

LegCo Panel on Administration of Justice and Legal Services

Meeting on 20 March 2001

Information Paper submitted by the Department of Justice
for Agenda Item IV "Drafting policy on bilingual legislation"

Background

At a recent meeting of the Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000, members noted that there were differences in drafting style between the Chinese and English texts of some provisions of the Securities and Futures Bill. It was agreed that the Panel should consider the matter.

2. In her letter of 22 February 2001 to the Secretary for Justice, the Clerk to the Panel advised that the Panel would discuss on the policy respect of the "new approach" in law drafting.

Status of Chinese text

3. Before April 1989, all legislation in Hong Kong were drafted and enacted in English only. The Official Languages Ordinance (Cap. 5) and Interpretation and General Clauses Ordinance (Cap. 1) were amended in 1989 to provide statutory authority for enacting legislation in both Chinese and English.

4. Before the Reunification, the Bilingual Legislation Programme consisted of two elements. New enactments were drafted and enacted in English and Chinese. As regards ordinances enacted previously in English only ("existing laws"), Chinese texts were prepared under the Law Translation Programme. The Chinese texts were declared authentic by the Governor-in-Council after consulting the Bilingual Laws Advisory Committee. The Law Translation Programme was completed in May 1997. Since July 1997, all new legislation have been drafted and enacted bilingually.

5. Section 10B(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that both the English text and the Chinese text of an ordinance were equally authentic. While the English text is usually drafted first and forms the basis upon which the Chinese text is prepared, the Chinese text is not a translation. In terms of legal status and effect, both texts are equal and should be treated as such.

Drafting Policy

6. The Law Drafting Division of the Department of Justice is responsible for drafting all legislation promoted by the Administration. Our drafting policy for the two texts is the same. **The policy is to draft legislation that :**

(a) can accurately reflect the policy intent; and

(b) subject to (a), is easy to comprehend and understand.

As between the two texts, there must not be any discrepancy in meaning. The Chinese text must convey the same idea to the readers of the Chinese text as the English text to its readers.

Chinese texts in the early years

7. Chinese texts prepared in the early years of the Bilingual Legislation Programme are basically translated texts. Draftsmen adhered to the style and format of the English texts. There were two reasons for adopting this approach. Firstly, draftsmen of Chinese texts were then relatively inexperienced in original legislative drafting. Secondly, ascertaining whether a Chinese provision could give effect to the intended policy was sometimes difficult because the instructing officer did not read Chinese. For existing laws, it was usually impossible and impractical to ascertain the policy intention because the laws were enacted long time ago.

8. Because of these constraints, Chinese texts prepared in the early years of the Bilingual Legislation Programme have been described by some as being word-for-word translation of English texts. Some provisions were criticized as being anglicized and not readily comprehensible.

Change in drafting style of Chinese text

9. Although the same drafting policy is adopted for the two texts, the difference in the nature of the two totally different languages may, in some cases, entail different approaches in composing the provisions. Our own experience shows, and outside feedback confirms, that the comprehensibility of Chinese legal sentences drops rapidly with the growth in their length. Chinese legal provisions have to be kept short and concise in order to be comprehensible, subject of course to accuracy in legal meaning. This requires draftsmen to apply their drafting skill and treat the preparation of Chinese texts as original drafting rather than slavish translation.

10. Two changes that took place in the last few years enable draftsmen of Chinese texts to change their role from translators to drafters –

- (a) With the completion of translation of existing laws, seeking policy bureaux's confirmation on policy intention is no longer impracticable.
- (b) The bilingual draftsmen have accumulated more experience in legislative drafting.

11. Accuracy in legal meaning and consistency in meaning between the 2 texts remain the most important concern of draftsmen of Chinese texts. In most cases, draftsmen can achieve this by drafting provisions in two languages that are the same in terms of both the legal meaning and style and presentation. However, comprehensibility and grammatical correctness of the Chinese texts may occasionally require the draftsmen to draft Chinese provisions that are different from the English text in terms of presentation but not in terms of substantial meaning.

12. The following are some examples of drafting skills that will produce Chinese provisions being dissimilar to the English equivalents :

- (a) Words and phrases are not put in the Chinese text if their omission will not result in failure to convey the intended policy. Sometimes, in the English text, certain elements are repeated in later provisions to save the readers' efforts to refer to former provisions. But, for the Chinese text, such repetitions do not always assist the readers. Rather, they make the provisions become longer with the result that the readers find the provisions less easy to understand. To avoid such shortcomings, repetitions are omitted in the Chinese text when their omission does not affect the meaning of the provision as a whole. (Please refer to Examples 1 and 2 at the Annex.)

- (b) Owing to the different choice of words, the sentence structure of the Chinese provision may look very different from the English one, but in fact both provisions carry the same meaning. (Please refer to Example 3 at the Annex.)
- (c) When necessary, a definition is added in the Chinese provision as an aid to achieve clarity. It avoids repetition and shortens the provision. (Please refer to Example 4 at the Annex.)

No change in policy

13. The drafting policy referred to in paragraph 6 has not changed. The experience of draftsmen of Chinese texts have however grown with time, resulting in more extensive use of the drafting skills mentioned in paragraph 12 in recent years. The change is a gradual and evolutionary process. It is not the result of an administrative direction that took effect on a particular day. There is no question of departure from existing practice. The attention of the Bills Committee on the Securities and Futures Bill was drawn to the issue. The reason is, probably, the bulk of the Bill (over 1000 pages) means more instances of difference in style can be found in one single bill. However, the style of Chinese text of the Bill is not different from that of legislation enacted in recent years.

Differences are rare

14. There should be no impression that Chinese texts and English texts of new legislation look very different. Stylistic and formatic differences can only be found in 1 to 2% of the provisions.

Accuracy of paramount importance

15. There should also be no impression that draftsmen of Chinese texts will seek to achieve conciseness at the expenses of accuracy in meaning. Accuracy in meaning has been and will be of paramount importance. Draftsmen of Chinese texts will only seek to make the provisions more concise if the attempt will not result in discrepancy in meaning between the two texts or failure to reflect the policy intention. In case of doubt, draftsmen are instructed to take a prudent approach. While discrepancies in meaning between the 2 texts of new legislation can still be identified occasionally, they are the result of drafting errors rather than pursuit for conciseness of Chinese texts.

Consultation

16. We have always been aware of the demand for accurate and clear legislation. The worldwide trend of plain legal language has affected the drafting style of both texts of legislation drafted in recent years. We have had many opportunities to exchange views on style of legislation drafting with users of legislation including legal practitioners, academics and judicial officers. The comments have been favourable. Enactment of legislation in recent years also indicated endorsement of the drafting policy by the legislature.

The way forward

17. Our foremost duty will always be conveying the policy intention in the most accurate manner. Both the Chinese texts and English texts of legislation must meet this requirement. Subject to that, we will also strive to draft legislation in such style so as to make them easy to comprehend and understand. Everyone is expected to abide by law, it must therefore be ensured that law is accessible and comprehensible. While the style of legislative drafting is our responsibility, we will welcome ideas and comments from all users of legislation, in particular the Members of the Legislative Council.

Law Drafting Division
Department of Justice
13 March 2001

Example 1

The English text of clause 206(7) of the Securities and Futures Bill reads as follows :

"(7) Where the Commission applies to the Court of First Instance for an order pursuant to subsection (1), it shall not be required, as condition of the granting of an interim order under subsection (6), to give an undertaking as to damages."

The Chinese text read as follows :

"(7) 凡證監會依據第(1)款申請命令，該會無須就損害賠償作出承諾，以作為根據第(6)款頒發臨時命令的條件。"

It seems that there is a "discrepancy" between the English text and the Chinese text in that the reference to "the Court of First Instance" is omitted in the Chinese text. The reference, however, is not strictly required in clause 206(7) when it is read with clause 206(1).

The English text of clause 206(1) reads as follows :

"(1) Where –
(a) ; or
(b) ,
the Court of First Instance, on the application of the Commission, may, subject to subsection (4), make one or more of the orders specified in subsection (2)."

The Chinese text reads as follows :

"(1) 凡 —
(a) ; 或
(b) ,
在符合第(4)款的規定下，原訟法庭可應證監會的申請，作出第(2)款指明的一項或多於一項命令。"

Obviously, under clause 206(1), the Commission is apply to The Court of First Instance. While this point is repeated in the English text of clause 206(7) but not in the Chinese text, no ambiguity would arise. There is no question of difference of meaning between the two texts.

Example 2

In the Securities and Futures Bill, clause 103 empowers the Securities and Futures Commission to authorize any collective investment scheme; clause 104 empowers the Commission to authorize the issue of any advertisement, invitation or document; clause 105 empowers the Commission to withdraw an authorization under clause 103 or 104.

The English text of clause 105(1) reads as follows :

"(1) Subject to subsection (5), where, in relation to an authorization of a collective investment scheme under section 103, or an authorization of the issue of an advertisement, invitation or document under section 104, the Commission decides that –

- (a)
- (b)
- (c) ; or
- (d)

the Commission may withdraw the authorization."

If the Chinese text were to reflect the wording in the English provision, it would read as follows :

"(1) 在符合第(5)款的規定下，就根據第 103 條就集體投資計劃給予的認可而言，或就根據第 104 條就廣告、邀請或文件的發出給予的認可而言，如證監會斷定 –

- (a)
- (b)
- (c) ; 或
- (d)

則證監會可撤回該項認可。"

In the present Chinese text, references to "集體投資計劃" and "廣告、邀請或文件的發出" are omitted. This does not affect the meaning of the provision but improves readability. The present clause 105(1) reads as follows :

"(1) 在符合第(5)款的規定下，就根據第 103 或 104 條給予的認可而言，如證監會斷定 –

- (a)
- (b)
- (c) ; 或
- (d)

則證監會可撤回該項認可。"

Example 3

Clause 211(3) of the Securities and Futures Bill specifies the time within which an application for review of a decision of the Securities and Futures Commission shall be made. Clause 224(2) specifies when the decision takes effect.

The English text of clause 224(2) reads as follows :

"(2) A specified decision, , takes effect –

- (a) where, prior to the expiration of the time specified in section 211(3) as that within which an application for review of the decision shall be made, the person in respect of whom the decision is made notifies the Commission that he will not make the application, at the time when he so notifies the Commission;
- (b) subject to paragraph (a), where the person does not make an application for review of the decision within the time specified in section 211(3) as that within which the application shall be made, at the time when the time so specified expires; or
- (c)"

In the English text of clause 224(2)(b), the word "time" is used for two different purposes. It is therefore desirable to identify the time specified by clause 211(3) clearly to avoid any doubt. But, in the Chinese text of clause 224(2)(a), the time specified by clause 211(3) is referred to as "限期", while "時" is used in relation to the time on which the decision takes effect. Thus, repeated reference to "第 211(3)條指明提出覆核申請的限期" in clause 224(2)(b) can be avoided. Instead, the "time" can be referred to as "(a)段提述的限期".

The Chinese text thus reads as follows :

"(2) 凡證監會就任何人作出指明決定..... —

- (a) 如該人在第 211(3)條指明的就該決定提出覆核申請的限期屆滿前，通知證監會他不會提出覆核申請，則該決定在該人如此通知證監會之時生效；
- (b) 除(a)段另有規定外，如該人沒有在該段提述的限期內提出覆核申請，則該決定在該限期屆滿之時生效；或
- (c) 。

Example 4

The English text of clause 265(3) of the Securities and Futures Bill reads as follows :

"(3) False trading takes place when, in Hong Kong or elsewhere, a person takes part in, is concerned in, or carries out, directly or indirectly, one or more transactions (whether or not any of them is a dealing in securities or futures contracts), with the intention that, or being reckless as to whether, it or they has or have, or is or are likely to have, the effect of creating an artificial price, or maintaining at a level that is artificial (whether or not it was previously artificial) a price, for dealings in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services."

In the Chinese text, grammatical correctness requires that the reference to "the effect" appear twice. To avoid repetition and to make the Chinese text easier to understand, "the effect" is referred to as "有關效果" and defined at the end of the provision.

The Chinese text thus reads as follows :

"(3) 如任何人在香港或其他地方意圖使一宗或多於一宗交易(不論其中是否有證券交易或期貨合約交易)具有或相當可能具有有關效果，或罔顧該宗或該等交易是否具有或相當可能具有有關效果，而直接或間接參與、牽涉入或履行該宗或該等交易，則虛假交易即告發生。在本款中，“有關效果”指為在有關認可市場或透過使用認可自動化交易服務交易的證券或期貨合約，設定非真實的買賣價格或維持非真實的買賣價格水平(不論該水平先前是否非真實的)。”