

## **The art of translation: Practical considerations when dealing with translation in an arbitration process**

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**An arbitration involving a contract dispute can often come down to a few key words or terms in the contract. What if that contract is in another language and needs to be first translated into English? How do you make sure your case is not "lost in translation"? Translation can impact the interpretation of your contract. It can increase cost and impact arbitral timelines. The solutions to resolve these problems are not always obvious or easy. This article discusses some of the practical issues that counsel should consider when dealing with translation in an arbitration process.**

Your client is party to an arbitration involving a contractual dispute. Your arbitration panel and counsel are all Canadian and English speaking. But, the key contract—and other key documents—are in another language. How might these factors impact your arbitration process?

This article highlights some of the practical issues that counsel should consider, including:

- The "art" of translating documents,
- How the arbitral process and timeline might be impacted by translations, including disputes that might arise, and
- The use of translation and transcription of oral testimony at the hearing.

The implications for your arbitration can be significant. As with many contract disputes, the entire case may come down to a few key words in a contract. If those words need to be first translated into English, the entire case may come down to how the translator interpreted those key words.

### **Translating documents for arbitration**

Translation is an art, not a science. An English word may have multiple translations in another language, depending on the sentence in which it is found, the country or region of the person who drafted the words, or the context of the case. Take the word "apricot". According to Rennert Translation Group:

- In most countries: apricot is "albaricoque"
- In Argentina, Chile, Uruguay: apricot is "damasco"; and
- In Mexico: apricot is "chabacano".
- In Spain, "saying that someone is "chabacano" means he is vulgar".

In other cases, a word may have no single translation. Multiple translators may come up with translations that are—sometimes unpredictably—different.

Counsel should consider the following issues:

- **Process and person for the initial review of documents in a foreign language.** Given the cost and time associated with translation, often, you will only translate documents you intend to rely on (and submit to the panel). As a result, your first reviews will be done with documents in their original language. Do you have in-firm reviewers capable of reading the language or will you have to retain outside review assistance?
- **Your own translator or agreed common translator.** The issues here are cost and control. Retaining your own translator will cost more but you have more control over the translation process and outcome. This may, however, mean that the parties obtain different translations of the same document. Consideration should be given to how the parties will resolve any disputes about two (or more) translated versions of the same document. If the parties agree to a common translator, consider whether you then agree to be bound by the translation.
- **Is your translator's country or region of origin important.** If it is, consider carefully your translator's background or the ability of your translation company to provide the translator with the requisite background.
- **The volume of translations.** If there are a large quantity of documents, it is likely that translation will be done by multiple translators (with different experience and backgrounds) to meet your arbitral timelines. This can lead to problems with consistency. For example, if the same term or clause is repeated in different documents (often the case in multiple letters that go back and forth between parties), the translations of that clause within those letters often vary. Translations should be double checked for consistency.
- **Costs.** The cost of translation can be significant. If long contracts are involved or the volume of documents is high, your translation costs can quickly turn into one of the most significant costs of your arbitration, though you may be able to recover those costs as part of your costs award if you are the successful party.

### Effect on arbitral timelines

Translation takes time. If the volume of documents is high, the time required may be significant.

The timelines for steps of a typical arbitration leading to the hearing may have to be extended to account for translation time. If translation is required on an expedited basis you are likely going to be charged a rush fee and any secondary review the translation company would typically do prior to certifying the translation might not be completed.

Translation might affect timelines at initial stages of production (particularly production of the documents you intend to rely on) as well as the production of documents that come to light through document requests at a later stage. Counsel should consider whether only those documents submitted to the panel will be translated into English or if other documents that might be requested will be translated. If yes, by which party (the requesting or providing party). Typically, the party relying on the document as part of its submissions to the panel pays for the translation.

These decisions will all have an effect on your arbitration schedule.

### **Translation and interpretation at the hearing**

By the time of the hearing, it is likely that issues with respect to the translation of documents will be resolved (or a process will be in place to resolve them). Witnesses may also ask to provide evidence through an interpreter. This raises a new set of considerations:

- **Will the parties jointly retain an interpreter?** If yes, are you then bound by the interpretation? It is often difficult to ascertain how well an interpreter will perform at the hearing (in the same way that it is often difficult to determine how your witness or expert will perform). The same consideration of the qualifications and background should be given to your interpreter as your translator. These are unlikely to be the same individual because the skill sets are different.
- **How do you preserve your ability to object if the interpretation is being done poorly or inaccurately?** It is not uncommon for objections to the quality of interpretation to arise. If counsel does not speak the language (and the panel does not speak the language), consider having your own interpreter at the counsel table to assist. Your own interpreter should be familiar with the documents and issues in advance of the hearing to provide the most effective assistance. Adding a second interpreter has cost and may create complications. In some cases, the interpreters may agree to a different interpretation. If the interpreters cannot agree, the panel should rule on the conflicting interpretations. But a number of questions arise: should the panel make the decision right away or wait until after the hearing is over? Should your interpreter wait to address interpretation issues until the end of the hearing instead of objecting throughout? Should the panel have its own interpreter to assist with the final determination on the correct interpretation? What if opposing counsel is bilingual (and you are not) and wants to raise objections and concerns about the quality of interpretation? Consider a process in advance to challenge the interpretation.

Objections will be easier to resolve if there is a court reporter recording or transcribing in the language of the witness, at the same time that another court reporter is transcribing the English interpretation. It has proven difficult in practice to find court reporters in Canada who transcribe languages other than English or French.

The time, and expense, associated with translation and interpretation can be significant. The solutions to resolve problems that might arise are not always easy. Counsel should try to act collaboratively in anticipating the difficulties and crafting agreed protocols to overcome them.

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