CONTRACTS 101

Paula Arturo

Lawyer-Linguist

I'm a lawyer, translator, and former law professor. I'm a partner at Translating Lawyers, a boutique firm specializing in legal translation by lawyers for lawyers. I've been a translator for 15 years and in that time, in addition to various legal and financial documents, I've also translated several highly technical law books and publications in major international journals for high-profile authors, including several Nobel Prize Laureates and renowned jurists. Among other things, I'm currently a head of IAPTI's Legal Affairs Department, member of the American Translators Association's Ethics Committee, member of the ATA Literary Division's Leadership Council, and member of the Public Policies Forum of the Supreme Court of Argentina.

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Contract Checklist

If you do both literary and work-for-hire translations, make sure you have one template for each. Many translators have just one template for everything and that can cause problems in the long run.

Contract Checklist

Literary

Delivery and obligation to publish; payment and rights; royalties and subsidiary rights; copyright; editing and acceptance; credits

Work-for-hire

Engagement of service; payment, invoicing, and delivery; confidentiality and nondisclosure; indemnification; term and termination

Boilerplate Provisions

Same for both

Sample Provisions

In this part of the presentation, we will look at specific provisions and examples of what they look like. Please remember that the following provisions are provided as a sample and for educational purposes only. DO NOT use without consulting with a licensed attorney in your area.

Engagement of Service

The following text is provided as a sample for educational purposes only. DO NOT use without consulting with a licensed attorney in your area.

The Client may issue work-for-hire assignments (hereinafter “a project” or “projects”) to the Translator in any form, including in the text of an email, that outlines the parameters of the project (which may include, but is not limited to, services provided, delivery time, budget, project specifications, etc.) to be performed by the Translator. Subject to the terms of this Agreement, the Translator will render the services set forth in each project assignment accepted by the Translator according to the terms and by the completion dates set forth in each project assigned.

Payment, invoicing and delivery

The following text is provided as a sample for educational purposes only. DO NOT use without consulting with a licensed attorney in your area.

Payment is within 30 days of invoice. Payments can be made via bank transfer (transfer information sent separately by e-mail) or PayPal and any service fee charged by PayPal shall be paid by the Client. Before starting any translation, editing or proofreading project, for a first-time client, unless otherwise agreed, 50 percent of the total estimated cost of the project is required as an advance for our services. If the remaining payment is not received within 30 days of the date of invoice, an annual late payment fee of 10 percent of the total amount overdue will apply from the date of invoice to the date of payment. Conversely, if the Client chooses to pay the full estimated amount in advance, a 5 percent discount will apply to the total estimated amount.

Confidentiality

The following text is provided as a sample for educational purposes only. DO NOT use without consulting with a licensed attorney in your area.

"Confidential Information" as used in this Agreement means any and all technical and non technical information related to the Client, its business, its clients or any translation project, including but not limited to, the text of any documents delivered to the Translator by or on behalf of the Client and any transaction thereof prepared or reviewed by or on behalf of the Translator.

Nondisclosure and Nonuse Obligations

The following text is provided as a sample for educational purposes only. DO NOT use without consulting with a licensed attorney in your area.

Except as permitted in this paragraph, the Translator will never use or disclose the Confidential Information. The Translator may use the Confidential Information solely to perform project(s) assigned by the Client, ensuring the same degree of care as the Translator accords to the Translator's own confidential information, but in no case less than reasonable care.

Indemnification and hold-harmless

The following text is provided as a sample for educational purposes only. DO NOT use without consulting with a licensed attorney in your area.

Client shall indemnify Translator against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other reasonable professional costs and expenses) suffered or incurred by Translator arising out of or in connection with [*insert possible scenario*].

OR

Client agrees to indemnify and hold Translator harmless from any and all losses, claims, damages, expenses or liabilities (including reasonable attorneys' fees) which Translator may incur based on information, representations, reports, data or product specifications furnished, prepared or approved by Client for use by Translator in the work performed under this Agreement. (ATA MODEL CONTRACT)

Boilerplate Provisions

Lawyers use the word “boilerplate” to refer to any standardized or “one size fits all” provision. In my opinion, this is a misnomer because these provisions actually regulate significant business and legal issues, especially in translation agreements, which are often international or interrelated with other agreements.

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Standard Governing Law Provision

The laws of the State of New York, without giving effect to its choice of law principles, govern all matters with respect to this Agreement.

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The laws of the State of New York, without giving effect to its choice of law principles, govern all matters with respect to this Agreement*, including all tort claims*.

OR

The laws of the State of New York, without giving effect to its choice of law principles, govern all matters *arising under or relating to* this Agreement.

Remedies

THE UNIVERSE OF WAYS AN AGGRIEVED PARTY CAN GO ABOUT BEING MADE WHOLE

Two key considerations:

1) What do you want from the other side if they fail to comply (for example, if they fail to pay on time)?
2) How much are you willing to be responsible for if you fail to perform? Are you willing to reduce price for late delivery, for example?

Damages

ONE OF MANY TYPES OF REMEDIES

Damages are usually a dollar amount. However, because as a general rule all remedies are cumulative, limiting damages to a specific dollar amount does not limit other available remedies without adding additional language making it clear that the parties want to limit remedies to said dollar amount.

Force Majeure

WHEN DRAMATIC CHANGES IN CIRCUMSTANCES STOP YOU FROM PERFORMING

In the U.S. a negotiated force majeure provision should address both case law interpreting these provisions and the concerns of the parties relating to particular risks. In codified countries, such as continental European countries, Latin American countries, some Asian countries, your clause can simply remit to the applicable article in your Civil and/or Civil and Commercial Code.

Unforeseeability is key

IF THE EVENT IN QUESTION IS IN ANY WAY FORESEEABLE, IT'S NOT FORCE MAJEURE

The essence of a *force majeure* event is that the act or event must be beyond the reasonable control of, and not the fault of, the nonperforming party. Example, power outages in Argentina.

Amendment

CAN RESULT IN TUG OF WAR WHEN ORAL MODIFICATIONS ARE MADE, ESP. OVER THE PHONE

Clients will sometimes agree to certain terms of service in writing, then change them when the project is already ongoing, and later try to enforce what was in the written agreement if the written agreement is more beneficial to them (e.g. payment, client agrees to pay advance over the phone, even though an advance was not stipulated in your T&Cs).

YOU CAN WRITE A PROVISION BY WHICH YOUR PHONE CONVERSATION TRUMPS YOUR T&CS OR YOU CAN CHOOSE NOT TO AGREE TO ANY MODIFICATIONS THAT ARE NOT STIPULATED IN WRITING

This Agreement may be amended only by written agreement of the parties.

OR

This Agreement may not be amended, except by written agreement of the parties.

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Severability

IN THE ABSENCE OF A SEVERABILITY PROVISION, COURTS WILL EITHER:

1) Sever an illegal provision but enforce the remainder of an otherwise legal contract; or
2) Decide that the invalid provision has “contaminated” the entire contract and rendered it unenforceable as a whole.

This depends on whether or not the unenforceable clause is clearly separate, distinct, and independent from the other provisions in the agreement.

TRANSLATION CONTRACTS DON’T ALWAYS NEED SEVERABILITY PROVISIONS. THEY ARE USUALLY RECOMMENDED WHEN OUTSOURCING OR WHEN CHOICE OF LAW MAY BE A PROBLEM

If any provision of this Agreement is held invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of this Agreement are not affected or impaired.

OR if you want open the door to negotiations for modifying illegal terms

If any provision of this Agreement is held invalid, illegal or unenforceable, the parties shall negotiate in good faith so as to replace each invalid, illegal or unenforceable provision with a valid, legal and enforceable provision which will, in effect most nearly and fairly approach the effect of the invalid, illegal or unenforceable provision and intent of the parties entering into this Agreement.

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Governing Law (US only)

IF BOTH PARTIES ARE IN THE US, YOU CAN HANDPICK BOTH THE FORUM AND SUBSTANTIVE LAW MOST BENEFICIAL TO YOU. DOING SO HAS TWO ADVANTAGES:

1) Protect yourself from a particular forum's mandatory, onerous, laws (such as an excessively short statue of limitations); and
2) Protect yourself with the laws of a particular jurisdiction, which may not exist or be enforceable somewhere else.

Choice of law

The laws of the State of [insert state] (without giving effect to its conflict of laws principles) govern all matters arising out of or relating to this Agreement, including, without limitation, its validity, interpretation, construction, performance, and enforcement.

Designation of Forum

Any party bringing legal action or proceeding against any other party arising out of or relating to this Agreement may bring the legal action or proceeding in the United States District Court for the [insert district court location] District of [insert state name] or any court of the state of [insert state name] sitting in [insert city name].

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Governing Law (international contracts)

IF YOU ARE IN A DIFFERENT COUNTRY FROM YOUR CLIENT, YOU SHOULD CONSIDER THE FOLLOWING:

1) Even if the governing law is that of your country and you choose a local forum, you still may not be able to enforce your contract.
2) Talk to a lawyer in your country who specializes in international private law to see what the best choice is for you.
3) Find out if your local translators organization acts as arbitrator.

When discussing choice of law, make sure to ask your lawyer the following questions:

- Does the legal system in question have a good reputation for providing contractual and regulatory fairness and certainty?
- Is that legal system commonly used as governing law in international commercial contracts in general and in translation contracts in particular?

Also keep the following question in mind:

- Does that legal system provide easy access to sufficient numbers of high quality experienced commercial lawyers (this will be important in the event of a dispute under the contract)?

Alternative Dispute Resolution

YOU MAY WANT TO AVOID THE COURTS ALTOGETHER IF A DISPUTE ARISES. IF SO, ARBITRATION MAY BE A GOOD OPTION

1) Arbitration can provide a faster and less expensive method of dispute resolution than litigation.
2) If there is no arbitration clause, you'll have to litigate (some exceptions).
3) Unlike the decision of court judges in the court system, the decisions of arbitrators are final and nonreviewable (some exceptions).

SOME CONSIDERATIONS

If you decide to arbitrate, you'll need to address:

1) Scope of the arbitration
2) Selection of arbitrators
3) Procedures to be followed (when applicable)
4) Applicable body of law

Who can arbitrate?

In the US, the American Arbitration Association under its Commercial Arbitration Rules.

Abroad, some translators associations and international arbitration associations.

Any person designated in your contract, including company managers.

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Broad Scope Arbitration Clause

Any controversy or claim arising out of or relating to this Agreement, or its breach, is to be settled by arbitration administered by [organization] in accordance with its [subject matter] Rules.

OR

The parties agree to submit to arbitration administered by the [organization] under its [subject matter] Rules the following controversy: [describe briefly].

Narrow Scope Arbitration Clause

Any controversy or claim arising out of or relating to [insert scope, .e.g. payment] provisions of this Agreement is to be arbitrated. All other controversies or claims arising out of or relating to this Agreement is to be adjudicated.

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Choice of Law Clause in Arbitration

The arbitrators are to interpret all controversies and claims arising under or relating to this Agreement in accordance with the laws of [state or country], without regard to its choice of law principles.

Venue

The arbitration is to be conducted in [insert city], [insert state or province], [insert country].

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Thanks