

AFJE Seminar
Friday, 7 November 2003

*ENGLISH DRAFTING –
THE TRICKS & TRAPS*

AVANT-PROPOS

- ⇒ TWO PEOPLE DIVIDED BY A COMMON LANGUAGE
- ⇒ SUBSTANTIVE LAW IS SECRETED IN THE INTERSTICES OF PROCEDURE

SLIDE 1 (a)

Some examples of the Maxims of Equity:

- ⇒ Equity will not suffer a wrong to be without a remedy: equity will intervene to protect a right which, perhaps because of some technical defect, is not enforceable at law.
- ⇒ He who seeks equity must do equity: a plaintiff who seeks equitable relief must be prepared to act fairly towards the defendant (future conduct).
- ⇒ He who comes to equity must come with clean hands: As above, relating to previous conduct.
- ⇒ Equity imputes an intention to fulfill an obligation: where a person is obliged to do some act, and does some other act which could be regarded as a performance of it, then it will be so regarded in equity.
- ⇒ Equity regards as done that which ought to have been done: where there is a specifically enforceable obligation, equity regards the parties as already in the position which they would be in after performance of the obligation (e.g. a specifically enforceable contract for a lease creates an equitable lease).
- ⇒ Equity looks to the intent rather than the form: looks at the substance of an agreement, rather than the form, when deciding what label to give the agreement.

SLIDE I (b)

Les enjeux sont ... très différents
The risk for the draftman...is the same

FRENCH

Article 1162 : "*Dans le doute la convention s'interprète contre celui qui a stipulé et en faveur de celui qui a contracté l'obligation*".

ENGLISH

"Contra proferentem"

SLIDE I (c)

FRENCH	ENGLISH
<p>Article 1156 : "<i>On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes.</i>"</p>	<p>Parol evidence rule : when a contract has been wholly reduced into writing, neither party can adduce evidence of the discussions between them to try to contradict or vary its meaning.</p>

SLIDE I (d)

FRENCH	ENGLISH
<p>Article 1157 : <i>"Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui avec lequel elle peut avoir quelque effet, que dans le sens avec lequel elle n'en pourrait produire aucun."</i></p>	<p>The golden rule : ordinary words must be given their ordinary meanings and technical words their technical meanings, unless absurdity would result.</p>
<p>"Article 1158 : <i>"Les termes susceptibles de deux sens doivent être pris dans le sens qui convient le plus à la matière du contrat."</i></p>	<p>Literal rule : words that are reasonably capable of only one meaning must be given that meaning whatever the results.</p>

SLIDE I (e)

FRENCH	ENGLISH
<i>Article 1160 : "On doit suppléer dans le contrat des clauses qui y sont d'usage, quoiqu'elles n'y soient pas exprimées."</i>	Néant !
<i>Article 1134 : "Les conventions... doivent être exécutées de bonne foi."</i>	Néant !

SLIDE I (f)

"REASONABLE CERTAINTY"

SLIDE I (g)

FRENCH	ENGLISH
<p>Article 1164 : "<i>Lorsque dans un contrat on a exprimé un cas pour l'explication de l'obligation, on n'est pas censé avoir voulu par là restreindre l'étendue que l'engagement reçoit de droit aux cas non exprimés.</i>"</p>	<p><i>Expressio unius est exclusio alterius</i> <i>Ejusdem generis – limitation by categories</i> <i>Noscitur a sociis – limitation by subject matter</i></p>

Our old friends...

⇒ "Without prejudice to the generality of the foregoing"...

⇒ "Including, without limitation..."

⇒ shall include, but not be limited to...

BUT NOT

⇒ "Whatsoever" "howsoever"

A SPOT OF SYNTAX

- ⇒ Tense : Present tense generally
- ⇒ "Shall" for obligation – Avoid "have to"
- ⇒ Use of "may"
- ⇒ Times : forthwith, by, between / from, until
- ⇒ Placing of adjectives e.g. financial institutions or companies

Four basic elements of an English contract :

1. Offer
2. Acceptance
3. Consideration
4. Intention to create legal relations

SLIDE II 1 (b)

... and what is meant by consideration ?

- ⇒ A promisee cannot enforce an obligation by the promiser "*unless he has given or promised something in return*" i.e. money or an obligation
- ⇒ A case of "*you scratch my back and I will scratch yours*"
- ⇒ Consideration need not be adequate i.e. peppercorn rent
- ⇒ Past consideration is not consideration
- ⇒ A unilateral undertaking is not enforceable !
- ⇒ No consideration ⇒ use a deed

SLIDE II 2 (a)

... and what is a deed ?

- ⇒ An agreement is not a *deed* unless "*it makes it clear on its face that it is intended to be a deed by the parties making it, or as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed for otherwise)*")
- ⇒ Wording such as "*THIS DEED*" at the beginning of the document and "*EXECUTED AND DELIVERED AS A DEED*" at the end of the document are clear examples of an intention to create a deed.

- ⇒ When is a deed obligatory under English law :
 - transfer of legal title in land
 - power of attorney
- ⇒ Used when no consideration or doubt over consideration
- ⇒ Limitation period – 12 years as opposed to 6 years for simple contracts

Now therefore in consideration of the promises, mutual covenants and agreements hereinafter contained and for the other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows :

The Sellers acknowledge that they consider the said restrictive covenants and provisions to be necessary to protect the goodwill of the business carried on by the Company and a factor on which the consideration payable by the Buyer is based...

SLIDE III (a)

FAUX AMIS	
FRENCH WORD	CORRECT ENGLISH TRANSLATION
1. Bénéfices	
2. Compensation	
3. Contrôler	
4. Délai	
5. Etudier	

SLIDE III (a)

FAUX AMIS

FRENCH WORD	CORRECT ENGLISH TRANSLATION
1. Bénéfices	Profits (not benefits) unless " <i>au bénéfice de</i> " = in favour of
2. Compensation	
3. Contrôler	
4. Délai	
5. Etudier	

SLIDE III (a)

FAUX AMIS	
FRENCH WORD	CORRECT ENGLISH TRANSLATION
1. Bénéfices	Profits (not benefits) unless " <i>au bénéfice de</i> " = in favour of
2. Compensation	Set off (not always compensation)
3. Contrôler	
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SLIDE III (a)

FAUX AMIS	
FRENCH WORD	CORRECT ENGLISH TRANSLATION
1. Bénéfices	Profits (not benefits) unless " <i>au bénéfice de</i> " = in favour of
2. Compensation	Set off (not always compensation)
3. Contrôler	Inspect / check / verify
4. Délai	
5. Etudier	

SLIDE III (a)

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2. Compensation	Set off (not always compensation)
3. Contrôler	Inspect / check / verify
4. Délai	Deadline / performance date / period (not delay)
5. Etudier	

SLIDE III (a)

FAUX AMIS	
FRENCH WORD	CORRECT ENGLISH TRANSLATION
1. Bénéfices	Profits (not benefits) unless " <i>au bénéfice de</i> " = in favour of
2. Compensation	Set off (not always compensation)
3. Contrôler	Inspect / check / verify
4. Délai	Deadline / performance date / period (not delay)
5. Etudier	Review (not always study)

SLIDE III (a)

FAUX AMIS

FRENCH WORD	CORRECT ENGLISH TRANSLATION
6. Exécution [du contrat]	
7. Important	
8. Liquidation	
9. Préjudice	
10. Renoncer	

SLIDE III (a)

FAUX AMIS

FRENCH WORD	CORRECT ENGLISH TRANSLATION
6. Exécution [du contrat]	Performance of a contract (not execution which means <i>signature</i>)
7. Important	
8. Liquidation	
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SLIDE III (a)

FAUX AMIS

FRENCH WORD	CORRECT ENGLISH TRANSLATION
6. Exécution [du contrat]	Performance of a contract (not execution which means <i>signature</i>)
7. Important	Of size or number, big, large, significant, sizable (only important when " <i>of consequence</i> ")
8. Liquidation	
9. Préjudice	
10. Renoncer	

SLIDE III (a)

FAUX AMIS	
FRENCH WORD	CORRECT ENGLISH TRANSLATION
6. Exécution [du contrat]	Performance of a contract (not execution which means <i>signature</i>)
7. Important	Of size or number, big, large, significant, sizable (only important when " <i>of consequence</i> ")
8. Liquidation	Payment (as well as liquidation of a company)
9. Préjudice	
10. Renoncer	

SLIDE III (a)

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6. Exécution [du contrat]	Performance of a contract (not execution which means <i>signature</i>)
7. Important	Of size or number, big, large, significant, sizable (only important when " <i>of consequence</i> ")
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9. Préjudice	Damage / loss (not prejudice)
10. Renoncer	

SLIDE III (a)

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6. Exécution [du contrat]	Performance of a contract (not execution which means <i>signature</i>)
7. Important	Of size or number, big, large, significant, sizable (only important when " <i>of consequence</i> ")
8. Liquidation	Payment (as well as liquidation of a company)
9. Préjudice	Damage / loss (not prejudice)
10. Renoncer	Waive (not renounce)

SLIDE III (a)

FAUX AMIS	
FRENCH WORD	CORRECT ENGLISH TRANSLATION
11. Transaction	
12. Magistrat	
13. Clause pénale	
14. Garantie	

SLIDE III (a)

FAUX AMIS		
FRENCH WORD	CORRECT TRANSLATION	ENGLISH
11. Transaction	Settlement or compromise agreement (not always transaction)	
12. Magistrat		
13. Clause pénale		
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SLIDE III (a)

FAUX AMIS		
FRENCH WORD	CORRECT TRANSLATION	ENGLISH
11. Transaction	Settlement or compromise agreement (not always transaction)	
12. Magistrat	Judge (not magistrate)	
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SLIDE III (a)

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11. Transaction	Settlement or compromise agreement (not always transaction)	
12. Magistrat	Judge (not magistrate)	
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SLIDE III (a)

FAUX AMIS	
FRENCH WORD	CORRECT ENGLISH TRANSLATION
11. Transaction	Settlement or compromise agreement (not always transaction)
12. Magistrat	Judge (not magistrate)
13. Clause pénale	Liquidated damages (not penalty)
14. Garantie	Warranty (of product) / Indemnity or bond/ in some circumstances "security" BUT NB "Bank Guarantee" "Guarantee" of consumer goods

SLIDE III (a)

FAUX AMIS	
ENGLISH WORD	CORRECT FRENCH TRANSLATION
1. Guarantee	
2. Consideration	
3. Execution	
4. Provision [of a contract]	
5. Material [e.g. loss]	
6. Put Option / Call option	

SLIDE III (a)

FAUX AMIS	
ENGLISH WORD	CORRECT FRENCH TRANSLATION
1. Guarantee	Caution
2. Consideration	
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SLIDE III (a)

FAUX AMIS	
ENGLISH WORD	CORRECT FRENCH TRANSLATION
1. Guarantee	Caution
2. Consideration	Contrepartie (not always consideration)
3. Execution	
4. Provision [of a contract]	
5. Material [e.g. loss]	
6. Put Option / Call option	

SLIDE III (a)

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SLIDE III (a)

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2. Consideration	Contrepartie (not always consideration)
3. Execution	Signature (not execution)
4. Provision [of a contract]	Disposition [d'un contrat] (not provision)
5. Material [e.g. loss]	
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SLIDE III (a)

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SLIDE III (a)

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6. Put Option / Call option	Promesse d'achat / promesse de vente

Joint and several
or
several

A common point of negotiation ; an easy solution but what do these terms mean ???

An example : the facts :

- ⇒ A, B and C together sell an asset to Buyer D for 300,000 €
- ⇒ A receives 150,000 €, B and C each receive 75,000 €
- ⇒ A warranty is given by A, B & C to D
- ⇒ The warranty is incorrect ("breach of warranty")
- ⇒ The Buyer sues the Sellers

Joint and Several Warranties

The warranty was worded...

- ⇒ *"The Sellers jointly and severally represent and warrant to the Buyer..."*
- ⇒ *"Les Vendeurs déclarent et garantissent solidairement..."*

Joint and Several (cont'd)

⇒ 4 undertakings

⇒ Best position for the Buyer

- can pursue A or B or C (or any combination of A, B and C) for **full** loss

⇒ No implied cap on the liability of a Seller unless a joint obligation to pay a debt.

⇒ Therefore A could be obliged to pay to the Buyer 300,000 €.

⇒ If only A is sued, he may seek a "*just and equitable*" contribution from B and C.

Several warranties...

- ⇒ *"Each of the Sellers severally [i.e. individually] warrants to the Buyer...."*
- ⇒ *"Les Vendeurs, agissant sans solidarité, déclarent et garantissent..."*
- ⇒ *Based on the same facts, what is the liability of each seller under French law ... and under English law .*

SLIDE III (g)

Several warranties... (cont'd)

- ⇒ 3 independent undertakings
- ⇒ In an English only transaction often perceived to be the best position for the Sellers but be careful as there is no stated cap on the individual liability of Sellers B&C and the Courts have no obligation to imply one . Therefore Sellers "B&C" could be liable for 300,000 €
- ⇒ Are B&C liable for 1/3 of the claim or 25 % each ? What is the position under French law ?
- ⇒ Under English law ?
- ⇒ If acting for the Sellers in an English deal, it is essential that the liability of each Seller is limited, for example, to the amount of the purchase price received by that Seller
- ⇒ As with joint and several liability, a Seller may seek a "*just and equitable contribution*" from the other Sellers.

Good faith...

- ⇒ In the UK, there is no legally binding obligation to negotiate in good faith
- ⇒ But, there is a moral obligation to do so
- ⇒ Lock-in agreements are not enforceable
- ⇒ Lock-out agreements are enforceable

SLIDE IV (b)

Quote from *Walford v. Miles* – Lord Ackner

The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. A duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly, a bare agreement to negotiate has no legal content.

The Dangers...

- ⇒ In a "*mainly*" English transaction, a French party believing that it is protected by the obligation to negotiate in good faith
- ⇒ In a "*mainly*" French transaction, the English party believing that it is not legally bound to negotiate in good faith towards the conclusion of a transaction
- ⇒ Is there a way out ? Most probably not
 - Strong statement on the non-binding nature of LOI
 - Submit the LOI to jurisdiction which does not recognise good faith negotiations but do not forget Article 3 (3) of the Rome Convention

SLIDE IV (d)

Renegotiation

⇒ If any provision of this Agreement shall prove to be void or ineffective, the parties shall negotiate in good faith to replace the relevant provision with another effective provision as near in intent, period, scope and amounts to that found ineffective or void.

"Blue pencil"

⇒ If any one or more provisions of this Agreement shall be declared to be invalid or ineffective in any respect, but would be adjudged to be valid and effective if part of the wording were deleted or the scope or periods reduced or amounts increased they shall apply with such modifications as may be necessary to make them valid and effective whilst adhering as closely as possible to the original intent, period, scope and amounts of the provisions set out herein and the Parties hereby undertake to make (and execute such documents as may be necessary to effect) such modifications.

SLIDE IV (e)

- ⇒ LOI, MOU, HOA = the same
- ⇒ In the UK, the practice is to make certain provisions non-legally binding (e.g. price, scope of warranties, etc.) and certain provisions binding (e.g. exclusivity, confidentiality, applicable law, etc.)
- ⇒ Frequently the words "*subject to contract*" are used to mean non-legally binding

L'utilisation obligatoire du français

⇒ ***"La langue de la République est le français"***

art. 2 de la Constitution – loi du 15/06/1992, issue de l'article 111 de l'ordonnance du 15 août 1539 (dite de Villers-Cotterêts)

Loi n° 94-665 du 4 août 1994 relative à l'emploi de la langue française (dite "Loi Toubon")

⇒ Emploi obligatoire du français dans un contrat :

- ⇒ conclu avec une personne morale de droit public (sauf EPIC pour exécution à l'étranger)
- ⇒ conclu avec une personne privée exerçant une mission de service public
- ⇒ de travail
- ⇒ conclu avec un consommateur

SLIDE V (b)

Exécution en France des contrats rédigés en anglais

- ⇒ **En Justice, l'emploi du français est obligatoire à l'écrit**
(décisions, assignations, significations, conclusions, etc.)
- ⇒ **les pièces peuvent être produite en langue originale**
⇔ **mais une traduction en français doit être fournie**
(contrôle de la Cour de cassation : risque de rejet/cassation ou d'interprétation erronée par le juge: ex. de "*jurisdiction*")
- ⇒ **Lorsqu'un mot étranger n'a pas, au regard du droit français, un sens rigoureusement établi, il est fortement recommandé, soit de préciser son sens exact, soit d'ajouter le mot en français**

Exécution en France des contrats rédigés en anglais (2)

⇒ Les mesures de bon sens:

- deux versions, dont une seule fait foi
(le français si les juridictions françaises sont compétentes)
- langue anglaise + droit français =
 - 1-arbitrage (ad hoc, CCI), avec débats dans les 2 langues et pièces admises sans traduction
 - 2-Tribunaux français, avec terminologie française mentionnée

Les formalités

Seuls des documents rédigés en français - ou accompagnés d'une traduction en français – ou encore un acte réitératif en français, peuvent être :

- ⇒ déposés au greffe d'un Tribunal de commerce**
- ⇒ enregistrés à la Recette des Impôts**
(traduction certifiée par un traducteur assermenté)