Unraveling Translation Service Contracts

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Let's examine what translation is to the law, what type of contracts translators should have, some of the benefits of having a contract, and resources for drafting one.

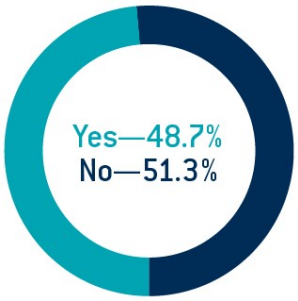
A common misconception about freedom of contract is that, when it comes to agreements between willing parties, pretty much anything goes. Although freedom of contract restricts

government or other forms of interference or control over freely and mutually convened agreements,[1] contracts are still limited by law. Therefore, if the performance, formation, or object of an agreement is against the law, the contract itself is illegal.[2]

In every area of contract law, what's legal and what's not depends on several factors, such as applicable law and jurisdiction. Translation is no exception, and translation contracts are far more complex than they seem. Thus, while one may be inclined to think all that's at stake are deadlines and rates, the truth is that translation contracts govern sophisticated relationships that may cross over jurisdictions or country borders, often involving third parties and even multiple related contracts.

Contracts are a key element of any business transaction, including translation. To better understand how translators operate, I conducted a brief online survey last year, the results of which were also presented at ATA's 57th Annual Conference in San Francisco.

As you can see in Figure 1, when asked about whether or not they used contracts, an alarming 48.7% out of 156 freelance translators answered "No," and an even more astounding 64.1% claimed not to have their own terms of service. (See Figure 2.) The results are surprising, especially when you consider that 82.1% of the surveyed group dealt with direct clients and were not necessarily relying on their clients to provide nondisclosure agreements (NDAs), purchase orders (POs), or any other legally binding document.[3]



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/Arturo_Fig1.png)

Figure 1: Survey Respondents Operating with Contracts

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Figure 2: Survey Respondents Operating with their Own Terms of Service

Translation as a Service

ATA members are probably familiar with ATA's *Translation Buying a Non-commodity—How Translation Standards Can Help Buyers and Sellers*,[4] which clearly explains, from a business point of view, what we mean when we say "translation is not a commodity." But what does that mean from a legal point of view?

Legally speaking, the contract pie is divided into three parts: contracts for the sale of real estate, contracts for the sale of goods, and contracts for the sale of service. Translation falls into the third category. But translation is not just any kind of service. If you look at the United Nations International Standard Industrial Classification of All Economic Activities (ISIC),[5] you'll find translation listed in Section M. This is the section for "*specialized professional*, scientific, and technical activities [that] require *a high degree of training*, and make specialized *knowledge* and *skills* available to the user [emphasis mine]." Translation is also defined under Class 7490 as "service activities [...] for which more advanced professional, scientific, and technical skill levels are required."

The reason translation is legally viewed as a service is because it makes specialist skills available to the user. Translation doesn't require the manufacture or production of goods, nor does it rely on raw materials, which are the standard criteria for something to legally classify as a "good" instead of a service.

Problem Clauses

If translation is such a specialized professional service, where so much is at stake for the end client, why are so many translators operating without the protection of a solid contract? One possible explanation based on the responses of the group I surveyed is that many translators refuse to enter into binding agreements that contain "problem clauses."

When asked specifically about clauses that have stopped translators from signing with clients,[6] the following were cited as being either the most problematic clauses or absolute deal breakers from the point of view of translators:

Spy Clauses: By "spy clauses," I mean any clause in which clients reserve the right to inspect their translator's computer. While such clauses may not necessarily be illegal, they should be reasonable and limited to situations that justify the intrusion, such as government contracts involving national security or other high-stakes translation jobs. Before agreeing to such clauses, translators need to make sure that doing so doesn't conflict with or otherwise breach existing agreements with other clients who could potentially be affected by such inspections. If translators agree and authorize the inspections, they'll need to take necessary measures to protect all private or confidential information and documents belonging to all their other clients.

Indemnity/Limited Liability: Though not illegal, this is yet another clause that should be limited. When it comes to such clauses, a point that often gets overlooked is that clients, brokers (when applicable), and translators are all equally responsible for ensuring that the translator is actually right for the job. Therefore, placing all the burden on a single party may not pass a fairness test.

Notification of Potential Opportunities: This is the clause by which brokers expect their freelance translators to notify them of potential new leads or market opportunities, as opposed to trying to take advantage of the lead or opportunity themselves. Though not illegal, translators must exercise caution in judgment before agreeing to such a clause and make a thorough cost-benefit analysis of the situation.

Non-compete/Non-solicitation/Non-dealing: These clauses are commonly found in agency contracts. Non-compete clauses are legal in the majority, though not all, U.S. states. (They are also illegal in many countries.) In translation contracts, they are basically clauses designed to stop translators from *competing with* their agency client. Non-solicitation clauses, on the other hand, stop translators from *approaching* the agency's clients or prospective clients. The problem with this clause is, of course, the difficulty of knowing who the agency's "prospective clients" are. Meanwhile, non-dealing clauses are far more restrictive than non-compete and non-solicitation clauses, and are designed to stop translators from dealing with clients or prospective clients, *even if the client approaches the translator* and not the other way around. All three clauses are only enforceable in jurisdictions where they are legal and when they are for a set period of time, normally up to one year, though some contracts stipulate up to three.

Payment of Translation Contingent Upon End-client Approval of the Translation/End-client

Payment of the Translation: Though also common in agency contracts, such clauses walk a dangerously thin line. A translator's contract with an agency client is a separate contract from that of the agency with the end client. Unless both contracts are legally interrelated because of the complexity of the business transaction at hand, it's very likely that the clause is unjustified. Interrelated contracts involve specific types of transactions. Contracts don't become interrelated by the mere desire of one party to transfer risk to another.

Copyright: If a translation is intended as a work for hire, then the contract should either read "work for hire" or make it otherwise very clear that the translation is intended as a work for hire. Under U.S. law (as well as the law of many other countries), if there is any ambiguity in wording, then the translator owns the copyright, which can then be sold, transferred, or licensed out.

Terms of Service

When asked "Do you have your own terms of service," an astounding 64.1% of translators surveyed answered "No." When asked why, reasons varied from expecting clients to be the ones doing the drafting to being afraid of scaring clients away. Some respondents claimed email is enough for proof of contract, which is a claim that is only true in some countries.

While one can understand why some professionals are a bit apprehensive of contracts, the benefits of having a solid contract outweigh the hassle or perceived (though unfounded) risk of sending a client your terms and conditions before working on a translation.These benefits include:

- **Protecting Your Business:** Contracts provide a description of responsibilities, establish a timeframe for duties, bind parties to their duties, help secure payment, and provide recourse if the relationship falters in any way. Without a contract, you're unprotected, and if the relationship goes south, it's your word against that of the non-compliant party.
- **Covering Attorney's Fees and Court Costs:** When a translation is small, the amount of money the contract is for is usually also small. Therefore, if the translator doesn't get paid, it may not be worth it for him or her to seek out an attorney and file suit. However, your terms of service can include a provision for reasonable attorney fees whereby the prevailing party in any dispute arising under the translation agreement is awarded his or her reasonable attorney fees and costs. This creates a legal incentive to pay by making it riskier for your clients not to do so.
- **Warding Off Deprofessionalization:** "Deprofessionalization, in its simplest form, is the process by which highly educated and skilled professionals are first displaced and then replaced with individuals of inferior training and compensation."[7] Both the legal and

medical professions are suffering deprofessionalization through the "substitution of standardized practices and protocols for existing methods of production of professional services."[8] It has been argued that the trend toward deprofessionalization is affecting the translation profession as well.[9] Deprofessionalization often results from the notion that no special qualifications are required to do a certain job. The overall lack of entry barriers to the profession, widespread misconceptions about bilingualism and translation, misrepresentations about advancements in machine translation, and other similar trends contribute to the deprofessionalization of translation. Against that backdrop, I would argue that a well-drafted contract that takes into consideration all the complexities and nuances involved in a translation helps increase the client's perceived value of what we do, creates awareness about what separates professional translators from amateurs, and helps counter the trend toward deprofessionalization.

Resources for Drafting Contracts

Whether you're among the 64.1% of translators who don't have their own terms of service, or you have terms of service and want to update them, some excellent resources include ATA's Translation Job Model Contract,[10] PEN America's Translation Contract for Literary Translators,[11] and PEN America's Translation Contract Checklist.[12] Of course, these models will need to be adapted to your local law, jurisdiction, and particular business setting, so seeking appropriate legal advice from a lawyer in your area is also recommendable. While standard clauses are available online, the way the courts interpret such clauses may vary from one jurisdiction to another. A qualified legal professional in your area can help you adapt them to your particular needs.

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Notes

1. Freedom of contract is "a judicial concept that contracts are based on mutual agreement and free choice, and thus should not be hampered by undue external control such as government interference." *Black's Law Dictionary* (10th edition, 2014), 779.
2. Atiyah, Patrick S. *An Introduction tothe Law of Contract*, third edition (Oxford: Clarendon Press, 1981).
3. Here is the link to the Translation Contracts Survey: http://bit.ly/contracts-survey

(http://bit.ly/contracts-survey).

4. *Translation Buying a Non-commodity—How Translation Standards Can Help Buyers and Sellers*, www.atanet.org/docs/translation_buying_guide.pdf (http://www.atanet.org/docs/translation_buying_guide.pdf).
5. United Nations International Standard Industrial Classification of All Economic Activities, http://bit.ly/ISIC-classification (http://bit.ly/ISIC-classification).
6. In this section, I use the term "client" in its broadest possible sense to refer to both direct clients as well as brokers and agencies.
7. Dionne, Lionel. "Deprofessionalization in the Public Sector" *Communications Magazin*e, issue 1, volume 35(The Professional Institute of the Public Service of Canada, Winter 2009), http://bit.ly/Deprofessionalization (http://bit.ly/Deprofessionalization).
8. Epstein, Richard A. "Big Law and Big Med: The Deprofessionalization of Legal and Medical Services," *International Review of Law and Economics*, Volume 38 (Elsevier, June 2014), 64-76, http://bit.ly/law-deprofessionalization (http://bit.ly/law-deprofessionalization).
9. Pym, Anthony. "The Status of the Translation Profession in the European Union," http://bit.ly/deprofessionalization-translation (http://bit.ly/deprofessionalization-translation).
10. ATA Translation Job Model Contract, http://bit.ly/ATA-model-contract (http://bit.ly/ATA-model-contract).
11. PEN America's Translation Contractfor Literary Translators, http://bit.ly/literary-translation-contract (http://bit.ly/literary-translation-contract).
12. PEN America's Translation Contract Checklist, http://bit.ly/contract-checklist (http://bit.ly/contract-checklist).

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