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by Vincent A. Ruiz, Esq., CCEP

From inappropriate cognates to simplified syntax: Accurate translations strengthen compliance

- Individuals' perceptions of the same, unambiguous event are influenced by their native language.
- The use of inappropriate cognates in legal translations, though common, inevitably results in distorted meanings.
- Merely because a third-party contract involves complex concepts doesn't mean a translator should try to achieve literal equivalence to the English source text.
- The morphology and syntax of English-language legal writing often call for the use of resourcefulness in translation, including the use of "plain-Spanish."
- Working to ensure clear and easily-understood foreign language contract provisions is a compliance tool unto itself.

By now, it should be regarded as sheer folly not to translate Codes of Conduct and related compliance policies into the languages of the foreign countries in which a company's employees operate. The same is true for communicating these policies—a task ideally accomplished through a mix of Internet and live training in such foreign languages. These requirements are, after all, some of the specific characteristics of an effective compliance program as outlined by Assistant Attorney General Leslie Caldwell in speeches she gave in 2015. Among the criteria DOJ will use to evaluate compliance programs are the following: "Are the institution's compliance policies clear and in writing? Are they easily understood by employees?"[1]

Ruiz

That the underlying English-language policies should be "clear" and "easily understood" is a common-sense obligation. Yet there are sound reasons—though rarely discussed—to ensure that the translations of these documents meet the same criteria. The issue goes well beyond never having an ostensibly bilingual employee perform the translation just to save expense, even when an in-house or outside lawyer will be reviewing the translation for accuracy and thoroughness. It is also important to appreciate linguistic nuances, while avoiding the temptation to decode English jargon for the sake of convenience.

Complexity is a challenge, not a barrier

If you find yourself among friends who were raised in Mexico and someone congratulates a visibly pregnant woman in the group, you

might hear this follow-up question: *Y ¿cuándo te alivias?* (literally, "And when do you get better?"). By conventional standards, the woman is not "sick" and, from the speaker's perspective, the forthcoming birth will be no less happily anticipated. But the lexical frame of reference in the question concerns the apparent and present discomfort of the mother-to-be. Most native English speakers, on the other hand, would likely focus on the future, using the common idiomatic expression, "And when is the baby due?" In the end, the answer to both questions may well be identical. The lesson here, however, is not that one group is more empathetic than the other, but rather that language differences are never quite as "simple" as they might seem.

When it comes to translated documents that are necessarily more complex than compliance policies—such as contracts with third-party vendors, consultants, and representational suppliers—there is every reason to expect that the "clear" and "easily-understood" standards should apply. Indeed, those standards can be taken as synonymous with making certain the translation truly imparts meaning where the risks of inaccuracies are the greatest.

Consider, for example, a third-party contact provision permitting the company to terminate the contract if it determines, "in its sole discretion," that the third party has violated the FCPA or other specified anti-corruption laws. To state in a Spanish translation that the company may exercise this right *"a su sola discreción"* suggests that the company can make this determination based on its sole "prudence" or "circumspection." The provision, however, instead concerns the company's right to use its *exclusive judgment* as to whether the facts warrant the extraordinary remedy of termination of the contract. A more suitable translation without the inappropriate cognate (*discreción*) would justify termination of a contract if the company concludes, *"a su exclusivo criterio,"* that such a violation has occurred.

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Similarly, the third party likely will be required under the contract to answer *"any* questionnaire or other communication" from the company concerning the third party's ongoing compliance with the representations and warranties it has made concerning FCPA issues. Such a contractual provision is a natural product of a company's need to monitor its third parties. Yet to assert—as even experienced translators sometimes do—that the third party must answer *"cualquier cuestionario u otra comunicación"* is potentially to convey that the third party need only respond to *"any one"* such questionnaire or communication of its choice among possibly several.

The imprecision is hardly surprising: Translators often seek to achieve literal equivalence to the English source text, believing that it serves to impart the complex meaning of the document. The problem is that English in general, but particularly in contracts and statutes, routinely substitutes the word

"any" for "every." Just look at the first sentence of each section of the anti-bribery provisions of the FCPA itself: "It shall be unlawful for *any* issuer…" (15 U.S.C. § 78DD-1); "It shall be unlawful for *any* domestic concern…" (*Id*. § 78DD-2); "It shall be unlawful for *any* person other than an issuer…or a domestic concern…" (*Id*. § 78DD-3) (emphasis added).

In Spanish, as with other Latin-based languages, an indefinite pronoun is generally substituted for a common noun in these instances: "any person who" → "*todo aquél que*" ("all those who"). To avoid the resulting ambiguity, statements of this sort are better expressed by using the word "every" ("*todo*") to include an entirety of persons or things: "*todo cuestionario u otra comunicación*" (i.e., *all* questionnaires or other communications).

For purposes of the FCPA, the same contract will appropriately define a "foreign official." Along with other related provisions, let's say that that contract requires the third party to notify the company immediately if the third party learns that such a "foreign official has acquired an *ownership, voting* or other economic interest in" the third-party entity. The translation might emerge something like this: "*el funcionario extranjero ha adquirido un interés de propiedad, de votación u otro interés económico en* [the third party]." Consider the problems this raises.

- Among other issues surrounding its morphology and syntax, English-language legal writing is notorious for its heavy use of conditional and hypothetical constructions (e.g., "provided that"; "except as may be"; "if"). This example involves dual hypotheticals: foreign official "acquires" → third party "learns." But as expressed here, "*un interés de propiedad*" broadly means one of many possible kinds of "property interests," not necessarily an "ownership interest." That phrase should be translated as "*una participación*" when referring to the holding of an investment or stake in a business.
- The foreign official might be lauded for having developed an interest in voting and elections generally (*un interés de votación),* but of course that is not the kind of risk about which the company need be concerned. What the contract instead calls for is an expression of the concept of acquired voting *rights* in the shares of the third party, so one needs to refer properly to "*derechos políticos*" in the third-party entity.

The use of grammatical transpositions, such as the above replacements of English adjectives with Spanish noun phrases, is common in high-level Spanish translations. It is frequently essential in legal documents to avoid erroneous consequences. In this instance, as appropriately modified, the Spanish clause can now supply the intended meaning: "*el funcionario extranjero ha adquirido una participación, derechos políticos u otro interés económico en* [the third party]."

There's nothing more taxing than . . . well, syntax

Another feature of English language legal writing is its extensive use of restrictive conjunctions and prepositional phrases (e.g., "notwithstanding", "subject to", "in accordance with"). When there are multiple instances of such formulations in the same sentence, an attempt in translation to duplicate the original English syntax can render the sentence extremely flawed.

For example, the same third-party contract might state, "Notwithstanding any other provision of this Agreement, the Company's obligation to pay [the third party] the amounts specified herein shall be expressly *subject to* and *contingent upon* such payments not being prohibited by" applicable anti-corruption

laws. This sentence not only exemplifies the prevalent—and unfortunate—use of the passive voice in English-language legal writing, but the highlighted phrases are nearly indistinguishable, each circuitously conditioning the company's obligation to pay on the lawfulness of the payments themselves under anti-corruption laws. Still, it would not be surprising to find a translation that assumed these two phrases must be dissimilar, or else they would not be utilized alongside one another. In such a circumstance, the translation of "subject to" might be *"de acuerdo con"*—illogically meaning "in accordance with," rather than "contingent" or "dependent upon."

Ultimately, the best solution to this challenge would be to translate the sentence using the active voice and a more direct formulation of the conditional language: "*No obstante alguna otra disposición de este Contrato, la Compañía quedará obligada a pagar las cantidades detalladas en el presente únicamente si cada uno de dichos pagos sea lícito en virtud de* [the anti-corruption laws]" ("Notwithstanding any other provision of this Agreement, the Company shall be obligated to pay the amounts specified herein *only if* each such payment is lawful under [the anti-corruption laws]"). Such is the value of a "plain-Spanish" counterpart to plain English.

Language enlightens compliance

Are any of the above examples, by themselves, likely to render such a contract unenforceable in the United States or a foreign jurisdiction? Maybe not, but in any dispute between the company and the third party, a combination of material inaccuracies in the contract could inexorably lead to challenges by the third party in a court or arbitration proceeding, with possible unfavorable results. Put a contractual disagreement in a litigator's hands, and watch how quickly the attorney begins parsing the words of the agreement.

Equally important, part of an effective compliance program means vetting, auditing, and monitoring third parties. Doing everything to ensure that all provisions of the contractual relationship are as clear and easily understood as possible, regardless of the foreign language in which the contract is written, will make those undertakings less demanding. In turn, if the essence of an FCPA due diligence program is to negate corrupt intent, setting forth unambiguous standards and expectations by which to measure the conduct of retained third parties is a vital step toward helping a company argue it has made a good faith effort to prevent and detect illegal conduct. ✳

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1. U.S. Department of Justice: "Assistant Attorney General Leslie R. Caldwell Speaks at SIFMA Compliance and Legal Society New York Regional Seminar" November 2, 2015. Prepared remarks available at http://bit.ly/caldwell-speech

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