From Jumping Frogs to Graffiti-Painted Walls: Legal Issues Caused by Mistranslation in International Commercial Arbitration

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by

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I. Introduction

In his 1903 book “The Jumping Frog – in English, then in French, then Clawed Back Into Civilized Language Once More by Patient Unremunerated Toil,” Mark Twain sought revenge over a poorly translated French version of his celebrated tale about the jumping frogs of Calaveras County. The re-translation into English was supposed to demonstrate the French translator’s incompetence (“eh bien! I no see not that that frog has nothing of better than another.”1). Twain must have thought this to be the only suitable response to the disappointing French treatment of his work. Today, he would likely have hurried to the nearest courthouse to file suit.

With the tremendous growth of world business over the past century, the need for commercial language services has risen significantly too. However, the types of translation2 problems encountered since the Twain era have not disappeared, in fact, quite the opposite. Furthermore, with the invention and popularity of the Internet has come a huge proliferation of translator and translation agency providers often making it very difficult, if not impossible, to distinguish the good from the bad. This is especially so because most translation contracts are not negotiated in person, but rather through email or over the phone because of the very long-distance nature of international business, and hence translation, where trust is often placed in parties in distant locations. In combination with a general lack of awareness about and standards for quality language services, the area is ripe with problems that can and often do cause significant legal problems. This article will analyze such problems and their legal outcomes.

1 Mark Twain, The Jumping Frog – in English, then in French, then Clawed Back Into Civilized Language Once More by Patient Unremunerated Toil 54 (1903).
2 “Translation” refers to the written reproduction of one writing (the “source” text) into a second language (the “target” text). Translation is also often known as “localization.” “Interpretation” is the rendition of a spoken language in another language either simultaneously (as seen, for example, during United Nations and European Union conferences and meetings) or consecutively, when the speaker relays part of the message to an interpreter who then conveys it to the audience in the target language (as is often done in court proceedings). For simplicity, this article will use the term translation when referring to written products.
After briefly examining the international financial significance of language services, the article will describe the types of linguistic challenges that professional translators face. This will provide a better understanding of the translation-related deficiencies that may arise in modern translation contexts. Next, the article will examine existing legal translation standards in select arbitral conventions, institutional rules and national legislation. The article will proceed to analyze a range of legal challenges caused by mistranslation and their potential outcomes in arbitral and post-arbitral proceedings. Finally, the article will propose possible solutions to the demonstrated problem of the lack of quality standards for and regulation of modern commercial translation.

II. The Demand for International Language Services

In the aftermath of September 11, 2001, the importance of reliable language services came to the forefront of the attention of national governments and the general public alike. For example, when an investigation found that “millions of hours of al Qaeda conversations had been intercepted by the United States, but were not translated until after the 9/11 attacks, the critical shortage of qualified translators and interpreters in the United States made for major headlines.”

This situation has not improved, which could turn disastrous for the soon-to-be former Guantánamo detainees. Preliminary hearings have already presented significant linguistics obstacles such as the defendants being unable to understand the proceedings against them, a problem which, according to Human Rights First lawyer Deborah Colson, “really undermines the system as a whole.” Professor of law Anthony Barkow, who in his prior career as an assistant U.S. attorney prosecuted terrorist sympathizers and who observed some of the ongoing

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3 For brevity’s sake, this article focuses on arbitral proceedings and post-arbitral enforcement proceedings rather than regular litigation.
5 Larry Neumeister, Ex-prosecutor Critical of Guantánamo Trials, the Miami Herald, November 29, 2008, at 5A.
proceedings in September 2008, explains that “some interpreters are simply not up to their tasks,” which led to “deathly slow and inefficient” proceedings in which interpreters sometimes got the message wrong even when working at “half speed.”

The importance of acquiring professional translation and interpretation services is equally apparent in modern international business and arbitral circles. The United States Department of Labor recently reported that the employment of translators and interpreters is projected to increase 24% over the 2006-2016 period, much faster than the average for all occupations. This reflects not only the “broadening of international ties,” but also an “increase in the number of foreign language speakers in the United States” as well as the growing need for language services in “health care settings.”

It still remains to be seen how the current economic downturn affects the language sector in particular, but the billion-dollar language industry recently experienced annual growth rates of 7.5%. The 2008 estimated translation industry turnover in the USA was $4.5 billion (42% of the global market share for language services), $4.4 billion in Europe (corresponding to a 41% market share), $1.3 billion in Asia (with a 12% market share) and $547 million in the rest of the world (representing the remaining 5% market share). Those numbers are still expected to jump to $5.3 billion for the USA, $5.2 billion for Europe, $1.5 billion for Asia and $632 million for the rest of the world by 2010.

English is without a doubt still one of the world’s most important languages seen from a commercial point of view. But although it dominates international business and legal

7 Careers, *supra* note 4 (citing Dep’t of Labor Statistics)
8 *Id.*
11 *Id.*
proceedings, it is far from the only language used, even by major institutions such as the Court of Arbitration of the International Chamber of Commerce (“ICC”).\textsuperscript{12} In 2003, only approximately 75\% of this Court’s awards were rendered in English.\textsuperscript{13} The second-most frequently used language was French followed by Spanish, German, Portuguese, Russian and Hungarian.\textsuperscript{14} Similarly, as the value of commercial disputes increase, the more likely it is that arbitral proceedings will be conducted in another language than the local language, at least in the case of institutions seated in non-English speaking countries.\textsuperscript{15} For example, in 2002, the Hungarian Court of Arbitration heard a total of thirty cases of which eight (or 27\%) were conducted in a foreign language.\textsuperscript{16} However, of the total of nine cases with a value of more than EUR 100,000, five were conducted in a foreign language, corresponding to 55.6\%.\textsuperscript{17} Readiness and ability to hear cases in another language than that used in the host country of the institution is thus a clear advantage for institutions in non-English speaking nations. Of course, this is especially true if the case involves English-speaking parties who will likely face difficulties finding attorneys and/or arbitrators who can work in unusual languages such as Albanian, Slovak, Danish or Polish.\textsuperscript{18}

However, speaking and writing another language sufficiently well for the purposes of what often amounts to multi-million dollar international transactions is a very difficult, especially in highly specialized financial, legal or technical contexts. It is not surprising, therefore, that there is an increasing number of disputes in both arbitral and judicial contexts in which language-related problems have been explicitly raised as contested issues.\textsuperscript{19} The next section will

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\textsuperscript{12} Tibor Várady, Language and Translation in International Commercial Arbitration 7-9 (TMC Asser Press 2006).  \\
\textsuperscript{13} 15/1 ICC Bulletin 16 (Spring 2003).  \\
\textsuperscript{14} Id.  \\
\textsuperscript{15} Várady, supra note 12, at 8-9.  \\
\textsuperscript{16} Id.  \\
\textsuperscript{17} Id.  \\
\textsuperscript{18} Id.  \\
\textsuperscript{19} Id. at 10.  \\
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exemplify some translation errors and illustrate how and why translation problems may arise. In turn, this will serve as a background for understanding the legal issues that may be raised in connection with translation issues in modern arbitral and post-arbitral contexts.

III. The Translation Challenge

While Mark Twain’s “Jumping Frogs” was undoubtedly not the first instance of large-scale mistranslation, it will surely not be the last either. Current examples of ideas lost in translation range from the humorous, such as an English-language sign in an Asian restaurant stating, “For restrooms, go back toward your behind,”20 to the downright dangerous, such as a recent CNN mistranslation of the Iranian President’s statements characterizing him as “pro-nuclear weapons” rather than accurately conveying his message that he was “pro-nuclear technology.”21 In a commercial context, a Danish construction enterprise bids on and wins a contract for the construction of a large investment bank in Manhattan. The Danish contract stipulates the equivalent of “walls to be painted in a graphite color” (in Danish, “grafit”). In an almost unbelievable flub, the translator translates this into “graffiti-painted walls” (in Danish, “grafitti”). Alarm bells should of course have gone off as it is highly questionable that a venerable, conservative New York bank would want to have grafitti-painted walls, much less pay dearly for such painting to be done. Instead, legal consequences appeared on the horizon, the first translation agency got fired and a second agency won the contract to re-do the entire translation, which also featured many other significant errors. The parties lost precious time and ended up paying more for the translated product than they would have if they had chosen qualified translators in the first place or, as could have been an alternative scenario, if they had not pushed the original translator to get the work done within a near-impossible or impossible

21 Id.
deadline. Both scenarios happen frequently in the translation industry, and both present a significant risk of mistranslation.

Even more severe consequences may arise from translation deficiencies. “For example, the mistranslation of a court judgment in Alfons Lutticke GmbH v. Hauptzollamt [“Main Customs Department”] Saalouis led to more than 200,000 suits filed in German courts.”22 In another case, EHS, “a Japanese translation service, erroneously “interpreted” [many computer] codes instead of [strictly] translating them [into English], thereby rendering the [entire English text] unreliable.”23 “Translation errors [also] frequently occur in [international] patent applications.”24

In many cases, applications of U.S. companies are not filed in Japan until near the end of the one-year priority deadline under the Paris Convention. As a result, the benrishi [paralegal patent application specialists] do not have sufficient time to review the translation; nor does a U.S. attorney, who does not speak Japanese, have the opportunity to have the Japanese application translated back into English in order to check the accuracy of the Japanese translation. In many cases, a poor translation is filed. Due to the rules governing the patent application process in Japan, the Japanese translation cannot be corrected, leaving the U.S. applicant with the incorrect Japanese patent application. In some cases, an inaccurate translation has been fatal to securing significant patent protection.25

The issue of mistranslation resurfaced in a significant way in late 2009 when doubts arose as to whether a Nicaraguan court order awarding $489 million to a class of Nicaraguan banana plantation workers had been mistranslated or, in the alternative, deliberately changed by top American plaintiff attorneys in order to be able enforce the order in the USA.26 The original document incorrectly named “Dole Food Corp.” and “Shell Oil Co.,” whereas the document filed in a California court used the correct company names “Dole Food Co.” and “Shell Chemical

23 Id. at 432-33.
24 Id. at 433.
25 Id.
Defense lawyers for the American attorneys accused of document falsification alleged “mistranslation” by the Spanish translator. In Spanish, one word can, in some contexts, correctly be used for both “company” and “corporation.”

A. Linguistic Traps

As shown, translation problems range from the seemingly innocent to the highly complex. One problem is that “languages never exactly ‘map’ onto one another.” For example, to translate ‘I hired a worker’ into Russian, [the translator] must know whether the worker was male or female. Conversely, if the translator literally translates “female worker” from Russian to English, unnecessary emphasis may be placed on the worker’s gender in English. More significant and subtle problems exist. For example, “the French word ‘contrat’ [covers] agreements that American legal practitioners would consider to be ‘conveyances’ or ‘trusts’ and excludes” documents that are known as “contracts” in American-English. Similarly, “the French word for ‘cause’ has been mistranslated as ‘cause of action.” The trap here is one of similar spelling, but different legal meanings, in other words what is generally known as “false friends.” Even the very same word may have different connotations in different parts of the world where people speak the same language. For example, “consideration” is not the same in Connecticut as it is in England, and “jurisprudencia” does not bear the same legal meaning in Mexico as it does in Spain.

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28 Roemer, supra note 27.
30 Id.
31 Id.
32 Id. at 47.
33 Id.
34 Id.
Furthermore, “words [often] denote not only [a] primary meaning, but also layers of nuance” built up slowly over the years. Jargon or industry-specific terminology may be so specific that it is almost an entirely different language to itself such as “legalese” in English. In this “‘language,’ concepts such as ‘due process,’ ‘duty of care,’ and ‘consideration’ have specific meanings that result from decades of case law.” If this is ignored in translation or if the translator is not aware of such subtleties, legal problems may all too easily arise.

Figures of speech and trade-specific phrases may also be difficult, if not impossible, to translate. For example, the expression “hired hand” can be difficult to translate into languages in cultures where people usually do not hire help on an ad-hoc basis. Similarly, the doctrine of “‘habeas corpus’ does not exist in some cultures” and will thus have to be carefully explained when translated into the languages of these cultures. One way around this problem may be to use the same phrase in the second language or one closely resembling it, possibly with a footnote explaining the term. For example, “due process” becomes “doo processu” in Japanese. Many non-legal phrases can be equally difficult to address correctly in other languages. For example, because of the climatic differences between Scandinavian and English-speaking countries, Danish has at least eight different words for what is just “snow” in English (natives of northern polar regions have even more).

B. The Punctuation Canon

36 Id. at 426-27.
37 Id. at 427.
38 Adler, supra note 27, at 46.
39 Kennedy, supra note 23, at 428.
40 Id. at 440.
Not only do words themselves present numerous challenges for translators, so does something so seemingly innocent as grammar and punctuation. “Consider the ‘punctuation canon,’ which has assumed at least three forms.”

(1) The strict English rule that punctuation forms no part of a given statute.
(2) Allowing punctuation as an aid in statutory construction, and
(3) Looking at punctuation as a less-than desirable, last-ditch alternative aid in statutory construction ([which] seems to have prevailed as the majority rule).

For several centuries, “England enacted statutes [] in unpunctuated form” with parliamentary action required to insert any punctuation. The strict interpretative rule may have made sense then. An old English case even sent a man to the gallows based on punctuation issues, so extreme caution in its place. Today, some “commentators [] urge that punctuation be treated as an indispensable part of the text, equal in status to the words themselves.” “Different languages [apply] different punctuation standards, and [negative consequences] could result” from ignoring this and other meaning-bearing linguistic functions. On the other hand, it also pays for translators to apply common sense when working with hurriedly created texts where punctuation and similar information may not carry any meaning at all. For example, the United States “Congress once passed a bill composed in part from photocopied memoranda and last-minute hand-written additions, which contained ‘accidental entries such as a name and a phone number --Ruth Seymor, 225-4844-- standing alone as if it were a special appropriation item.”

C. In Search of Translation Excellence

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41 Adler, supra note 30, at 105.
42 Id. at 105-06.
43 Id. at 106.
44 Id.
46 Id. at 106.
47 See id. at 107.
48 Id. at 108.
On the basis of the above review of just some of the many pitfalls of translation, the temptation may arise to seek perfection from translators. But is that reasonable or even realistic? And what is “a perfect translation”?

First of all, “fluency, and not merely proficiency, in both the source and target languages is required in order to decipher the correct meaning of a phrase and to find the correct corresponding phrase that expresses this meaning in the target language.” But even great knowledge of a certain language does not guarantee successful translations. “It’s not enough for a translator to know standard Arabic, for example, because the dialects of modern Arabic can be as different from standard Arabic as Spanish is from Latin. It is the nuances of a language, and an in-depth knowledge of the subject matter being translated or interpreted, that make the difference.”

The translator also needs to have at least some education in translation theory. The common notion that because a person speaks two languages for private purposes, that person can also work as a professional translator simply does not hold true in today’s highly specialized business world. Additionally, truly professional translators will know how to invoke a variety of methods and tools (electronic and otherwise) in response to the challenges posed by modern cross-national linguistics.

Translators of legal texts face particularly difficult challenges because, by the very nature of the work they do, legal considerations have already appeared on the horizon by the time the translators become involved with the project. Quite obviously, parties do not want further legal trouble at that point in time. Often, very significant amounts of money and perhaps even corporate survival are at stake in such contexts. Furthermore, the outcome of cases often hinges

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49 Kennedy, supra note 23, at 424.
50 Jarvik, supra note 20.
51 Kennedy, supra note 23, at 425.
upon the texts created by the translator as arbitrators and judges cannot read the original language text. Thus, legal translators possess a significant amount of power. Legal translators need to know how to wield this correctly and ethically. In effect, “legal translation really means a lesson in comparative law.” If legal translators take that role seriously and know how to price their services and pace their work accordingly, it will become possible for them to create at least near-perfect translations.

If perfect translations are too much to hope for, can a legal standard then at least be set for what makes at least a “good” translation? A Swiss court formulated the standard that a “good translation is one that does the job it was ordered to do.” No legal precedent regarding such a standard exists in the United States. With the amount of international business undertaken in this country, an equivalent standard should be established here as well, if not by judges, then by professional associations or other industry players. This would not be all that difficult to do. A “good” translation should preserve the exact meaning and intent of the source text, yet come across as if it was an original text and thus not appear “translated.” A good translation should use correct trade-specific terminology, should convey all possible nuances and ambiguities of the source text when that is called for and not create ambiguities when the source text is clear. In the case of legal translation, it should ensure that all legal concepts used have the precise legal effect as their source equivalents or use explanations in cases where it may not be possible to find full equivalents in the target language. End users should be able to fully rely on the accuracy of translated texts. In many cases, this even means improvements of the original text.

52 See Adler, supra note 30, at 50.
53 Id.
54 Kennedy, supra note 23, at 437-38.
55 Id.
56 Id.
As shown, linguistic pitfalls and quality issues abound in translation contexts. The next section will examine whether existing law takes this into account.

**IV. The Law of Language Use in International Commercial Arbitration**

This section will examine how select conventions, institutions and national statutes propose the selection of language(s) and translation/interpretation for international commercial arbitration purposes and whether any rules address the qualifications of language professionals.

**A. Conventions and Institutional Standards**

Article IV(2) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) states that if the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article 22 of the 1985 UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) also addresses languages. According to this:

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

The vast majority of arbitral institutions follow the pattern that the designation of the language of the proceedings belongs to the sphere of autonomy, that parties are thus free to select the language themselves and that only if they have not done so will the institution select a language.  

For example, the ICC Rules of Arbitration states that “in the absence of an

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agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration.”

The American Arbitration Association (“AAA”) somewhat similarly states that “if the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement” and addresses the need for translation services by stipulating that “[t]he tribunal may order that any documents . . . shall be accompanied by a translation into the language(s) of the arbitration.”

However, few arbitral rules address any possible quality considerations. Exceptions are the Japanese and Korean commercial arbitration rules, which both require that the Japanese or Korean and English versions of arbitral awards shall be “official,” “and if a discrepancy in interpretation arises between the two versions, the interpretation of the Japanese [or Korean] version shall prevail.” In contrast, the rules of the Iran-US Claims Tribunal stipulates that “[a]ny disputes or difficulties regarding translations shall be resolved by the arbitral tribunal.”

B. National-level Legislation

In addition to the above-mentioned supranational stipulations, national-level arbitration acts also frequently feature provisions pertaining to languages and translation. For example, nations from Austria to Zimbabwe have adopted rules which, in similarity with the New York Convention, call for the parties to select an arbitral language and, if they fail to do so, for the tribunal to select the language. In contrast, no legislation addresses translation needs or language services for arbitration purposes in the United States. This is perhaps not surprising

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62 Várady, supra note 12, at 231-252.
given the frequent American ignorance of other languages than English in professional contexts (which may change with what appears to be an increasing focus on international affairs in general) in combination with the vast prevalence of English in American business contexts and situations.

Many national provisions also explicitly foresee the need for document translation although few address translation quality concerns. The prevalent standard is exemplified by Article 35 of the British Columbia Commercial Arbitration Act which simply states that “[i]f the arbitral award or arbitration agreement is not made in an official language of Canada, the party must supply a duly certified translation of it into an official language.”63 Many other nations have adopted this “duly certified” requirement such as Ireland, Kenya, Mexico, New Zealand, Nigeria, Russia, Scotland, Singapore, Zambia and Zimbabwe.64

A few nations do, however, make use of more specific stipulations regarding translation quality and the professional qualifications of language professionals. For example, in Bermuda, translations of agreements or awards must simply be “certified by an official or sworn translator or by a diplomatic or consular agent.”65 Bolivia requires that translations be signed by an “authorized expert.”66 India calls for translations to be “certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.”67 The United Kingdom

64 See id.
66 Bolivia Law Nr. 1770 on Arbitration and Conciliation art. 77(III), Mar. 10, 1997, as reprinted in Várady, supra note 12, at 231.
requires certification by an “official or sworn translator or by a diplomatic or consular agent.”

In Thailand, the translator must have “sworn or made oath [sic] before the court or before an official or person having such power, or with the certification by an official authorized to certify the translation, or by the Thai consulate in the country in which the award or arbitration agreement was made.”

In Egypt, translations into Arabic must simply be authenticated by a “competent organism [sic].”

As shown, the worldwide norm is to let the parties choose the arbitral language, and if they fail to do so, the tribunal will. The language chosen has in some cases been a “neutral language” such as, for example, English and not German, even in cases where contracts between parties were originally in another language than the “neutral” language. This seemingly goes against the ICC Rules which call for the language of the contract to be decisive when choosing the language of the arbitral proceedings. The reason for choosing English, apart from it being widely considered a “world language,” may be that parties have been known to not even take arbitration proceeding invitations seriously if written in what might be considered a non-neutral language. In one somewhat humorous illustration of this hopefully rare problem, the appellant argued that the court should refuse enforcement or recognition of an arbitral award because, among other things, he had only received an invitation in Romanian, which he considered to be an “incomprehensible” language.

Perhaps not surprisingly, the court considered neither that argument nor appellant’s explanation that “he did not want to go to Romania to recover the goods

since one never knows what will happen there.” Nonetheless, using major languages for arbitral proceedings is probably wise, if possible and desirable given the circumstances of each case.

V. Legal Effects of Mistranslation

In spite of the existing, albeit few, legal provisions addressing mistranslation as well as the practical precautions parties may and should take, linguistic errors invariably still occur in translated documents. Human beings err, so to some extent, this may simply be unavoidable. This section will thus analyze some potential legal effects of mistranslation in arbitral and post-arbitral award proceedings.

A. Translation Deficiencies and Possible Legal Consequences in Arbitral Proceedings

i. Actual Mistranslation

To bring a legal challenge on translation grounds, the mistranslation must, as a general rule, have affected the outcome of the case. Common problems are the use of the wrong terminology, words and phrases that are translated literally and thus result in incorrect renditions of the meaning of the original text, and even textual omissions. Such problems may result in severe misunderstandings of the underlying issues. Mistranslation may lead judges or arbitrators to decide cases differently than with no error.

As a threshold matter, the lack of translation, in other words text which the translator forgot to include in the target text, may lead to the subsequent disqualification of certain arguments or documentary evidence. Deadlines may also have to be extended to allow for the missing text to be translated. However, “the question arises whether similar consequences

74 Id.
75 Várady, supra note 12, at 184.
76 Id.
77 Id. at 123.
78 Id.
may” take place if arbitrators discover a mistranslation.\textsuperscript{79} It is unlikely that a substandard document will simply be set aside by the arbitrators.\textsuperscript{80} Of course, because mistranslation can only be discovered after quite some linguistic scrutiny,\textsuperscript{81} it is possible that arbitrators do not notice the mistake at all. If they do, they may order a substitute translation with a possible extension of the deadlines in the case.\textsuperscript{82}

The most likely and arguably best outcome in cases where arbitrators discover translation deficiencies is for them to consult with the parties and proceed in accordance with agreements reached on this background. This is what happened in a Hungarian case where two arbitrators referred to different versions of the “Budapest Rules”: the Hungarian original and an English translation containing an erroneous restriction that did not form part of the original.\textsuperscript{83} As arbitral institutional rules do not feature an official version as legislative acts do and as they become binding because of party agreement, it would have been difficult for the arbitrators to justify deciding which version should be the decisive one without at least a tacit agreement by the parties in the case.\textsuperscript{84} This is precisely how the arbitrators proceeded.\textsuperscript{85} While not perfect, this solution shows the importance of addressing mistranslation decisively at an early stage in the proceedings instead of, perhaps, ignore it only to see it arise as a challenge in post-award proceedings.

\textit{ii. The Problem of the Hidden Anchor Language}

International business contracts are often drafted in a language which is not the native language of any of the parties to the contract. For example, a Danish seller and a Greek buyer may well choose English as the contract language. In such situations, the original signed by the

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 124.
\textsuperscript{84} Id. at 124-25.
\textsuperscript{85} Id. at 125.
parties may be a translation with the underlying language from which such translation was made remaining hidden. The question becomes whether a court or arbitral panel may ever consider the “anchor” (original) version of the contract to be relevant.  

In one case involving mistranslation of the Hungarian word for arbitral tribunal into “court” in English, “the arbitrators [] question[ed] whether a valid arbitration agreement existed at all.” In examining whether they had jurisdiction to address the case at all, the arbitrators discussed the “limits of the power of the arbitrators in seeking the ‘true intent’ of the parties beyond (or even in spite of) what the parties actually wrote” and, in narrowly finding jurisdiction because of the imperfect reference to the arbitral tribunal agreed upon by the parties, concluded that an “arbitration agreement must possess [] a minimum level of coherence in order to serve as a foothold for a search after the true intentions of the parties.” When such translation dilemmas arise, investigating the hidden anchor language may help the arbitrators. But should the arbitrators do so or is this beyond the scope of their duties?

Normally, parties are bound by what is written in a clause of the binding document, even if they failed to scrutinize it having had an opportunity to do so. This may seem like a harsh outcome. On the other hand, expecting arbitrators to examine an anchor language in order to establish the proper meaning of a contractual provision may also be undesirable for the contractual parties as arbitrators may not have the linguistic skills to verify the accurate meaning of the underlying text, may not go through the extra time and trouble of hiring language specialists, and may simply not want to adopt the extra role of being “language accountants.”

iii. Closely Related Languages

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86 Id. at 134.
87 Id. at 136.
88 Id. at 136.
89 Id. at 136.
90 Id. at 137.
91 Id.
Suppose documents in, for example, Danish and Norwegian, Serbian and Croatian, or Czech and Slovak, are not translated because they are very closely related languages which a party fluent in both erroneously considers other parties able to understand as well. Would this still present a ground upon which to present a legal challenge?

It would, according to one New York state case where Krio was requested in order to prevent the alleged deprivation of the defendant’s right to a fair trial.\textsuperscript{91} The court found that Krio, which evolved from Creole and Pidgin English, is indeed a separate and distinct language that cannot readily be understood without an interpreter.\textsuperscript{92} In criminal cases, fairness and due process are, of course, of particular importance in contrast to commercial cases which “merely” deal with shifting financial liabilities.

Similarly, the International Criminal Tribunal for the former Yugoslavia has accepted the different official names for what arguably only constitutes regional dialects, i.e. Serbian, Croatian and Bosnian, but acknowledges that these languages can be used interchangeably.\textsuperscript{93} The Tribunal uses an alternating sequence of the abbreviations of these languages (S/C/B). However, the Tribunal only grants parties the right to a translation \textit{from} other languages \textit{into} S/C/B, but not \textit{between} these.\textsuperscript{94} Such solutions are occasionally adopted “by legislators as well, but this is [] exceptional.”\textsuperscript{95} “One [such] exception is the Norwegian Arbitration Act which states that “Swedish and Danish may also be used if the language is Norwegian.”\textsuperscript{96} The Danish and Swedish arbitration acts do not contain corresponding provisions.\textsuperscript{97}

Whereas arbitrators should not decide whether translation is or is not needed between closely related languages (the parties should), arbitrators should at least be aware that some

\begin{footnotes}
\item[92] Id.
\item[93] Várady, supra note 12, at 154.
\item[94] Id.
\item[95] Id. at 156.
\item[96] Id.
\item[97] Id.
\end{footnotes}
languages are so closely related that people speaking these may be able to understand each other.98 Such awareness helps them prevent strategic objections or false assertions of a lack of understanding. In turn, increased awareness of this issue will place a higher burden on a party that seeks to challenge an award on the ground of lack of translation just as it will help make counter-arguments against such a party more powerful.99

Even if parties do not feel that a translation of all pages in a case is legally necessary, arbitrators may have an independent interest in obtaining one. For example, arbitrators may consider this to enable them to gain deeper insight into the underlying issues of a case instead of having to rely on only those documents that the parties have had translated. However, it is likely not a good idea for arbitrators to acquire translations sua sponte, at least not without notifying and perhaps getting the consent from the parties first. To draw an analogy to a Hong Kong case where translation was not at issue, but where certain technical issues were, plaintiff buyer asked the chief arbitrator to attend a “briefing” by experts on the technical history of the allegedly faulty machinery without defendant seller being present during the briefing.100 The Hong Kong Court of Final Appeals held that because seller had had plenty of time to raise this issue before finally doing so on appeal and because the arbitrator did not make an “assessment of the state of the equipment,” seller had not been prevented from presenting its case and that no court intervention was thus necessary on public policy grounds.101 Nonetheless, conducting any kind of meeting which may even just appear to be part of the formal arbitral or adjudicative proceedings is widely considered poor practice as it could be seen as an attempt to undertake proceedings ex parte. Thus, arbitrators should avoid any kind of situation where they may be

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98 Id. at 153.
99 Id.
perceived as having become involved in the finer, practical details of a case whether related to translation or other issues.

*iv. Party Misconduct*

Translation beyond what was arranged for by the parties or the arbitrators may also represent a ground for challenge on the basis of either a “violation of the procedure agreed upon by the parties” or a “violation of the doctrine of equal treatment of the parties.” For example, in a case between Honeywell Bull of France and Computacion Bull of Venezuela, an ICC arbitral award was initially rendered in favor of Computacion Bull. Honeywell Bull then brought an action to set aside the award. One of Honeywell Bull’s arguments was that Computacion Bull had sent copies of their pleadings in Spanish to two of the arbitrators whose first language was Spanish, but not to the non-Spanish speaking arbitrators, thus allegedly providing “preferential access to certain members of the tribunal.” The Court rejected this challenge because Honeywell Bull had not alleged that the Spanish and English content of the pleadings differed and because the “incident” had been resolved by an earlier arbitral tribunal decision to strike the Spanish materials from the record. The Court concluded in what is arguably a somewhat conclusory manner that “the equality of the parties had been strictly safeguarded.”

Not surprisingly, this drew mixed reviews from commentators. One of these considered the submissions of additional Spanish materials to be an infringement of the equality between the parties that could have created an imbalance among the arbitrators. Another commentator found that ”there was no great damage since the Spanish version of the briefs was

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104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
109 *Id.*
not considered during the deliberations,"¹¹⁰ thus apparently taking the “no foul, no harm” position that arbitral proceedings should not be too rigorous. Was this simply a case of arbitrators getting “a benefit beyond what was bargained for”?¹¹¹ Perhaps, but the conduct undoubtedly created at least an appearance of impropriety. It could be argued that the real purpose of submitting the original-language papers was to elicit “Pro-Hispanic bias or sympathy”.¹¹² Tibor Várady, a recognized legal scholar in the field of translation-related legal issues, nevertheless considers the conduct to be inconsequential because whereas it was arguably improper, it “could hardly” corrupt an arbitrator with “normal ethical standards.”¹¹³ The problem with this ethical line of reasoning is twofold. First, arbitrators - like everyone else - may indeed form sympathies based not only on the nationalities of the parties, but also on what is often a better original document than what in reality often turns out to be hastily produced substandard translations. Second, mere assertions that arguably improper conduct could “hardly” corrupt ethical arbitrators is presumptive and does not solve a party’s concerns in a legally acceptable way.

Because of the significant amounts of money often at stake in international business transactions and thus in arbitration proceedings, parties probably most often find out about consequential translation errors before awards are granted. On the other hand, given the business world’s general lack of focus on translation accuracy, it is neither unthinkable nor unprecedented that parties do not become of aware of such deficiencies until after the arbitral panel has already rendered an opinion. The next section will examine the legal consequences in such instances.

B. Translation Errors in Post-Arbitral Award Proceedings

¹¹⁰ Id. at 127.
¹¹¹ Id.
¹¹² Id.
¹¹³ Id.
A party who is dissatisfied with an arbitral award may attempt to seek court annulment. Challenges based on language-related deficiencies are brought on a number of different legal theories with varying and often uncertain outcomes.

\textit{i. Mistake of Fact}

In an Ohio arbitration patent infringement case, plaintiff moved the court to vacate an arbitral award claiming, in short, that a Japanese patent used by defendant had been mistranslated, that this caused the sole arbitrator to find against plaintiff, and that plaintiff had not discovered the translation error until after the award had been granted. Plaintiff argued this to constitute a “mistake of fact.” The United States Federal Arbitration Act does not recognize mistake of fact as a reason for the set-aside of awards. Rather, it only allows vacation “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” However, the District Court found that

\begin{quote}
“while this Court is not to revisit the arbitrator’s factual determinations, where the record . . . demonstrates an unambiguous and undisputed mistake of fact and . . . strong reliance on that mistake by the arbitrator . . . it can fairly be said that the arbitrator exceeded [his] powers, or so imperfectly executed them that vacation may be proper.”
\end{quote}

Thus, early reliance on mistranslation may result in the setting aside of arbitral awards, at least before American courts. However, the court in this case also pointed out that a party cannot

\footnotesize{
\begin{enumerate}
\item Id. at 157.
\item Id. at 273.
\end{enumerate}
}
claim relief from an error for which it can fairly be charged failure to object in a timely manner.  

The court thus eventually held against this plaintiff under the circumstances of the case.  

Had this case been before a non-American court, Article V(1)(c) of the New York Convention allows vacation of awards in matters so long as the decision stays “beyond the scope of the submission to arbitration.” This provision is specific and does not allow challenges to “imperfect decisions” based on mistranslation and related grounds “as long as the decision stays within the scope of the arbitration agreement.”

In short, to be able to claim mistake of fact and thus violation of the right of a party to properly present his/her case, the standard applied is that of a “diligent party” who studies the disputed files in due time and objects if any translation errors are found. If this is not done until a possible appeal stage, it may be held to be too late. According to the Ohio District Court: “Otherwise, arbitration awards could never be final.”

\textit{ii. Possible Judicial Duty to Act}

In contrast, the Austrian Supreme Court has held that whereas “in principle, it is not possible to raise issues of mistranslation in appellate proceedings,” but the situation is different when this is “so erroneous that a whole section of the holding is missing.” Amazingly, neither the parties nor the lower court were aware of the omission. The Austrian Supreme Court examined whether courts in general have a right or a duty to raise the issue of translation correctness sua sponte if an obviously recognizable inadequacy comes to their attention. The Court held that “there is no rule in either the New York Convention, or in the applicable Austrian

\begin{footnotes}
\footnote{120 Id. at 274.}
\footnote{121 Id.}
\footnote{122 Varady, supra note 12, at 213 (citing New York Convention Art. V (1) (c) (1958))}
\footnote{123 Id.}
\footnote{124 Id. at 214.}
\footnote{125 Conlux USA Corp., 929 F.Supp. at 274.}
\footnote{126 Várady, supra note 12, at 186.}
\footnote{127 Id. at 185.}
\footnote{128 Id. at 186.}
\end{footnotes}
norms, or in the relevant [] Austrian-Swiss treaty that would oblige the court to remain satisfied with an incomplete translation. “129 The Court concluded that “incompleteness has to be investigated it, at least when this is recognizable from the structuring of the document even without a command of the language of the original.”130 Thus, the Court gave priority to substance and fairness to the parties over formality.

On the other hand, there is also nothing in the New York Convention that affirmatively requires courts to intervene in cases of obvious mistranslation.131 The problem with “obviousness” is to convert this phrase into a more legally applicable standard. If a deficiency in translation is so obvious that even judges without knowledge of the source language may notice it, “the neglect of the party who did not object” before the lower courts may be said to be “even greater.”132 This may, as analyzed above, lead at least American courts reviewing an arbitral award to find no grounds upon which to find in favor of the party who should have discovered a potential translation error at an earlier stage of the proceedings.

It is arguably not the role of courts to investigate the quality of translations when the parties or the translators could have ensured a proper quality themselves. As described, no rules call for courts to substitute correct translations for incorrect ones sua sponte or otherwise. The parties in the Austrian case above may simply have been lucky that the Supreme Court elevated substance over form and not vice versa. This outcome is far from certain in other jurisdictions. In contrast, because of the relative informality of arbitral proceedings compared to court trials, arbitrators may be more likely to grant some leeway and consult with the parties in the case of mistranslation than are courts. At any rate, the best avenue for parties discovering translation deficiencies is, of course, to raise the issue as soon as possible whether the issue is before an

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129 Id.
130 Id.
131 Id.
132 Id. at 187.
arbitral tribunal or a court of law. The outcome of post-arbitral motions before courts of law is, at best, uncertain.

**iii. Arbitrator Misconduct**

Even the conduct of the arbitrators themselves may be questioned. In an English arbitration case, a key issue was whether a contract had been formed at all.\(^{133}\) After the conclusion of the case, one of the arbitrators confirmed that he did not understand Italian, but had nevertheless stated in his award that he had “carefully considered the evidence,” part of which had been submitted in Italian only, but orally translated by a co-arbitrator.\(^{134}\) A reviewing court subsequently found that a “conscientious arbitrator has to scrutinize the language of letters and cables himself” and not rely on any shortcuts as was the case here.\(^{135}\) The court found that there had been an irregularity which may have caused a substantial miscarriage of justice and set aside the award.\(^{136}\)

How would this differ from an instance where one arbitrator asks another perhaps more experienced one to clarify a technical issue, but in the same language? In this scenario, the arbitrator being asked would not have to step outside of his/her professional role as an arbitrator and assume that of a translator. Second, the actual evidence of the case would be the same, the arbitrators would merely discuss the documents that the parties have already presented in the case. Such discussions among the arbitrators are not only to be expected, one must certainly hope that the arbitrators will in fact consult with each other and draw on each other’s collective experiences. This is an advantage of synergism, but arguably not a problem because one arbitrator will not have attempted to present new evidence to the other(s) as in the case above.

\(^{134}\) *Id.* at 221.
\(^{135}\) *Id.* at 224-225.
\(^{136}\) *Id.*
Today, framing the possible problem of arbitrators not reading the evidence because it is in a language with which the arbitrator is not familiar as “misconduct” may not provide a ground upon which to present a legal challenge.\textsuperscript{137} Under the New York Convention, the Model Law and the 1996 UK Arbitration Act, a more likely argument may be due process or “the inability to present one’s case” because, arguably, one’s case has not been fully presented until the arbitrator has read all the evidence.\textsuperscript{138} Other perceivable arguments could be that the “proceedings were not in accordance with the agreement of the parties or with the lex arbitri.”\textsuperscript{139} For sure, a “norm [ ] was [ ] violated [in the above case]”, namely that “arbitrators [must] read [all evidence] submitted to them.”\textsuperscript{140} The problem with that approach is that it is merely a norm and thus “rarely spelled out in statutes or arbitral rules.”\textsuperscript{141} The closest British statutory provision, for example, is one that calls for the arbitral tribunal to provide “fair means” for the resolution of issues.\textsuperscript{142}

Further, “the issue of relevance also emerges with regard to [the translation of] documentary evidence.\textsuperscript{143} Arbitrators may not order translations done simply because the arbitrators do not consider the evidence important.\textsuperscript{144} “The question arises whether in post-arbitration proceedings the court should or should not take into account the pertinence of a missing translation.”\textsuperscript{145} A cardinal rule in international commercial arbitration is that “a post-award scrutiny does not enter into the merits of the case.”\textsuperscript{146} For example, “the New York Convention [and the Model Law strictly] limit the possible grounds for refusal of recognition of

\begin{itemize}
\item \textsuperscript{137} Várady, supra note 12, at 204.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id. at 205.
\item \textsuperscript{141} Id.
\item \textsuperscript{143} Várady, supra note 12, at 205.
\item \textsuperscript{144} Várady, supra note 12, at 205.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id. at 206.
\end{itemize}
[an arbitral award] to “public policy reasons” or procedural deficiencies.”\textsuperscript{147} Of course, the lack of translation of material documents may well be held to constitute a serious procedural deficiency. In contrast, public policy arguments are typically not strong in international commercial arbitration. The United Kingdom Arbitration Act allows setting aside only if a serious irregularity has taken place\textit{ and} if this “has caused or will cause substantive injustice to the applicant.”\textsuperscript{148} However, this poses a problem of logic: if courts are not supposed to reinvestigate the merits of arbitration cases, how can they find out if a possibly missing translation is relevant or caused any injustice? How would they know without having a translation done, thus precisely looking into the underlying merits? How would they even know that a translation was indeed missing without closely re-examining the case? Scrutinizing alleged translation irregularities thus in itself presents a dilemma: it may help prevent eventual injustice, yet it may also violate the rule that courts should not look into merits of arbitration cases.

\textit{v. Arbitral Awards Unfit to be Considered in Court Proceedings}

Awards must, of course, be understandable and “have some legal and logical consistency in order to be confirmed or recognized and declared enforceable by courts.”\textsuperscript{149} Although this seems obvious, it is not always the case that arbitrators or their translators have a sufficiently good command of the language in which they write the awards to ensure that the awards are fit to be recognizes.\textsuperscript{150} In one case, a defendant objected that because of the translated language of the award, it was not clear who was to deliver what to whom.\textsuperscript{151} However, the reviewing English

\begin{footnotes}
\textsuperscript{147} Id.


\textsuperscript{149} Várady, supra note 12, at 158.

\textsuperscript{150} See generally id.

\textsuperscript{151} Id. at 159 (quoting Tongyuan (USA) Int’l Trading Group v. Uni-Clan Ltd., [2001] 2001 WL 98036 EWHC (Comm) [23] (Eng.)).
\end{footnotes}
court did recognize the award, emphasizing that courts should not find “difficulties of construction” when reviewing translated awards. According to the court:

This award, of course, was made in China, and made in the Chinese language. The document from which all those in court have worked is a certified translation. But even when a foreign award is made in the English language, it must be rare that it will use terms precisely mirroring those which an English court would use for the purpose of drafting a judgment. The question, in my judgment, is whether the award as it stands (in this case the award in translation) is sufficiently certain to be capable of enforcement as it stands. No judgment is read in a vacuum.

This demonstrates the fact that courts may be likely to approach foreign awards with a sense of “cultural tolerance” in interpreting different linguistic styles of expression. However, this case also makes it clear that for awards to stand, the language used must, of course, meet certain linguistic standards just as the case emphasizes the importance of following proper translation-related procedures such as certification.

Other theories upon which mistranslation has been raised in arbitral and post-arbitral contexts are fairness of the proceedings, equality of the parties, lack of opportunity to respond (since a party may arguably not be aware of what to respond to if it relies on an erroneously translated text), violation of public policy (since translation errors constitute obvious misunderstandings and that it would be against public policy to render an award or court ruling based on misunderstanding) as well as violations of the New York Convention’s Article V(1)(b) (“otherwise unable to present his case”) or V(1)(d) (“arbitral procedure not in accordance with the agreement of the parties”).

In short, there appears to be no shortage of legal creativity when it comes to presenting grounds for challenging mistranslations, which perhaps comes as no surprise. However, the outcomes of legal challenges on such grounds are uncertain as the cases are often highly fact and

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152 Id.
154 Várady, supra note 12, at 160.
155 Id. at 210-214.
jurisdiction specific. Thus, it would clearly be better to seek to avoid the problem to begin with. The next section will analyze how, if at all, this can be accomplished and, if not, how more awareness can be brought to this little known area of international law.

VI. Solutions

Remedial action in relation to mistranslation could and should be implemented at many levels. First, this section will address private-party action as the private sphere is arguably the most realistic one in which to expect steps to be taken since the corporate actors are the ones with the most at stake in this context. Possible solutions at the institutional, national and supranational levels will be examined next as these can drive potentially sluggish actors to act.

A. Private Level Action

It would seem obvious that just as in other industries, translators’ qualifications and skills vary from person to person. However, translations are frequently, but erroneously, considered a fungible service where money can be saved with not much impact. As demonstrated in a prior section, this is an incorrect assessment of the difficulty of language services. One linguistics professor even noted that “while the naïve public often assumes that anyone who speaks two languages is qualified to be a translator, that assumption is no more valid than the conclusion that everyone with a brain is qualified to do brain surgery.”\textsuperscript{156} In selecting translation services providers, quality is often overlooked in favor of the “right now”\textsuperscript{157} where parties will shop not only for the lowest price possible, but also the supplier who can deliver the translated product the fastest. Yet, significant amounts of money are often at stake in commercial arbitral proceedings. Just as corporations are willing to internalize even very high costs for high quality product designers, accountants, lawyers and other professionals, so should they raise their awareness that price and quality issues also apply to the language field.

\textsuperscript{156} Id.
\textsuperscript{157} Id.
i. Identifying and Cooperating with Qualified Translators

Above all, private actors should scrutinize the qualifications and backgrounds of translators and/or translation agencies carefully instead of focusing quite so heavily on prices and delivery timelines as is currently the case. Translation clients are often simply not exercising due diligence when seeking out language services. They may also need to apply better project management techniques so that time does not become as critical in translation contexts as is often the case today.

Várady finds that “[t]he ideal translator is a person who has a legal education, an excellent command of the languages concerned, experience with translation, [and] who is a certified translator,” but also recognizes that “[t]his ideal profile is . . . not the typical profile.” Even if it were, using lawyers as translators is far from a sound solution. It does not follow that simply because a person - including an attorney - is bilingual or highly trained in another language that that person is also attuned to all the fine nuances of language usage as well as the myriad of complex requirement of commercial translation described earlier in this article. Not only are professional translators trained to handle these challenges, but today, most translators also specialize in various sub-disciplines such as legal, financial, medical, technical or literary translations, thus giving them even more insight into correct language use and terminology in these fields. Modernly, it is not uncommon to encounter translators who only work in one or two of such fields. This makes sense: someone who is good at translating Harry Potter products, for example, will likely not know enough about software, patents, or medical technology, to

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158 Kennedy, supra note 23, at 425.
159 Várady, supra note 12, at 91.
160 Some will claim that they master three or more languages fluently. Whereas this mastery may be possible and sufficient for non-commercial, non-translative contexts, reality shows that only a handful of exceptionally gifted linguists master several languages well enough to be able to render a high-quality, reliable translation for commercial purposes.
161 This is of course not to say that one may not come across the occasional attorney who would truly be an ideal choice for a translation project because of his/her experience in a certain legal area in combination with his/her linguistic skills, but such persons are a rare find indeed.
name just a few areas of specialty, to work professionally with such texts. In effect, Várady’s theory holds translators in some disregard by indicating that if a lawyer can be assigned as a project translator (which in itself is highly unlikely in most cases because of the compensation differences between the professions), this is much to prefer over employing even a university-educated and experienced translator. However, this low regard of the translation profession is precisely what has caused much of the translation problem to begin with. Further, it is contributing to many highly qualified translators leaving the profession for more lucrative and esteemed professions, which in turn will contribute even more to the unfortunate state of affairs in the translation industry. In short, translations should be left to trained language professionals just as lawyering is better left to educated and trained lawyers.

A more likely scenario would be for translators to be able to consult with lawyers, technicians and other experts about terminological difficulties. Unfortunately, even this seemingly easy step is, in reality, difficult to implement as it is very hard or impossible for translators to have the time to find and consult with knowledgeable experts. It would also be very difficult for most translators to absorb this additional cost. The most likely solution to this is for the end client to provide access to its experts for translators needing help with specialized terminology. For example, a client needing its machine manuals translated could appoint one of its engineers to assist the language professionals with explanations of troublesome phrases just as law firms requesting legal translations could do the same with their attorneys. Alas, many translation agencies stand in the way of this due to the fear of losing future business if the end client and translators decide to contract directly once they receive each other’s contact information.\footnote{Obviously, this would not be a problem if the client does not use a translation agency, but rather an individual translator.} This fear poses a real-life obstacle to quality assurance even in spite of the far-reaching no-compete agreements that most translators sign when contracting with translation agencies.
agencies. Clients should at least provide sufficient background information so that translators are fully aware of, for example, the purpose of having the document translated and the target audience for the text. Even this seemingly easy and innocuous step is often not taken.

**ii. Certifications and Other Quality Labels**

Upon project completion, language services clients should make sure that the translations are certified as failure to do so may result in one or more of the legal consequences set forth above. As a threshold matter, clients need to ascertain what is meant by “certified” in the relevant jurisdiction(s). The terms “certified” and “official or sworn translator” contained in the New York Convention are repeated in many national arbitration acts. But what exactly lies behind these terms?

The word “certification” seems to imply a certain level of quality control. Regardless, courts come out very differently on whether or not certification actually implies any quality control. To be on the safe side, clients should thus make sure that the language service providers use standard quality assurance methods before “certifying” their work so that this is a meaningful process and not simply a matter of rubber-stamping. Having a translation certified essentially only gives parties a remedy against the translator and/or translation agency if a translation turns out to be materially incorrect. However, this is not insignificant: the risk of adverse legal action will, at least in the litigious United States business world, act as an impetus for translators and agencies to only affix their certification to quality document and thus, of course, to ensure quality products in the first place.

Currently, most individual translators as opposed to translation agencies certify their own translations. This may not entail sufficient quality control as it is difficult to edit one’s own texts, particularly under intense deadlines. For this latter reason, reputable translation agencies always

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164 Várady, *supra* note 12, at 177-79.
use two translators: one to actually translate the text, the other to perform quality control of the first translator’s work. A certification subsequent to such a process should suffice. However, a problem may well arise in this connection as one translator typically does not want to certify the work of another for fear of legal product liability consequences. Where a translation agency is used, the agency could certify the text covering both the translation and the editing process. Where individual translators are used, the end client should make sure that two people – a translator and an editor – have worked on the text. The certification could be done by either, but should arguably be done by the editor as the translator may, as described, simply not be in the best position to review his or her own work as independently as a language editor can.

Similarly, the terms “sworn or official translator” are legally vague and do not reflect any specific and globally accepted industry norm simply because none exists. Some jurisdictions use more specific qualifying phrases such as “accredited” (the United States) or “state-authorized” (Denmark) about translators who have passed certain translation tests or, as in Denmark, studied at Master’s Degree level to be able to use the protected title “state-authorized translator and interpreter.” In jurisdictions where such quality stamps exist, language clients should make sure that such professionals are used.

iii. Machine Translation: Back to the Future?

Rhetoric about machine translation as a solution to today’s various translation challenges must stop. For example, in his 2000 State of the Union address, President Clinton claimed that “[s]oon, researchers will bring us devices that can translate foreign languages as fast as you can talk.”165 To be sure, machine-assisted translation and translation memory software can help improve translation quality when used as a specialized tool by already qualified translators familiar with such products. However, machine translation will likely never be able to displace

the human brain in the complexity of language translation, at least not in the foreseeable future. Focusing on technical solutions to translation problems is neither realistic nor helpful in bringing more attention to the current need for quality translation services, quite the opposite.

*iv. What Is a Translator, Anyway?*

The image of translators also needs to be improved from being mere “bilingual typists” or administrative assistants to being appreciated as the highly qualified and multi-skilled professionals they are.¹⁶⁶ One suggestion may thus be to use titles such as “intercultural consultants,” “localization specialists,” “language professionals” or “linguists” that more sufficiently convey the difficulty of commercial translation than does the traditional title “translator.” A similar trend was, for example, also adopted in relation to secretaries who now almost exclusively use titles such as “executive,” “judicial,” or “administrative assistants.” Indeed, this development seems to be surfacing in intercultural communication as witnessed by an increasing use of the titles just mentioned.

*v. Suing Language Professionals for Substandard Work*

Finally, a solution might be to bring suit against translators or agencies for malpractice in case of severely and grossly inadequate translations. This is not an oft-used avenue, but would send an appropriate and much-needed signal to substandard language services providers. Such action should be brought selectively so that translators and agencies that have put forth a good faith effort to meet often very difficult work requirements and deadlines are not targeted unnecessarily. Rather, suits could be brought against providers who clearly carry the responsibility for avoidable and gross mistakes and who have, perhaps produced such substandard work several times in the past. In other words, the translation industry’s equivalent of “repeat offenders.”

¹⁶⁷ *Id.* at 441.
Similarly, law firms using translators in arbitral and other contexts might be sued for malpractice, negligence or breach of contract for selecting unqualified language vendors. In such cases, the law firms would undoubtedly file third-party actions against the language service provider(s) for breach of contract or indemnification. Regardless, such legal threats may help send a broader signal to the translation industry at large to exercise care in the provision of language services just as it would help impose a duty of reasonable care on all parties involved in translation selection and application processes, including law firms.

In short, legal loopholes and uncertainties abound in relation to translation deficiencies, thus making it important for clients purchasing language service to take an active role in ensuring that quality translators and/or translation agencies are used, that the translated documents are inspected at an early point in time, and that possible mistakes and resulting legal issues are raised with all other parties, institutions and tribunals as soon as possible after discovery. What is required is not extreme measures, but rather simple common sense solutions that focus on quality in addition to saving money and time.

B. Institutional-level solutions

i. Arbitral organizations

Prophylactic action is required by arbitral organizations as well. For example, clearer rules should be drafted stipulating when official translations are required and in which instances they may be waived, what “duly certified,” “official translator” and similar expressions mean to the particular arbitral organization and whether the arbitrators may examine the original documents themselves to verify translation accuracy. In general, arbitration rules should specify the role and ethical duties of the organization’s arbitrators in translation contexts. Ethical rules for translation issues in arbitral contexts may only be considered aspirational, but would still help raise awareness about this area. Importantly, arbitral institutions should cooperate closely with
national translation organizations such as the American Translators Association on obtaining higher national accreditation standards as well as lists of accredited language professionals.

Individual arbitrators should, at an early stage of the proceedings, make sure that the parties have submitted translations of all documentary evidence not already in a language that the arbitrators can understand. Of course, the final responsibility for ensuring that arbitrators receive properly translated evidence rests not with the arbitrators, but rather with the parties as also is the case in court proceedings. However, just as judges can order parties to submit additional materials and briefings, so can arbitrators take an early, proactive role in this area to avoid subsequent legal disputes over avoidable translation issues.

ii. Judicial action in post-arbitral proceedings

An argument has been made that judges should monitor not only courtroom interpretation, but also review the translations of documents from expert witnesses, special masters, foreign courts, and so forth.168 This is not a viable solution. First, it is unrealistic to expect already busy judges to concern themselves with practical details such as translation quality assurance. Second, it is highly unrealistic to expect that judges have the linguistic and trade-specific knowledge to perform this suggested role of language editor. To be sure, judges should always keep an eye out for possible party misconduct, which might include translation issues. However, there is a great difference between expecting judges to assume their normal roles and to be translation specialists. It is more expedient and realistic to leave translation monitoring and review up to the parties whose interests that are at stake.

In contrast, what judicial chambers could do is to make sure that the parties have requested courtroom interpreters, if necessary. Experience shows that this too is frequently forgotten until a relatively late point in time at which the best interpreters may no longer be

168 Adler, supra note 27, at 54.
available. Similarly, in possible pre-trial hearings, judges could remind the parties to be ready to present evidence as to translator and translation quality issues based on the above guidelines.

iii. Professional associations

National translation associations should adopt stricter rules for who may use titles and stamps of approval such as “translator,” “accredited,” and “certified.” For example, the American Translators Association (“ATA”) has undergone significant development in this area. It once allowed anyone paying a relatively insignificant membership fee to join the organization as a “translator” and active member of the association without having to present any types of academic credentials or relevant work experience. Members could also freely advertise their services on the association’s website, although those members having passed the association’s certification test were allowed to add this certification to their membership details. Now, the ATA operates with a layered membership system in which “active” members must have “passed an ATA certification exam or [be] established as having achieved professional status through an Active Membership Review.”169 This recent development may signal an increasing and much needed awareness in the American translation industry of the importance of using true translation professionals and that not everyone who merely knows more than one language is automatically part of that group. Again, clients should make sure that they only use qualified and certified translators as this will send a signal to the translation industry and its practitioners to continue this professional development trend.

The American Bar Association (“ABA”) and the ATA could and should co-operate on solutions of how to prevent the above-mentioned translation issues. Currently, no such cooperation appears to take place. For example, the ABA could work with the ATA on the creation of lists of qualified translators with certain specialties. The ABA and various arbitration

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associations could also establish such lists themselves. As these organizations would not have the loyalties that the ATA may owe to all its members, even not very highly qualified ones, it may be a more expedient solution for the ABA and arbitral institutions take separate action.

The ABA and ATA could also implement joint professional seminars in which ABA members could obtain CLE credit. As analyzed, the interests of these organizations and their stakeholders overlap significantly in some cases and contexts. It would be natural for the organizations to cooperate more closely on issues in which they have a mutual interest.

Finally, universities in the United States could create translation specializations or perhaps even degrees on par with those offered by most European universities. Few American universities even offer any courses in this area. In addition to raising provider qualifications, this would also increase the general awareness of the role that translation plays in modern international business life. Similarly, law schools could offer relevant courses so that future attorneys seeking to practice international law would gain some early awareness of language difficulties and their many possible legal ramifications.

C. Solutions at National and Supranational Level

National laws governing the translation industry and processes more closely than is currently the case would be beneficial.\textsuperscript{170} However, national governments may not currently perceive translation issues to be sufficiently important to warrant legislative resources. To be sure, very important economic and international issues require much attention from American and non-American lawmakers alike at this point in time. But since an ounce of prevention is worth a pound of cure, it would be worthwhile for legislatures to consider the adoption of relevant legislation to avoid some of the above-mentioned problems. Laws could be adopted stipulating who may use the title “translator” in similarity with regulations for attorneys, doctors

\textsuperscript{170} Kennedy, supra note 3623 at 424.
and other professionals. For example, the title “translator and interpreter” is, in Denmark, a protected title which only professionals with Master’s Degrees in the area may use. The Danish Ministry of Commerce and Industry issues permits as well as stamps that translators can use on each page of a translation to certify its correctness. Similar steps could relatively easily be taken elsewhere.

As in Bolivia, Bermuda and the United Kingdom, other national governments could also adopt clear translation standards in their national arbitration acts. Such acts should clearly define what a “certification” is and who may certify translations. Legislation should also specify whether setting aside arbitral awards on the basis of mistranslation is permissible or not, and whether courts are allowed to (re)investigate possible translation deficiencies in arbitration cases.

At supranational level, conventions – especially the New York Convention – should be amended to more accurately describe what phrases such as “official” or “sworn” translators cover. Conventions should clarify whether “certification” implies a quality control of the accuracy of the translation or not.

Possible future amendments of the New York Convention should emphasize that the provision that allows for translation certifications to be performed “by a diplomatic or consular agent” should only be a rare exception, perhaps for rush or emergency situations, and not the rule. Diplomatic and consular agents are, in general, not sufficiently qualified to attest whether translations meet a certain quality standard or not. Furthermore, conventions and national arbitration acts should specify the grounds upon which mistranslation may be raised as an issue before, during and after arbitral proceedings.

Finally, a lesson may be learned from the Uniform Arbitration Act of the Organization for the Harmonization of Business Law in Africa. Article 31 of this Act states that “if the arbitration agreement and the award are not drafted in French, the party seeking recognition should submit a
translation certified by a translator who is *on the list of experts* in the country concerned.”171

Presumably, this requirement would cede legal ground to the lesser certification requirements of Article IV(2) of the New York Convention as analyzed above. On the other hand, an argument could be raised that developing national lists of pre-qualified translation professionals would help raise the quality standards and awareness in this area and thus clearly follow the spirit, albeit perhaps not the word, of the New York Convention. Surely, the Convention was never meant to promote lax quality standards within international commercial arbitration, quite the opposite. At any rate, the New York Convention could bear updating to better prevent the current confusion in the area of translator qualifications. Such updating would help establish clear impetus for national-level verification of translator qualifications and the establishment of lists of qualified professionals whether by governments or by national translation organizations. As discussed above, this would be helpful to the involved parties, whether translation clients or professional providers.

In the United States, many seem to believe that international conventions do not have much “bite” and thus will not lead to any actual improvement of problems of international significance including translation quality problems. That may to some extent be a valid argument. On the other hand, conventions and other types of international law are applied by courts and quasi-judicial tribunals in international commercial contexts. These sources of law are thus of particular relevance to the translation industry which is, by its very nature, an integral part of international commerce. Thus, conventions arguably play an important and realistic role in this area. Furthermore, although some in the United States may not always hold international conventions in very high regard, other nationals very often do so. Conventions certainly set

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171 For English version, see Várady, *supra* note 12, at 177 (emphasis added).
guideposts that national governments and institutions can and do use to show the direction in which the world community is moving. This important in international arbitral contexts as well.

VII. Conclusion

Today, commercial translation is a highly complex undertaking. Mistakes are all too easily made, and poor translations can make or break an international transaction. Instead of a successful and profitable experience, parties conducting international business may, instead, end up with a host of legal challenges the outcome of which is highly uncertain. This cannot be acceptable to the involved parties, associations or tribunals. Therefore, an increased awareness of translation-related problems and proactive solutions in international commercial arbitration and post-arbitral judicial contexts is called for. No industry, country or organization can solve the outlined problems alone. A collaborative effort across industries and perhaps even nations is needed. Valuable lessons can be learned from those nations in which language services is not the free-for-all that often appears to be the case in, for example, the United States. However, all affected parties must first realize that they share a crucial and non-polarizing interest; namely to work for higher quality standards and regulations in the area of language services. This would have the potential of producing great synergy effects for both the translation industry as well as for international business corporations, associations and tribunals. The translation industry would experience an improved image on par with that seen in certain other countries. International business life and tribunals would be able to save valuable time and money in avoiding tedious and costly translation and interpretation errors. The legal industry would also be well served from this trend because mistranslation is, at bottom, misinformation upon which legal professionals cannot base their work product.