and the Amendments No. 1 referred to in paragraph 14.01 of Article XIV, if signed, shall be null and void and no party shall have any claim against the other.

1.03 This Agreement shall cease to be conditional upon the date when all the conditions set out in paragraph 1.01 of this Article shall have been fulfilled and the following provisions of this Agreement shall come into effect immediately on that date.

The contract this example is from is well drafted and it sets out clearly in 1.02 what will happen if the conditions precedent have not been met. Even if the conditions precedent are almost totally met but not completely met, the contract will still not be in effect. However, what the civil law lawyers in Barcelona stated is that the courts in civil law countries would uphold the contract if a condition precedent was almost totally met – a very different interpretation and clearly of enormous consequence to the parties to the contract.

### e) Conclusion

What I have given here is just a small sampling of some of the legal English terminology which has been incorporated into international commercial contracts. Hopefully what I have provided has illustrated the reason I argue that much of the legal English we see today in international commercial contracts is inappropriate in the international setting.

I expect that what I have stated may also appear very negative, however I do not want to leave the impression that there is no solution. I will briefly note three areas where solutions to the problem are being attempted.

The first is the use of 'neutral language'. To illustrate what I mean here I look to two institutions which have found it necessary to use neutral language to overcome the many problems created by different languages and accompanying meanings from different legal systems. The first institution is the Court of Justice of the European Community. In a paper presented by Pascale Berteloot, Head of General Services, Translation Directorate of the Court of Justice, in September 1997 at an International Bar Association Conference in Bratislava, Ms. Berteloot discussed how the Court dealt with the English concept of 'legal privilege'. The Court used neutral terminology to identify this concept as follows: "the protection against disclosure afforded to written communications between lawyer and client". By using this neutral terminology rather than the term 'legal privilege', no problems arose when the concept was translated into the different languages of the Community. As Ms. Berteloot noted, "[t]he compact expression of English law disappeared and gave way to a more descriptive expression with the possibility of consistent translations in all the languages."<sup>32</sup>

Another institute which has used neutral language is UNIDROIT (the International Institute for the Unification of Private Law, headquartered in Rome, Italy). In its *Principles of International Commercial Contracts* (Rome, 1994) it tried "to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied."<sup>33</sup> In trying to eliminate some of the problems presented by the different concepts, approaches, and terminology of the different legal systems, the working group that created the *Principles* deliberately avoided "the use of terminology peculiar to any given legal system."<sup>34</sup> In doing this they made use of terms commonly used in international contract practice, however, where necessary they created entirely new concepts with corresponding new terminology.

A second area where some of the problems discussed in this paper are being addressed is in the 'plain English movement'. This is a movement, within the various common law countries, which began approximately 15 years ago. Its initial success was in those areas involving legal documents which are regularly used by the general public, such as leases, mortgages, and insurance policies. It has been less successful in commercial transactions where there are lawyers representing both parties to the transaction. However it is gaining momentum as lawyers are seeing that their initial fear of increased litigation has not materialized. In British Columbia, our Legislature now has a stated policy of drafting all new legislation in 'plain English' (ie. in a style that can be more easily understood by all). As well, the more recently-called lawyers have been taught to draft in a plainer style of English. There are still, however, many lawyers who draft in the older style and, of course, many of the precedents that are being used by the lawyers are drafted in the older style. The movement however is steadily gaining ground and as more lawyers become accustomed to this newer style and more precedents are created following this newer style, hopefully, some of the problems I have discussed will be eliminated. On a negative note however, in a recently published text on international joint ventures, I noticed that the precedents provided by the writers still include the words *in law or in equity* as well as *execute and deliver!*

A third area that has developed to try to overcome some of the problems discussed here is the teaching of Legal English. I have mentioned in this paper the course I have developed – it is a course in Legal English for International Commercial Transactions. It is specifically designed for those lawyers who have not been trained in the common law and who are non-native speakers of English. My premise is that if non-common law lawyers know what these terms in these contracts mean to a common law lawyer, they will be able to know which terms they want to retain, which terms they want to discard, and which terms they will need to convert to neutral language.

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<sup>1</sup> A.K.R. Kiralfy, *Potter's Historical Introduction to English Law and its Institutions*, 4<sup>th</sup> ed. (London: Sweet & Maxwell Limited, 1962) at 20-21

<sup>2</sup> R. David & J.E.C. Brierley, *Major Legal Systems in the World Today, An Introduction to the Comparative Study of Law*, 3<sup>rd</sup> ed. (London: Stevens & Sons, 1985) at 311; S.F.C. Milsom, *Historical Foundations of the Common Law*, 2<sup>nd</sup> ed. (London: Butterworths, 1981) at 11; A.K.R. Kiralfy (1962) at 13 notes that several attempts were made during this period to restate the old law

<sup>3</sup> F.W. Maitland & F.C. Montague, *A Sketch of English Legal History*, (New York: G.P. Putnam's Sons, 1915) at 32

<sup>4</sup> Maitland & Montague (1915) at 32

<sup>5</sup> A.K.R. Kiralfy (1962) at 20

<sup>6</sup> Pollock & Maitland, *The History of English Law*, 2<sup>nd</sup> ed., Volumes I and II (1898) (reissued in 1968 by Cambridge University Press), Volume II at 605

<sup>7</sup> A.R. Kiralfy, "English Law" in D.M. Derrett (ed.), *An Introduction to Legal Systems* (New York: Frederick A. Praeger Publishers, 1968) at 177

<sup>8</sup> The common law at this time actually came very close to being permanently replaced by the Roman law then being propounded in continental Europe - see F.W. Maitland's lecture on this subject reproduced in *English Law and the Renaissance*, Cambridge University Press (1901)

<sup>9</sup> A.R. Kiralfy, "English Law" in D.M. Derrett (ed.) (1968) at 167

<sup>10</sup> A. Baugh, *A History of the English Language*, 2<sup>nd</sup> ed. (London: Routledge & Kegan Paul Ltd., 1957) at 134-135; O. Jespersen, *Growth and Structure of the English Language*, 8<sup>th</sup> ed. (Leipzig: B.G. Teubner (1935) at 79-82; O.F. Emerson, *The History of the English Language*, (New York: The Macmillan Company, 1935) at 55

<sup>11</sup> L.M. Myers, *The Roots of Modern English*, (Boston: Little, Brown and Company, 1966) at 120; G.E. Woodbine, "The Language of English Law", *XVIII Speculum, A Journal of Mediaeval Studies* 395 (1943) at 408

<sup>12</sup> Woodbine (1943) at 399

<sup>13</sup> Emerson (1935) at 72-73

<sup>14</sup> David & Brierley (1985) at 312; Maitland & Montague (1915) at 32-35

<sup>15</sup> Pollock & Maitland (1968) Volume I at 87

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<sup>16</sup> A brief excerpt, translated into English, reads as follows: ...because the laws, customs, and statutes of this realm be not commonly known in the same realm, for that they be pleaded, showed, and judged in the French tongue which is much unknown in the said realm...that all pleas which shall be pleaded in his courts whatsoever...shall be pleaded, showed, defended, answered, debated, and judged in the English tongue, and that they be entered and enrolled in Latin...(see Emerson (1935) at 64-65)

<sup>17</sup> D. Mellinkoff, *The Language of the Law*, (Boston: Little, Brown and Company, 1963) at 116

<sup>18</sup> Mellinkoff (1963) at 116

<sup>19</sup> L.M. Myers, *The Roots of Modern English*, (Boston: Little, Brown and Company, 1966)

<sup>20</sup> Baugh (1957) at 243

<sup>21</sup> Mellinkoff (1963) at 84

<sup>22</sup> Mellinkoff (1963) at 91-92

<sup>23</sup> Emerson (1935) at 85

<sup>24</sup> Emerson (1935) at 85

<sup>25</sup> Mellinkoff (1963) at 134

<sup>26</sup> Mellinkoff (1963) at 134

<sup>27</sup> Sir William Holdsworth, *A History of English Law*, Volume II, 4<sup>th</sup> ed. (London: Methuen & Co. Ltd., 1936) at 481

<sup>28</sup> See Pollock & Maitland (1968) Volume I at 81 for more examples

<sup>29</sup> The United States is different from the rest of the common law world in that they have the Uniform Commercial Code (the UCC). It governs various aspects of commercial law, and as such, plays a decided role in international commercial transactions. The American Law Institute has also created a series of Restatements of the law in such areas as Contracts and Torts. These restatements set out what the law in the general category is, how it is changing, and what direction the authors (leading legal scholars in the field) think it should take. These Restatements do not have the force of law, however, they have had a definite impact on American law and are frequently cited by the courts.

<sup>30</sup> F. Bortolotti, D. Ferrier, O. Lando, D. Matray, K. M. Swantee, V. Roberts, *The ICC Agency Model Contract, A Commentary* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1993) at 88

<sup>31</sup> see for example: S. FitzGibbon & D. Glazer, *FitzGibbon and Glazer on Legal Opinions: What Opinions in Financial Transactions Say and What They Mean* (Boston: Little, Brown, 1992); W.M. Estey, *Legal Opinions in Commercial Transactions*, 2<sup>nd</sup> Edition (Toronto: Butterworths, 1997)

<sup>32</sup> P. Berteloot, *Cross-lingual and cross-cultural communication at the Court of Justice of the E.C.*, IBA Conference – Bratislava, 8<sup>th</sup> September, 1997 at 10

<sup>33</sup> UNIDROIT *Principles of International Commercial Contracts*, Rome (1994) at viii

<sup>34</sup> UNIDROIT *Principles* (1994) at viii

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This paper was first published in *The Development of Legal Language*, papers from a Symposium on Legal Linguistics, Rovaniemi, Finland, September 13-15, 2000, Ed. Heikki E.S. Mattila, Pub. Kauppakaari, Finland.

The book includes scientific articles written by specialists of different countries. They provide information on the development and properties of several legal languages (Catalan, English, Finnish, French, German and Swedish). In addition to the above paper, other articles include the type of legal English used in international commercial contracts, the differences in the variants of legal French used in France and the European Union, the historical foundations of German legal language, and translation problems between legal English and legal French.

Talentum, Uudenmaankatu 4-6, 00120 Helsinki, FINLAND. Orders [kirjatilaus@talentum.fi](mailto:kirjatilaus@talentum.fi). 2002, Paperback, 193 p., ISBN 952-14-0633-X, Price 34,00 €

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Introduction" in *International Business Lawyer* (following an International Bar Association conference in Barcelona, Spain).