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The translation of the Chinese Civil Code in a perspective of comparative law

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Abstract: Observing the challenges of the translation of legal texts in China, it is noteworthy that the source language, until the plethoric legislation under Dèng Xiǎopíng, was mainly German. The challenge eventually consisted in finding or 'inventing' adequate Chinese terms to render the German terms of art. Then the pendulum swung back. Chinese became the source language as Chinese statutes had to be translated into English. The challenge for the translators is a new and different one, because the English legal terms refer to the *common law* system (while Chinese law belongs to the Germanic legal family). What is for instance for a Chinese court the legal value of a translation which leads an existence beside the original text, e.g. of the English translation of a disposition of the Chinese Civil Code? A court is, generally speaking, only bound by an 'authentic' translation, – not by a simple official or by a private translation. Moreover, in the hypothesis that both language versions are authentic, the court has, in case of divergence between them, the obligation to reconcile the two versions. For a court – or an arbitrator, a legal counsel or a scholar – having to interpret and apply a particular disposition in a pending case, the added value of a translation is the following one. The interpretation which the translator himself gives of the text which he has to translate, can influence and facilitate their subsequent

understanding, even in the case of a non-authentic translation. One could say that the text is 'chewed' already. The translation, if made timely, could also help the legislator to draft a final text which would be more clear and readable. For the drafter of an international treaty or of a commercial contract the same is true. The obvious negative aspect of a translation is that it can contain inconspicuous juridical errors and by consequence create confusion and misunderstanding by those who will have to apply the disposition. In the recent Chinese Civil Code some examples of such mistranslation can be given. In case of translation of a legal text of a non-*common law* jurisdiction a special warning about the danger of introducing in a surreptitious way foreign *common law* concepts in the target law system, is not superfluous. The process of translation of a legal text requires first an understanding of the precise legal meaning of it, and subsequently the conveying of that meaning in the target language in respect of the coherence of the concerned target law system. That last point precisely is the challenge. Two recommendations can in conclusion be made, one concerning the timing of starting the translation process, and another one concerning a desirable supervision by a comparative lawyer during the translation process.

Key words: agency contract; authentic translation of a legal text; cause and consideration; Chinese legal terminology; commission contract; comparative law; good faith; hardship and frustration; Hohfeldian analysis, multilingual legal text; oblique procedural action; official or private translation of a legal text; public policy; trust.

Introduction

On January 1, 2021 the new Civil Code of the PRC came into being, after a long period of expectations and preparatory works (Herbots 2021: 39–49). This was great news for the comparative private lawyers all over the world. The PRC – a political and economic world power – belongs to the Germanic legal family (Zweigert and Kötz 1998; Glendon, Carozza and Picker 2015). In spite of the difficulty of the Chinese language, the Code – primordial source of law in a continental style system – was for the Western lawyers immediately accessible in translation. It is now waiting for the interpretation of the Code by the Chinese courts.

The present contribution concerns the English translation of the Code. Professor Chen Weizuo (2004; 2020) of the Qinghua

university in Beijing, who years ago translated the German Bürgerliches Gezetzbuch (BGB) into Chinese, is now working on his own private English translation of the new Chinese Civil Code, changing the source language of his translations. Getting that news in an e-mail from him, the thoughts of the author of this contribution (who wrote a book on legal translation and interpretation problems, cf. Herbots 1973: 183) began wandering to the history of the legal translation in China which shows a similar swung of the pendulum since the end of the Qing dynasty, and, starting from there, to other thoughts about legal translations in general, hence the idea of writing this paper. Paragraph 1 of this contribution places the topic of the translation of *legal* terms of art in the historical perspective in China. The further paragraphs situate the issue in the broader and comparative context of the translation of legal texts. Paragraph 2 draws attention to the danger of introducing by error foreign *common law* concepts in the Chinese law via the English translation. In paragraph 3 legislative changes in terminology are mentioned. Paragraph 4 distinguishes *authentic* language versions from non authoritative ones. A translation too can be authentic. This does not only concern statutes, like the Civil Code, but also treaties and commercial contracts. In case of divergence of the different language versions, only in the hypothesis of *more than one authentic* version a court has the duty to reconcile the divergent texts. Paragraph 5 raises the issues of the conveyance of the exact meaning of a legal source text into the other language. The existence of an authentic translation will be beneficial for a court. But in paragraph 6 it is demonstrated that also the non-authentic translation of a legal text may have benefits. It may also benefit the legislator himself. Unfortunately, there is another side of the medal. A translation of a legal text can be a source of errors, and often is. Some examples of such errors in the new Chinese Civil Code are given in paragraph 7.

1. The reversed phenomenon of the translation of legal texts in China. Historical overview

1.1.Imperial China[1]

In the Chinese Imperial times which ended by the creation of a republic in 1911, no precise legal terminology came into being. Although there were during all those dynasties (221 B.C. – 1911) magnificent periods of flowering philosophy, arts and literature, no pure legal science emerged like it had been the case in the Roman Empire. The national statutory law and the brilliant dynastic Codes contained mainly criminal law and sophisticated rules governing the well-functioning imperial administration. The reason of this lack of interest for private law is to be found in the Confucian philosophy (or as the Chinese say the philosophical movement of Ruism), which since the Han emperors became the state philosophy.

According to Confucius (Kǒngzǐ 孔子) it was not the role of the written penal law (the *fǎ* 法) to regulate the relations between the citizens in society, as on the contrary the Legists asserted, but it is the role of the *lǐ* (the rituals, the social etiquette and protocol, the moral standards and the customs). Traditional Chinese society was characterized by the rule of *lǐ* 礼 as opposed to the rule of *fǎ* 法. The imperial State was not interested in regulating private law. The Qing Code called civil matters 'minor matters' that should primarily be dealt with outside the formal legal system. The main practical function of the law was not to protect citizens and to allocate rights to them, but rather to strengthen and protect the power of the ruler. The emphasis was put on the idea of punishment and not on the protection of an ideal of justice. There existed no class of lawyers before 1911, as it existed in Rome, since there was no specific legal education. The cultivated elite corps of the mandarins was selected by difficult exams which dealt mainly with literature and Confucian philosophy. No Ulpianus, Paulus, Gaius or Pomponius, no Cicero. Each district magistrate, a mandarin, had a secretary who would assist him in the criminal cases. He was a lower civil servant, who was not highly esteemed. His daily practice only gave him his specialization. This is the only person whom we could call a 'lawyer'. There were neither

[1] See Bodde and Morris (1967); Chang (2016); Bodde (1982), Mac Cormack (1996).

advocates for the parties before 1911. A former legal secretary who for remuneration could write a complaint for a party, corresponds most closely to a legal counsel.

No wonder that no precise legal terminology came to existence in imperial China. Let's take the example of the concept *contract*. The concept of contract finds its origin in the ancient term *qì yue* 契约, which, however, was never clearly defined. There are several equivalent concepts in Chinese history, like *zhi ji* 质剂. The word is ancient Chinese and can be found in the Rites of Zhou, which state that people use larger and longer pieces of bamboo, *zhi* 质, to *sell* slaves and livestock, while *ji* 剂, which are smaller and shorter, are used to *sell* iron and jewellery. Since the West Zhou dynasty the lender and the borrower had to write their *loan* agreement on a piece of cloth, and then tear it into two parts; each party would get one part to prove the agreement. When a conflict arose, the parties could bring both parts together to recreate the written agreement. The same would be done after the invention of paper in the second century B.C. The parties wrote *hé* 合 and *tóng* 同 on the paper, and each got a part with either *hé* 合 or *tóng* 同 on it. A *hétóng* 合同 comprised the two parts of the paper. In the 20th century the modern Chinese legislation adopted the term *hétóng* 合同 for *contract*. Early Chinese law never developed beyond the stage of recognition of several distinct types of agreement to which legal consequences were attached. No Law of contract emerged comparable to that developed in Rome at roughly the same epoch. The main reason for the difference between Rome and China lay in the lack of emergence in China of a class of private lawyers resembling the Roman jurists. The consequences of this situation are still to be felt.

1.2. The end of the Qing and the republic

The modern Chinese legal terms are mainly terms of art translated from Western legislations. This process of translation started in 1839 when a high imperial official organized the translation in mandarin of chapters of the book of Emerich de Vattel on international law. In 1862 the imperial college for the spread of Western science was established and a time of more systematic introduction of Western law

started. As regards legal terminology, sometimes the corresponding Chinese terms existed, like *hétóng* 合同 for *contract* or *hélǐ* 合理 for *reasonableness*. Sometimes the concept didn't exist in Chinese. The three manners of integrating foreign terminology in the Chinese language were then: to give a new signification to an existing Chinese term, or to introduce a neologism, or finally to use loan words. Many neologisms were introduced and are still used today, like *zhǔquán* 主权(sovereignty), *fǎyuàn* 法院(court of justice), *zérèn* 责任(liability). Other terms were modified later, like *gōngfǎ* 公法 (international law, now: *guójìfǎ* 国际法) or *lùfǎ* 律法 (law, now: *fǎlù* 法律). During the second half of the nineteenth century the Chinese used Japanese legal terminology as an aid for the translation of the Western legal text. In Japan the law developed in the Meiji period (1868 – 1914), consisted mainly of Japanese translations of continental European statutes. The concept of *constitution* for instance was unknown. The Chinese borrowed from Japan the term *xiànfǎ* 宪法, to designate the Western concept of constitution (*xiàn* 宪 meaning: first, earlier, ancestral; *fǎ* 法 meaning written law). To designate the concept of subjective right, which was an unknown term of art, they formed the neologism *quánlì* 权利 from *quán* 权(power) and *lì* 利 (advantage).

During the late Qing dynasty emperor Guāngxù mandated a special hand-picked committee to draft a Western style Civil Code for China. Mainly the German model was followed. The drafters faced a big, but fascinating semantic problem, namely the translation of the German terms of art in Chinese. That Code, however, would never be enacted, because the Republic was proclaimed in 1911. After the formation of a national government finally in 1928, a legislative committee was charged to draft a civil code following the model of Guāngxù. It was successful and the first Chinese Civil Code, following mainly the model of the BGB, was enacted in 1930. It is still in force in Taiwan, but in the PRC it was, together with the whole legislation enacted under Chang Kai-Shek, repealed in 1949. As regards the semantic problem, a fine example is given by the concept of *good faith* which appears in the Civil Code of 1930, as well as later in the Law of contracts of 15 March 1999 and now in the Civil Code of 2020. To render the term *Treu und Glauben*, used in the BGB, the Chinese drafters had to create a new word, *chéngxìn* 诚信, *a contraction of chéng shí* 诚实 *(honesty) and xìn yòng* 信用 (trustworthiness), two concepts from the classical Confucian writings.

Before the Kuo Min Tang Code, the term *chéng xìn* 诚信 (in abbreviated form) was unknown in the Chinese legal language. It means literally *honesty and trustworthiness*. The translation of the Chinese Legal System Publishing House is *good faith* (Novaretti 2010: 953–981). It should be stressed, from the point of view of comparative law, that in a Common Law jurisdiction (like Hong Kong) *good faith* has a meaning which differs totally from the legal term of art 'good faith' ('Treu und Glauben') in the law of contracts in Continental jurisdictions, like the one of Mainland China.

1.3. The socialist market economy

After the Maoist period, and the reform and opening up of the economy in 1978 under Dèng Xiǎopíng a plethora of Western statutes were transplanted (Cohen, Chan and Ming 1988; Cohen, Edwards and Chang Chen 1980; Cohen 1970). Concerning the legal terminology, one continued to take the path taken in earlier days, i.e. to use the three manners of integrating foreign terminology in the Chinese language. Those terms belong now completely to the Chinese legal language. Another example of the same barrel: *fairness* or *equity* in a contract, in the sense of Aristotelian commutative justice, was rendered in Article 5 of the law on Contracts of 1999 and now in Article 6 of the new Civil Code by the neologism *héng píng fǎ*, 衡平法 derived from the words *héng* 衡(measure), *píng* 平(equality) and *fǎ* 法 (legal rule).

After the flood of legislation following 1978 it can be said that the law of the PRC possesses a thesaurus of legal terms of art based on the translation of German sources. Speaking of a legal thesaurus, however, the record ought to be set straight in comparison with German law. A Western legal language is a specialized technical language. A Western native speaker needs a legal training to understand it. By contrast, the Chinese language used in the statutes is ordinary, almost banal and very simple from the viewpoint of a Western lawyer. Chinese legislation is characterized by an absence of legal jargon (cf. Lubman 1970: 13; Cao 2004: 94f; Peerenboom 2002: 247, 251) Compared with the very precise German legal language, the Chinese legal style and terminology is yet not well developed. In the

context of the opening of the Chinese market and the accession of the PRC to the W.T.O. in 2001, the Chinese legislation is officially translated in English, the *lingua franca* also in South East Asia.

2. The danger of 'pollution' by *common law* concepts

At this stage of the contemporary history, the phenomenon of translation of statutory texts in China changes, and at the same time the challenges for the translators. The pendulum swings back. It is no longer the challenge of the translation of German texts into Chinese which is predominant. It becomes the reverse. The challenge of the translation of modern Chinese texts into English becomes that the translation must respect the coherence of the Chinese system which belongs to the Continental Law system, and may not be 'polluted' with *common law* concepts via the English terminology.

To make this idea of 'pollution' clear, a good example of such a pollution can be given which was caused by a wrong translation in South Africa in the late nineteenth century[2]. As comparative law specialists know, the concepts of *cause* and *consideration* are totally distinct from each other. Chief Justice de Villiers, who like all the South African judges had received his legal education in the English inns of court in London, had in a case of 1885 to translate the term *causa* [*oorzaak*] used in the Roman-Dutch law of contracts (a law system belonging to the continental law family and not to the *common law*). He translated it wrongly by *consideration*. This became a precedent and so, by an erroneous translation of the Chief Justice the doctrine of consideration was imposed into the Roman-Dutch law which had to be applied in South Africa and which did not contain it. De Villiers plucked the English doctrine from its surroundings and from a system of which it forms a well understood part, and grafted it upon a legal system to which it is wholly foreign. It lasted unfortunately till 1919, when in the case *Conradie v. Rossouw* the doctrine of consideration was rejected.

[2] The South African case given as an example was discussed by Herbots (2000: 457–481).

Qíngshìbiàngēng and 'frustration'

One may be afraid that similar mistakes happen, when Chinese commentators who, like De Villliers, got their legal education in the *common law* for instance in Hong Kong, write commentaries on the Chinese Civil Code which belongs to the Civil Law tradition. Some commentaries on Article 533 of the new Chinese Civil Code may give an example of a possible pollution of the Chinese law by using concepts of the *common law* through the intervention of a wrong translation. Ten years after the refusal of the doctrine of hardship ('la théorie de l'imprévision') by the National People's Congress at the vote of the Contracts Act of 1999, the Supreme People's Court recognized that doctrine, called in Chinese the doctrine of the change of circumstances (*qíngshìbiàngēng* 情势变更). A remarkable "interpretation contra legem"! The Guiding Opinion of 7 July 2009 makes use of the *hélǐ* 合理 (reasonability) standard in an instruction wherein the Supreme People's Court states that in dealing with cases affected by a significant *change of circumstances* courts shall "reasonably adjust the interests of the parties". The new Article 533 of the Civil Code incorporates this interpretation and pushes a progressive agenda:

> "Where the basic conditions of a contract undergo a material change which was unforeseeable at the time of the conclusion of the contract, and which is not a commercial risk to be assumed after the formation of the contract, rendering the continuation of the performance of the contract grossly unfair for either party, the disadvantaged party may renegotiate with the other party; and if the negotiation fails within a reasonable time limit, the party may request the People's Court or arbitral institution, to modify or terminate the contract. The People's Court or arbitral institution shall change or terminate the contract based on the actual circumstances of the case, in accordance with the principle of fairness."

Some Chinese scholars, writing their commentary in English, use in this content the concept of *frustration of the contract*. This is like comparing apples and oranges. In *common law* systems (like that of Hong Kong) relief for hardship is never granted in the absence of an express contractual provision. The *doctrine of frustration* is something different from that of hardship. It excuses performance of the contract when *the circumstances have changed so much* that the

performance required by the contract is *radically different* from that which was initially undertaken by the parties.[3] An *economic* hardship will *not* render a contract frustrated. So, integrating the doctrine of frustration in the Chinese law system would lead directly and in the shortest time to misunderstanding. These are two different doctrines, both based on a change of circumstances. As William Shakespeare wrote in the Twelfth Night, "Words are very rascals. The flavour of a sentence is apt to change or disappear in a translation; and just this flavour may change the aspect of the case." This is all the more true concerning the translation of a legal text.

3. Amendments in the terminology

In the contemporary period it happens that the legislator amends the Chinese terminology and the English translation. An example in the Civil Code, is given by the modification of the term *social and public interests*. The *common law* concept of *public policy* (*ordre public et bonnes moeurs* in the French terminology) is an 'open-ended' concept. It refers to the rules which establish the legal foundations on which the economic or moral order of the society rests. It has been left to the courts to determine in particular cases whether an agreement between individuals is incompatible with the interests of society and therefore unenforceable. It introduces an element of indeterminacy in the legal discourse. It is, however, not left to an arbitrary evaluation by the courts. But in the Chinese Law on Contracts of 15 March 1999 (Article 7) it is not only stipulated that the parties shall respect *social morals* (which is the term used in the BGB to mean *public policy* (*Gute Sitten*), but also that they may not disturb the social and economic order or harm *social and public interests*. This is a much broader concept than public policy, which is narrowly defined and is in practice foreseeable. The Arbitration Law contains the same too broad term: *the award which violates social and public interests will be denied enforcement by the People's court.* This opens the door to arbitrariness. Article 8 of the Civil Code abandons that term and provides now that a contract shall respect *public order*

[3] The source of this doctrine is the famous case *Krell v. Henry (1903)*, in which *Taylor v. Caldwell* (1863) was cited as a basis.

(*gōnggòngzhìxù* 公共秩序). The broader term *social and public interests* (*shèhuìgōnggònglìyì* 社会公共利益) allowed the People's courts to take the concrete circumstances of the case into consideration to judge if the contract was void. The changed and narrowly defined term in Article 8 C.C. is more in line with international practice. Could it be that the English translation made the Chinese legislator think twice about a too broad term in the earlier law which is a danger for the certainty of the law?

4. The difference between an authentic version and official or private translations

Let us now turn to the theoretical question of the legal value of a translated legal text. The Chinese text of the Civil Code which was enacted by the National People's Congress in 2020, is the only *authentic* text of the Code[4]. There came, however, an *official* English translation (Legislative Affairs Commission of the Standing Committee of the National People's Congress 2021). What does such a translation mean for a Chinese court? In this short paper we look at analogous phenomena of multilingual legal texts in other countries.

4.1. The authentic version of a multilingual legal text

That the mandarin linguistic version of the Civil Code of the PRC is the only *authentic* version of it means that, if a difference with the *official* translation should appear at a later moment, only the authentic text is binding for the courts. From a comparative point of view one can point at other countries where *more than one version* of the multilingual statutory text is authentic. This is the case for example in Belgium, Switzerland, Canada, Quebec or in the European Union. This is also the case in the autonomous administrative region of Hong

[4] In Belgium, as *mutatis mutandis* in China now, there existed until 1961 only an authentic French linguistic version of the Civil Code; in Dutch there was only an official translation. Since 1961 the two language versions are authentic. See Herbots (1986: 35–72).

Kong. The Swiss Civil Code for instance is published in three language versions, which are all equally authentic: French, German and Italian.

4.1.1. The court must reconcile the divergent versions

A problem arises in these systems when, at the stage of interpretation of the statute, a divergence appears between the two versions, and one of the litigating parties bases his argumentation on one version, while the other one favors the other version. How will the court then arrive at reconciling the divergent text versions, which are presumed to have the same meaning?

The Belgian Law of 30 December 1961 offers the following solution:

> "Controversial topics based on a divergence between the Dutch and the French texts are decided according to the will of the legislator which is determined according to the usual rules of interpretation."

In other words, the version should prevail which is the closest to the legislature as ascertained by the regular rules of interpretation of deeds and statutes; that version shall prevail which is most consistent with the intention of the concerned Article, and the ordinary rules of legal interpretation shall apply in determining such intention.

The Chinese Civil Code says the same in Article 466.2 for the analogous problem of divergence between two authentic versions of a multilingual *contract*:

> "Where a contract is made in two or more languages which are agreed to be equally authentic, the words and sentences used in each text shall be presumed to have the same meaning. Where the words and sentences used in each text are inconsistent, interpretation thereof shall be made in accordance with the related clauses, nature, and purpose of the contract, and the principle of good faith, and the like."

If there is *more than one* authentic version of a multilingual legal text, and if a divergence between them appears the court has to *reconcile* the versions. It is not the version in the *language of the procedure* that shall prevail, neither the "*original*" text [this is the text

in the working language used in the drafting process (*die führende Sprache*)]. The words and sentences of both authentic texts are presumed to have the same meaning and must be reconciled.

4.1.2. Several authentic language versions in China

In China too this could be the case, for instance if there was a divergence between the Chinese and the English text of the Vienna Convention. The Vienna Convention on the international sale of goods was ratified by the PRC and became as a Uniform Law part of the domestic law of China. There are five authentic versions of the CISG. The English version of it is not only an *official* version. The Chinese and the English *authentic* versions are on a foot of equality before a Chinese court.

This would also be the case in China, if a translation of a contract governed by Chinese law was declared by a contractual clause to have authentic value, or if a translated version of an international treaty entered by the PRC and another State or with an international organization was agreed to be authentic.

4.1.3. The reason of the existence of translations which are declared authentic

How to explain the worldwide phenomenon of several *authentic* versions of a statute? The reason lies in susceptibilities and nationalist sentiments. In the Justinian Roman empire, when nationalism did not exist yet, the issuing of several novellae in authentic Latin and Greek versions was due to the need to make them understood by everybody in the empire. In contemporary China the reason for an *official* translation in English of the unique authentic version in Mandarin Chinese of a statute is different. It is, certainly since the accession of the PRC to the W.T.O. in 2001, the need to make the legislation known to *foreign* investors, traders and expats, English being the *lingua franca*, also in East Asia.

4.2. The private translation and the official translation

A statutory text can be translated by a scholar. The Chinese Code or part of it can for instance be translated in Italian (cf. Monti 2020). A private institution can do the job, like for instance the Max Planck Institute for comparative law and international private law who made a German translation of the Chinese Civil Code[5]. A private translation can be considered as having the same value for the interpretation, as a scholarly writing (*la doctrine*). As Dölle (1961: 27) writes:

> "When the translation is made by a private person, it earns to be treated in the same way as any other scientific explanation of the meaning of the text ('Sinndeutung'), and can in this respect be used as a legitimate tool for the interpretation."

This is equally true for an *official* translation. An *official* translation is made under the exclusive responsibility of the legislator after the enactment of the original text. This is the only difference with a private translation. A court cannot base the interpretation of the normative text on its official translation (except if that translation has been declared by the legislator to be authentic). But the official non-authentic translation may have a value similar to that of an authoritative scholarly writing.

5. The art of translation

5.1. Understanding the *legal* meaning in the first place.

The process of translation requires a broad and profound understanding. The problems of translation are closely connected to semantic analysis and the theory of the significance-in- context. This is well explained in an English court decision, *Dies v. British and international Mining corporation ltd*:

[5] For the German translation of the Chinese Civil Code see Ding, Leibküchler, Klages and Pißler (2020: 207–417).

> "The precise mental process of translating a word or sentence spoken or written in one language into another language is or may be somewhat complex. In fact, to say that you translate one word by another seems to me to be a summary method of stating a process, the exact nature of which is a little obscure. A substantive word is merely a symbol which unless it be part of a tale told by an idiot signifies something. If that something is a concrete object such as an apple or a particular picture, the process of translation from one language to another is easy enough for any one well acquainted with both languages. Where the words used signify not a concrete object, but a conception of the mind, the process of translation seems to be to ascertain the conception or thought which the words used in the language to be translated conjure up in his own mind, and then, having got that conception or thought clear, to re-symbolize it in words selected from the language into which it is to be translated. A possible danger, when the document to be translated is one on which legal rights depend, is apparent, inasmuch as the witness who is in theory a mere translator may construe the document in the original language and then impose on the court the construction at which he has arrived by the medium of the translation which he has selected."[6]

If the text which has to be translated is a legal, normative text, the translator should by consequence be a lawyer. That is obvious. How could a non-lawyer understand fully a difficult legal text?

5.2. Conveying the meaning into the other language.

Having understood the text, the translator has to render it in *the target language*. An imprecision of language indicates a concomitant imprecision of thought. A translated term in English should accurately convey the meaning of the original Chinese text. Otherwise, it would mislead the target readers. Let's take the legal concept *land ownership* as example. According to the Constitution of 1982 all agricultural land is *owned* by *collectives*. What kind of *right* does a Chinese peasant have on his plot of land, knowing that he may not sell or mortgage it? What means the Chinese term renderend by the English term *ownership*? Wesley Newcomb Hohfeld, in his seminal book on

[6] The court decision Dies v. British and International Mining Corporation Ltd (1939) I, K.B. 724, p. 733, per Stable, J.. Concerning this topic, see the writings of one of the founders of the modern discipline of translation studies, Nida (1964); Nida and Taber (1969).

fundamental legal conceptions as applied in judicial reasoning (1919), attempted to disambiguate the term *right* by breaking it up into eight distinct concepts. He demonstrated that there is no such thing as a legal relation between a person and a thing. A legal relation always operates between two people. The *right* of a Chinese peasant on his land must be defined by using this Hohfeldian analysis. Such a dissection of the *right* of a Chinese peasant on his land needs a more profound study. How to translate the Chinese term rendered by the English term *collectives* which is enigmatic? Instead of the term *collectives*, Jing An and Jiahui Sun (2022) use *rural collective economic organizations*, a paraphrasing, which refers to the three types of collective economic organizations which emerged since the reform and opening up, including town, village and group based on the Agricultural Cooperation Movement and the People's Commune. This translation is an example of a correct and good way of conveying the meaning of a Chinese legal term into a target language[7].

6. Benefits of a translation

What are the benefits of an (authentic or non-authentic) translation, on the one hand, and the hidden reefs and shoals of it, on the other hand? The fact must be stressed that a legal text which is presented in several linguistic versions, enriches the toolbox of the court when it has to interpret that legal text. The timely translation offers benefits also to the drafter or the drafting commission. The advantages or problems created by the translation of a legal text are not limited to plurilingual *statutory* texts; plurilingual *treaties* and commercial *contracts* present the same challenges.

[7] The authors give other interesting examples: State ownership, land, real estate, immovable property, real property / personality rights / quasi-contract / *negotiorum gestio* / unjust enrichment.

6.1. Benefits for the interpretation of the source text

It cannot be denied that a good and nuanced translation which is not limited by a word-by-word rendering, may clarify the original text, and can even be more precise. A seminal case of the Hong Kong High Court, *R. V. Tam Yuk Ha* (1996) illustrates the problem of interpretation of a multilingual normative text in case of divergence between the authentic versions (Hong-Kong Department of Justice 2017)[8]. The lady, appellant, a licensee of a store selling fresh meat and fish, was convicted of placing metal trays outside the designated area of the shop without written permission from the Urban Council. She was found by the magistrate court to be in breach of a by-law, according to which

> "no licensee shall cause or permit to be made in respect of the premises to which the license relates: (a) any alteration or addition, which would result in a material deviation from the plan (…)".

One of the key issues the case turned on, was whether the phrase *any alteration or addition* was in conflict with the corresponding phrase *gēnggǎi huò zēngjiàn gōngchéng* 更改或增减工程 in the Chinese version of the by-law. As the presiding appeal judge argued this phrase clearly means *alteration or addition works*. No one who understands the Chinese language would come to the conclusion that the placing of metal trays would be a *zēngjiàn gōngchéng* 增减工程. In his view the English language term of *addition to the plan* is ambiguous and the Chinese language term is clear and plain. The only reasonable step for the court is to give effect to the text which favors the appellant.

This case concerned a divergence between two authentic language versions. In the case of divergence between an authentic and an *official (or a private)* version also, the non-authentic text may be considered similar to a (possibly contrary) scholarly, doctrinal legal opinion which can be inspiring for the court. There are many

[8] This case was discussed in the following official document: "*A paper discussing cases where the two language texts of an enactment are alleged to be different*", Hong Kong E-Legislation, Database established by the Department of Justice (1998). https://www.elegislation.gov.hk/othdissem?OTH_DISSEM_CONTENT_ATTACH_ID=24

examples of this in the comparative literature, cf. Herbots (1985: 959–972; 1973: 183).

6.2. Benefits for the drafting of the definitive text

Let's now turn to the legislator – or the drafter of a treaty or of a contract – himself. If the translation happens before the enactment or the signature, it can help to enhance the quality of the text which has to be translated. It can at least prevent legal errors. To formulate a thought in another language has often a simplifying or clarifying influence on the drafting in one language. That a legal text is drafted in several languages can sometimes be a blessing in disguise. It obliges to be more careful than usual in choosing the terms, and so often allows discovering that the text of a first project is uncertain or could cause confusion. It happened sometimes in Genève for instance that the English version of a French project expressed the intention of the conference more exactly than the original text; it happened also that one discovered during the translation that a technical term used in a text was inappropriate. Concerning the Swiss Civil Code Gutteridge (1953: 147) writes:

> "The fact that a French translation had to be made of the Civil Code led to a change of the German text to make it match the French expressions; a greater clarity of the German text was inevitably the consequence."[9]

7. Examples of pitfalls and errors in the English translation of the Chinese Civil Code

The medal has, however, another side. The danger of a translation, the hidden reefs and shoals, should be stressed. A translation can be a source of errors[10], and often is. Ivrakis (1960: 214) for instance writes:

[9] My own translation. For this topic see also Keller (1960).
[10] See also Schlesinger (1960: 477).

> "Experience and state practice has demonstrated that so-called official translations of international instruments, supplied by governments themselves, presented at times terminological discrepancies which were more or less misconstructions of the original text."

Let us give some examples of legal errors in the translation of the Chinese Civil Code. A supervision of the translation process by a comparative lawyer's team (like it happens in the Directorate-General of Translation of the European Commission) would have prevented these errors.

7.1. The right of subrogation[11]

An example of misleading translation is to be found in Article 535 of the Chinese Civil Code concerning the *dàiwèiquán* 代位权, a claim *by right of subrogation* according to the English translation. Article 535 is inspired by the French law on the *oblique action*. It is a remedy which enables a creditor of an insolvent debtor to exercise the indolent debtor's claim, except those which are purely personal to him. The creditor is allowed by law to act as representative of the debtor, but he is not *subrogated* in the rights of that inert debtor.

The term *subrogation* in a civil law system points to a concept, which is related to the payment of a debt. This is not the case in the hypothesis of Article 535 of the Chinese Civil Code. The term *subrogation* indicates that if another person than the debtor, for instance a surety pays the creditor, that person is *subrogated* into the place of the paid creditor. Who pays, steps into the shoes of the paid creditor. The claim of the paid creditor is not discharged, but passes to the person who paid, together with possible other securities held by the paid creditor. In the different hypothesis of Article 535 of the Chinese Civil Code, namely the indolence of the insolvent debtor to exercise his claim against his own debtor, the creditor of the inert debtor is not *subrogated* in the rights of his inert debtor. It is misleading to use the translation *by subrogation* instead of *by way of an oblique legal claim*. For a translator who is only a linguist,

[11] The erroneous usage of the concept of subrogation was already pointed at and discussed by Herbots (2021).

however, a correct legal translation of Article 535 was an impossible task. Indeed, the legal term *oblique legal claim* does not exist in the English language, for the good reason that the "oblique legal claim" is unknown in the *common law*. This may make us think of the difficulties of the drafting commission of the Chinese Civil Code of 1930, which had to translate into Mandarin German legal terms like *Treu und Glauben* (*good faith*) which did not exist in Mandarin. Likewise *oblique action* does not exist in the *common law*.

The cited German private translation of the Chinese Civil Code follows the lead of the English translation. The blind leading the blind… It uses the term *Subrogationsrecht*, adding however prudently in footnote *Wörtlich: Recht zur [Ausübung eines Rechts]anstelle [des Schuldners]*.

7.2. The commission contract[12]

A second example can be found in the nominate contracts related to agency, i.e. the legal representation of a person, a general concept which is treated in the General Part of the Chinese Civil Code (Articles 161 and following). The two discussed nominal contracts are the *wěituōhétóng* 委托合同(Article 919) and the *hángjìhétóng* 行纪合同 (Article 951).

The *wěituōhétóng* 委托合同 is translated by a neologism, *entrustment contract*. In the German translation of the Chinese Civil Code it is translated by *Geschäftsbesorgungsvertrag*, [although it is said in footnote *wörtlich: Auftragsvertrag*]. This neologism is not wrong, but for clarity's sake it would be preferable to choose *mandate contract* (or agency contract, agency being used already in the official translation of Book I, the General Part, of the Code). The concept of mandate is very well known in continental law.

The *hángjìhétóng* 行纪合同 is translated by *brokerage contract*. This is clearly a wrong translation. The German Commercial Code regulates a contract, called *Kommissionsvertrag*, by which a person desirous of purchasing or selling goods or securities gives a

[12] The incorrect translation of the notion of *hángjì hétóng* 行纪合同 was pointed at and explained by Herbots (2021).

mandate to an intermediary versed in this type of business (*Kommissionär*). The customer giving the mandate is called the *Kommitent*. The *Kommissionär* dealing with a third party, acts in his own name, but for the account of the *Kommitent*, receiving for his services a commission (a percentage of the sales price). This concept is unknown in the English *common law*. The contract is the model for the Chinese nominate contract *hángjìhétóng* 行纪合同, which should by consequence be translated by *commission contract* for lack of a better word. The German private translation says correctly *Kommissionsvertrag*. In the *common law* a brokerage contract is not precisely defined. It is not advised to translate a well defined concept by a vague concept of another law system.

A third nominate contract, called in the official translation of the Code the *intermediary* contract, does not concern the concept of representation. The Chinese intermediary - unlike the English broker - does not conclude a contract and does not represent his client. His services consist only in bringing the two (future) contracting parties together. In the German private translation that particular nominate contract is rendered literally by *Vermittlungsvertrag*. *Maklervertrag* would be more adequate.

7.3. The trust

Two examples of clear translation errors in the English versions of the Chinese Civil Code were given above. The *common law* concept of 'trust' (used to translate the Chinese term *xìntuō* 信托 illustrates the challenge created by the translation of a Chinese legal text into English. The non-paraphrasing of the term *trust* may create confusion and may therefore also be characterized as an error.

In China, the *trust idea* appeared when, at the end of the 19th century, so-called trust companies were introduced. That was first in 1890 a company based on Japanese capital, and then in 1913 the *Dalian trust company*, followed by others. The financial unrest in 1921 convinced the republican government of the necessity to regulate (only) *administratively* those financial institutions. Surprisingly, the trust industry developed without any legal basis. There was a dichotomy between the buoyant life of the so-called trust-companies

in the sectors of banking, insurance and securities and the law; a dichotomy in other words between the economists and the lawyers. The lawyers had to wait and the first 'trust' law was enacted in 2001, modeled on other Asian systems. However, in this Chinese law of 2001 the trust is *not conceptualized* (Jian 2021). Since, after the economic reforms of Dèng Xiǎopíng, one started to work on the drafting of a future Civil Code, a possible integration of a trust law in the Civil Code was discussed, but in the definitive version of the Code of 2020 the trust – or any trust-like device like the (French) fiduciary contract – was left out of the Code, except in one Article, namely Article 1133,4. It only mentions the *trust*, stating that "a natural person may, in accordance with law, create a testamentary trust". The 'trust' law of 2001 is retained *outside* the Code, as a separate law for financial institutions only. The Chinese Civil Code of 2020 continues the Civil law tradition followed since the very beginning of the reception of Western law in China, and refuses to integrate the trust.

It is well known in comparative law that the trust and the trust law are very typical for the *common law*. It is impossible to insert it as such in a Civil law system, like the Chinese or the German one (notwithstanding the possible creation of trust-like devices which can be conceived, as the French legislator did in 2007). A trust-like device as the French *fiducie* (fiduciary contract) has to match the requirement of coherence with the legal Civil law context. An Anglo-American trust is not a contract, and belongs rather to the domain of the 'real rights'. A fiduciary device is a (nominated of innominated) contract. So, again, let us not mix apples and oranges. Nothing in Chinese law forbids an individual, however, to make a fiduciary (trust-like) contract or a testament providing for a *separate fund* at the disposition of *a beneficiary* and *created by* a fiduciary *contract*. That seems the meaning of Article 1133.4.

In the already cited German translation of the Chinese Civil Code the term *xìntuō* 信托 in Article 1133 (in the English translation *trust*), is rendered by *Treuhand*. One should keep in mind, however, that the German case law does not recognize the institution of the trust, as it is incompatible with the dogmatic foundations of German law. Nowhere in German law any single institution can be found which *by itself* performs all the functions for which the *common law*yer deploys the trust. However, contemporary German law has several 'trust-like devices', which work differently, but perform functions similar to the 'trust'. In some situations a person holds rights

for the benefit of another, via a device described by the umbrella term '*Treuhand'*. So, *Treuhand* may refer to the *Treuhandanstalt*, an agency of the German government charged with privatizing numerous state-owned companies in East Germany some time before the reunification of Germany in 1990.

The word *Treuhand*, however, is not a clear term in German; it can, moreover, not be exclusively described as *an Anglo-American trust* (Gvelesiani 2016: 93). It has no equivalent in English. *German trust-like device* – is the best English translation of the term *Treuhand*. This analysis will help to get rid of the ambiguities of the translation. In the same vein it would be preferable not to translate the term *xìntuō* 信托 in Article 1133.4 of the Chinese Civil Code as 'trust'. The term *trust* in the English translation of the Chinese Civil Code and the term *Treuhand* in the private German translation are both ambiguous. 'Chinese trust-like device' would be better to render the concept of that device with Chinese characteristics, called *xìntuō* 信托 in the Chinese legislation and in the practice of the financial institutions.

8. Conclusion: clearer text, better law

At the start of the modernization of the Chinese law the source language for the translation of western model texts was German. The challenge for the translators consisted in finding and inventing Chinese indigenous concepts to render the unknown German concepts. At the moment of the reform and opening up of the economy of the PRC in 1978 the new legal terminology was assimilated and digested. The modern Chinese law had now to be in his turn translated into English, the worldwide *lingua franca*. This means a new challenge for the translators. It becomes crucial not to introduce in the Chinese law foreign (*common law*) concepts via the English translation. This would lead to misunderstandings of the own Chinese law.

The translation of a legal text must not only be linguistically good, but also juridically correct. In order to enhance the juridical quality of a translation two techniques are available. The translation of a multilingual legal text – be it a bill, a project of a treaty or of a commercial contract – should be effectuated not only by linguists –

how excellent they may be –, but in cooperation with specialized comparative lawyers.

Moreover it is suggested that the original text should be translated *before* the enactment, or *before* the signature of the treaty or the commercial contract, and not, as is actually the case, *after* that moment. The drafter or the drafting commission would then still have the time to improve the quality of the text by taking into account what the difficulties of the translation – whether *authentic* or simply *official* – revealed about the original text. Hence, the redaction of the definitive text will become clearer. How clearer the text, how better the law.

Three examples of legal errors in the translation which could have been avoided if there had been a supervision of the translation by a team of comparative lawyers, were selected in the Chinese Civil Code: Article 535 does *not* create subrogation; the *hángjìhétóng* 行纪合同 in Article 951 is *not* a brokerage contract; the *xìntuō* 信托 in Article 951 is *not* an Anglo-American trust.

Those mistakes don't, however, create a pressing problem for a court, because the Chinese Civil Code has *only one* authentic text, so that the court is not obliged to reconcile the divergent language versions.

Even for a *non-authentic* translation of a Chinese statutory text – like it is the case for the Civil Code – a supervision of the translation as described above is desirable. A non-authentic translation too can, as we saw, play a role in the interpretation of the multilingual text. A good translation enriches the toolbox of the court. And may the comparative lawyer have the last word? A good English translation will allow a more intense academic dialogue and more fertile discussions between specialists in the concerned branch of the law.

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