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What is in a language? Parlez-vous français?

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Thursday, March 31st, 2022

English may be the *lingua franca* of our time, but it is not the only language of international law. *Royal Bank of Canada v HMRC* [2022] UKUT 45 (TCC). raised issues around the interpretation of a tax treaty concluded in English and French, both languages being equally authentic.

The complex facts are summarised at http://kluwertaxblog.com/2020/07/29/income-from-immoveable-property-article-6-and-royalty-streams/. The Canadian resident bank received payments that related to oil production from the UK sector of the North Sea as a creditor of a Canadian company that it had lent money to which had become insolvent. The bank argued on several grounds that the payments were business profits within Article 7 and that it had no UK permanent establishment. HMRC argued that the payments were income from immoveable property in the UK within Article 6. One of those grounds concerned the role and meaning of the French text of the treaty.

Language dispute

The starting point of the language dispute was an HMRC argument that expert evidence on the meaning of the French text was required for it to be considered. This was rejected at first instance by the First-tier Tribunal without giving reasons. This rejection was correct. The reason is simple: the meaning of the treaty is a legal matter for argument and not a question of evidence on which witness evidence can be given. Nonetheless, when the decision was appealed, the taxpayer applied for permission to adduce expert evidence on the meaning of the French text of the treaty. Permission was refused.

One of the taxpayer's grounds of appeal was that arguments based on the equally authoritative French language version of the Treaty were dismissed with insufficient, if any, consideration, resulting in a potentially contradictory interpretation. This, it was said, is contrary to the Vienna Convention on the Law of Treaties (VCLT) and established principles of treaty interpretation.

HMRC however contended that the taxpayer should not be permitted to argue the point, since it had been refused permission adduce expert evidence on the meaning of the French text of the treaty. The Upper Tribunal ruled that the taxpayer was permitted to argue the point and that regard may be had to the legal texts and other sources when considering whether there is any ambiguity in the English wording of the Treaty and whether the French wording casts any further light on the meaning of immoveable property in Article 6(2). The absence of expert evidence, it said, may or may not be a difficulty for the taxpayer in making its argument, but does not prevent it from doing so.

While the Upper Tribunal's decision must be correct, the reasoning is doubtful. Article 33 of the VCLT does not require ambiguity in one language version for the other language texts to be considered. The relevant ambiguity is between the different texts. It is simply a matter of proper interpretation of the treaty.

Meaning of immoveable property

The dispute turned on the expression in the partial defintion of immoveable propery in article 6(2):

"rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources;"

"les droits à des redevances variables ou fixes pour l'exploitation ou la concession de l'exploitation de gisements minéraux, sources et autres richesses du sol;

The taxpayer's argument was that this expression is only concerned payments given as consideration for the grant of an oil exploration or exploitation right and not anything else. It argued that this was supported by the French text. In particular, term "concession" is to be understood in the sense of 'grant' in English. The French text had no equivalent for the English word 'consideration' so that it referred only to 'payments for the working or the grant of the right to work', thereby demonstrating the direct relationship between the payments and the grant of the right to work.

Canadian case law on the meaning of "concession" Canadian legal dictionaries and legislation where the terms 'grant' and 'concession' are used synonymously in bilingual Canadian tax legislation were cited in support of the argument.

Status of the French text

The taxpayer argued that the French version of the Treaty was incorporated into domestic law. The UK mechanism for incorporation is by way of statutory instrument authorised by statute. The Statutory Instrument states that "arrangements specified in the Convention set out in the Schedule (to the Instrument … should have effect." Only the English text is included in the schedule.

Unfortunately, the Upper Tribunal declined to decide this question, simply saying that it was obliged to consider both languages that construction of the English version of the Treaty cannot fairly be carried out without considering the French text.

The execution provisions read:

"In witness whereof the undersigned, duly authorised thereto, have signed this Convention.

Done in duplicate at London, this 8th day of September 1978 in the English and French languages, both texts being equally authoritative."

This language makes clear that there is a single treaty in both languages made in two instruments (see VCLT, Article 1(a)). Inclusion of this part of the treaty in the UK statutory instrument makes the whole treaty made in both English and French into UK law. It is not simply an aid to interpretation of the English text.

The Upper Tribunal did, nonetheless, conclude that both texts are equally authoritative by virtue of

the terms of the Treaty and Article 33(1) of the Vienna Convention.

No clear identification of the character of the sources cited by the taxpayer was given. Instead, the court said that materials as to the meaning of the French text "have whatever weight in the argument they are found to have."

Grant and concession

Noting that the word "grant" does not appear in the English text, which refers to rights to variable or fixed payments as consideration for the working of, or the right to work natural resources, the Upper Tribunal found this wording can include a number of different types of transaction, including the transfer of rights to work natural resources. "Concession" in the French text was similarly not limited to the grant or the original grant of the right to work natural resources. Consequently, there was no ambiguity between them that engaged VCLT, Article 33(4).

Foreign language in unilingual courts

Perhaps the last word on dealing with foreign language treaties belongs to Lord Scarman in *Fothergill v Monarch Airlines Limited* [1981] AC251, [1980] UKHL 6, where he said, in the House of Lords, of a treaty concluded in French where an English translation had been enacted into UK domestic law:

"We are to take judicial notice of the French. We have to form a view as to its meaning. Given our insular isolation from foreign languages, even French, and being unable to assume that all English judges are familiar with the language, how is the court to do its duty? First, the court must have recourse to the English text. It is, after all, the meaning which Parliament believes the French to have. It is an enacted translation, though not binding in law because Parliament has recognised the possibility of inconsistency and has laid down how that difficulty is to be resolved.

Secondly, as with the English language, so also with the French, the court may have recourse to dictionaries in its search for a meaning. Thirdly, the court may receive expert evidence directed not to the questions of law which arise in interpreting the convention, but to the meaning, or possible meanings (for there will often be more than one), of the French. It will be for the court, not the expert, to choose the meaning which it considers should be given to the words in issue."

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