THE CHINA-NZ FTA AND WAXING JURIDICAL

Ruiping Ye and Ricarda Kessebohm*******

This article considers the translation of legal personality and the use of the word juridical in the China-New Zealand Free Trade Agreement.

Les réflexions des auteurs portent sur la manière dont a été traduit le concept de 'personnalité juridique' dans le Traité de Libre Echange intervenu entre la Chine et la Nouvelle-Zélande en 2008 et ils analysent les différents contextes dans lesquels l'expression 'juridique' y a été utilisée.

I INTRODUCTION

The Free Trade Agreement between the Government of the People's Republic of China and the Government of New Zealand (the China-NZ FTA)[1] is the first free trade agreement that China signed with an OECD country and therefore is viewed as an archetype for further free trade agreements between China and other countries such as Australia and China. At first glance the China-NZ FTA in its English version uses some terminology that puts the English reader a little ill at ease. For this reason some of the language of the agreement is analysed here.

The terminology analysed is juridical person and the relevant passages are:

Article 4

person means a natural person or a juridical person.

第4条 人是指自然人或法人。

Article 103

juridical person of a Party means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether

* LLB (Xiamen), LLM (VUW), Barrister and Solicitor of the High Court of New Zealand.

** Diplomjuristin (JLU Giessen), LLM (VUW).

1 New Zealand China Free Trade Agreement, New Zealand–China (signed 7 April 2008, entered into force 1 October 2008).

privately-owned or governmentally owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association, which is either:

(a) constituted or otherwise organised under the law of that Party, and is engaged in substantive business operations in the territory of that Party; or

(b) in the case of the supply of a service through commercial presence, owned or controlled by:

(i) natural persons of that Party; or

(ii) juridical persons of that Party identified under subparagraph (a).

第103条

一方的法人是指根据适用法律适当组建或组织的任何法人实体，无论是否以营利为目的，无论属私营还是政府所有，包括任何公司、信托、合伙企业、合资企业、个人独资企业或协会，其为：

（一）根据该方法律组建或组织的、并在该方境内从事实质性商业经营的法人；或者

（二）对于通过商业存在提供服务的情况，则为：

1. 由该方自然人拥有或控制的法人；或者
2. 由第（一）项确认的一方法人拥有或控制的法人。

person of a Party means either a natural person or a juridical person of a Party.

一方的人是指一方的自然人或法人。

This article is divided into two parts. The first part deals with the use of the terms juridical person and legal person from the English version perspective and the Chinese law perspective. The second part focuses on the words juridical, juridic and juristic, relative to the term legal.

II LEGAL PERSON AND JURIDICAL PERSON IN THE CHINA-NZ FTA

The China-NZ FTA was signed in April 2008. One interesting issue about the China-NZ FTA is the use of legal person and juridical person. This part examines the use of these two terms in the Free Trade Agreements (FTAs) that New Zealand has signed with other countries, discusses the meaning of these two terms and explores the reason why both terms were used in the China-NZ FTA. It recommends consistency in the use of the terms, not only within one document, but also in all documents within the jurisdiction. It also analyses the ambit of the Chinese term for legal person (*fa ren*), and recommends that a different expression be used in the China-NZ FTA.

A Legal Person and Juridical Person in a New Zealand Context

The terms legal person and juridical person are both used in the China-NZ FTA. Article 4 of the China-NZ FTA defines "person" as "a natural person or a legal

person". In contrast, art 103 defines "person of a Party" as "either a natural person or a juridical person of a Party".

It is not clear from the text whether or not a "person of a Party" is a person as defined in art 4. The fact that they are separately defined suggests that they have different meanings, although it is not clear what the difference is. The context where the two terms are used does not help either. Article 135[2] and Appendix 3 to Annex 8[3] use the term "legal person" while arts 103,[4] 115[5] and 125[6] use the term "juridical person". These indicate that the two terms should have different meanings, but the text does not suggest why one term should be used instead of the other.

B The use of Legal Person and Juridical Person in Statutes and other FTAs

New Zealand statutes use the term legal person consistently. Although some statutes have international treaties which use the term juridical person in their schedules,[7] this term does not appear in the main text of any enactment. In contrast, the FTAs that New Zealand has signed have used juridical person and legal person alternatively, although apart from the China-NZ FTA none of the documents had used both.

Over the years New Zealand has signed seven other free trade agreements: the Australia-New Zealand Closer Economic Relationship Agreement 1983 (Australia CEP), the New Zealand-Singapore Closer Economic Partnership Agreement 2001 (Singapore CEP), the Trans-Pacific Strategic Economic Partnership Agreement 2005 (Trans-Pacific SEP), the Thailand–New Zealand Closer Economic

---

2 "Investments include investments of legal persons of a third country". Ibid, art 135.

3 For example, "coverage for the same legal person's property and liabilities"; "the investors' legal persons" Ibid, Appendix 3.

4 "[C]ommercial presence means …, including though the constitution, acquisition or maintenance of a juridical person" Ibid, art 103.

5 "[T]he service is being supplied by a juridical person" Ibid, art 115.

6 " … an employment contract with a natural or juridical person of that other Party"; "…the service supplier or juridical person which" Ibid, art 125.

7 For example, the International Finance Agreement Act 1961, sch 7; Convention Establishing the Multilateral Investment Guarantee Agency (opened for signature 11 October 1985, entered into force 12 April 1988), art 13; the Arbitration (International Investment Disputes) Act 1979, Schedule; Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966), art 25; the Mercenary Activities (Prohibition) Act 2004, Schedule; *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* (GA Res 44/34, A/Res/44/34) (1989), art 10.

Partnership Agreement 2005 (Thailand CEP), the New Zealand-Malaysia Free Trade Agreement 2009 (Malaysia FTA), the Agreement Establishing the Asean-Australia-NZ Free Trade Area 2009 (Asean FTA) and the New Zealand-Hong Kong, China Closer Economic Partnership Agreement 2010 (HK CEP).[8] Among these free trade agreements, three use juridical person, and three use legal person:[9] the Singapore CEP, the Trans-Pacific SEP and the Malaysia FTA use the term legal person but not juridical person; conversely, the Thailand CEP, the Asean FTA and the HK CEP use juridical person.

On most occasions the terms are used in the same context. For example, the Singapore CEP defines "person" as "either a natural person or a legal person",[10] while the Asean FTA and the Thailand CEP define "person" as "a natural person or a juridical person".[11] The Trans-Pacific CEP defines "supplier" as "a natural or legal person of a Party"[12] while the HK CEP defines "supplier" as "a natural or juridical person of a Party".[13] It is clear from this that legal person and juridical person are interchangeable.

C The Meaning of Legal Person and Juridical Person

There is no statutory definition of "legal person", but a New Zealand law dictionary defines it as "an entity on which a legal system confers rights and imposes duties".[14] The word "juridical" means "of or pertaining the administration

8 For the full text of these agreements and additional information relating to them see New Zealand Ministry of Foreign Affairs and Trade "Trade Relationships and Agreements" MFAT <www.mfat.govt.nz>.

9 The New Zealand–Australia Closer Economic Relations Trade Agreement, Australia–New Zealand ("Heads of Agreement" signed on 14 December 1982, basic provisions entered into force 1 January 1983) contains a series of agreements over the years, and was not examined for this paper.

10 Singapore Closer Economic Partnership, Singapore–New Zealand (signed 14 November 2000, entered into force 1 January 2001), art 16(i).

11 Asean Free Trade Agreement (Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area?) (signed 27 February 2009, entered into force for most countries including New Zealand 1 January 2010), art 2; Thailand-New Zealand Closer Economic Partnership Agreement, Thailand–New Zealand (signed 19 April 2005, entered into force 1 July 2005), art 1.2(m).

12 Trans-Pacific Closer Economic Partnership (Trans-Pacific Strategic Economic Partnership?) (signed 18 July 2005, entered into force for New Zealand and Singapore 28 May 2006), art 11.1.

13 New Zealand–Hong Kong–China Closer Economic Partnership Agreement, New Zealand–Hong Kong (signed 29 March 2010, entered into force 1 January 2011), art 3(i).

14 Peter Spiller *Butterworth's New Zealand Law Dictionary* (6th ed, LexisNexis, Wellington, 2005).

of justice; of or pertaining law or jurisprudence, legal".[15] The definition of "juridical person" is no different from that of "legal person":[16]

> **Juridical person**: *See artificial person*: 1. An entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being…

One dictionary more straightforwardly defines "legal person" as an "alternative term for juridical person".[17] The Chinese version of the China-NZ FTA does not differentiate the two terms and uses 法人（"*fa ren*") where the English version uses juridical person and legal person.

These definitions and usage further suggest that legal person and juridical person refer to the same types of entities and are interchangeable.

D The Reason why both Terms were used in the China-NZ FTA

Legal person is not defined in the China-NZ FTA, but art 103 defines "juridical person of a Party" as:

> Any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association, which is either: (a) …; or (b) …

This definition is a verbatim reproduction of the General Agreement on Trade in Service (GATS) art XXVIII (l) and (m). There is a footnote to "service supplier of a Party" in art 103.[18] This footnote is also identical to GATS footnote 12 which appears in art XXXVIII.

---

15 Bryan A Garner *Black's Law Dictionary* (9th West, St Paul, 2009). See also Stuart Berg Flexner *The Random House Dictionary of the English language* (2nd ed, Random House, New York, 1987) with a similar meaning.

16 *Black's Law Dictionary*, ibid. Also see "Juridical Person" Business Dictionary <www.businessdictionary.com>:

> Entity (such as a firm) other than a natural person (human being) created by law and recognized as a legal entity having distinct identity, legal personality, and duties and rights. Also called artificial person, juridical entity, juristic person, or legal person.

17 "Legal Person" Business Dictionary, ibid.

18 "Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (ie the juridical person) shall …" New Zealand China Free Trade Agreement, above n 1, art 103 (fn 1).

The definitions of "juridical person" and "juridical person of a Party" in the Asean FTA are exactly the same as the definition for "juridical person of a Party" in art 103 of the China-NZ FTA.[19] Footnote 1 to art 103 of the China-NZ FTA is also present in the Asean FTA. The definitions of "juridical person" and "juridical person of a Party" in the China-Singapore FTA are the same as those in the China-NZ FTA and the Asean FTA.[20] Therefore, it is highly likely that because ch 9 of the China-NZ FTA was on trade in services, the text was taken from the relevant part of GATS without adjustment to co-ordinate with the rest of the FTA.

E Recommendation

Since the terms legal person and juridical person have the same meaning, the China-NZ FTA should have used one term consistently rather than both of them. Given that New Zealand normally uses legal person, it would be better if the term juridical person was replaced by legal person. The Singapore CEP is a good example of this. In the Singapore CEP, the wording of the definition of juridical person in article XXVIII(l) of GATS is used, but the term defined and used in the text is legal person. This is a conscious change of terminology to fit into the text of the Agreement. New Zealand should adopt this approach.

F Chinese Law on Legal Personality

The use of the term legal person also presents some issues from the Chinese law perspective. The Chinese term for "legal person" is "法人(*fa ren)*". *Fa ren* is defined by statute but the whole statutory regime is a patchwork in this regard. As a consequence, the meaning of 法人 in Chinese law and that of juridical person in the China-NZ FTA can be different.

The General Principles of the Civil Law of the People's Republic of China 1986, which is the Civil Code of China, provides for the capacity of natural persons (*ziran ren*) and legal persons (*fa ren*) to enjoy civil rights and civil responsibility. Legal person is "an organisation that has capacity for civil rights and capacity for civil conduct and independently enjoys civil rights and assumes civil obligation in accordance with the law".[21] To have legal personality, an entity has to fulfil the following requirements:[22]

---

19 Asean Free Trade Agreement, above n 11, art 2(d) and (e). The China-NZ FTA combines the two definitions in one.

20 China–Singapore Free Trade Agreement, China–Singapore (signed 3 September 2008, entered into force 1 January 2009), art 59(c) and (d).

21 Civil Law of the People's Republic of China 1986, General Principles, art 36 [General Principles]. However, even if an organisation satisfies these criteria, it may still not be a legal person. For example, people who sign contracts should have the capacity to enjoy civil rights and civil

(1) be established in accordance with the law;

(2) possess necessary property or funds (as may be prescribed by law);

(3) possess a name, organisation and premises; and

(4) be able to independently bear civil liability.

Not all entities created by law have legal personality. Chapter 3, "Legal Person", of the General Principles provides for "*qiye faren*" ("enterprise legal person"), "*jiguan*" ("government organisations, departments of the central or local governments"), "*shiye danwei*" ("institutions") and "*shehui tuanti*" ("social associations") and "*lianying*" ("joint operations"). Enterprises include "*quanmin qiye*" ("enterprises owned by the whole people", or "State-Owned Enterprises"), "*jiti qiye*" ("collective enterprises" – a mysterious economic being whose ownership has been debated and is still confusing), "*zhongwai hezi qiye*" ("Sino-foreign equity joint ventures"), "*zhongwai hezuo qiye*" ("Sino-foreign contractual (co-operative) joint ventures") and "*waizi qiye*" ("wholly foreign-owned enterprises"). For an enterprise to be a legal person, it must have at least the prescribed amount of funds, a constitution, a business premises and an organisational structure, and be registered as a legal person.[23] Those government organs that have independent funding are legal persons from the day they are established.[24] Depending on the law that creates the institutions, some institutions and social organisations have legal personality from the day they are established, others need to be approved and registered as a legal person to have legal personality.[25] Joint operations may or may not have legal personality.[26]

The General Principles provide for some other entities under the chapter of "Natural Person": "*geti gongshang hu*" ("Individual Industrial and Commercial Entities"), "*nongcun chengbao jingying hu*" ("Rural Contracting Households") and "*geren hehuo*" ("Individual Partnership").[27] Putting them under the heading of

---

liability: Contract Law, art 9. However, contract is "an agreement between natural person, legal person and other organisation": Contract Law 1999, art 2. "Other organisation" is not defined. There may be some "special subjects of civil law" that are not legal persons, for example, the state. See Jianfu Chen *Chinese Law: Context and Transformation* (Martinus Nijhoff Publishers, Boston, 2008) at 348–358 for analysis of legal personality in Chinese law.

22 General Principles, ibid, art 37.

23 Ibid, art 41.

24 Ibid, art 50.

25 Ibid.

26 Ibid, arts 51 and 52.

27 Ibid, arts 26–35.

"Natural Person" suggests that they are not "legal persons".[28] Furthermore, since their owners are personally responsible for their liabilities,[29] they do not have the independent ability to bear civil liabilities, which is the fourth criterion of a legal person.

"Individual Sole Proprietor Enterprise" ("*geren duzi qiye*") under the Sole Proprietor Enterprise Law 1999 should fulfil the statutory requirements and be duly registered, but the shareholder personally owns its assets and has responsibility for all liabilities of the entity.[30] Since an Individual Sole Proprietor Enterprise cannot independently assume civil obligations, it does not fit into the statutory definition of legal person either.[31]

Partnerships under the Partnership Enterprise Law 1997 do not have independent legal personality; partners of ordinary partnerships and ordinary partners of limited partnerships are responsible for the liabilities of the partnerships.[32]

The status of companies established according to the Company Law 1993 is more clear-cut.[33] All companies registered under the Company Law 1993 are legal persons.[34] The Company Law 1993 expressly states that a branch of a company, including a foreign company, does not have legal personality, and the parent company bears the liabilities for the conduct of its branch.[35]

In summary, a "juridical person of a Party" under art 103 of the China-NZ FTA includes "any corporation, trust, partnership, joint venture, sole proprietorship or association", but in Chinese law the ambit of *fa ren* is narrower. To avoid confusion and dispute in the future, it would be better if the China-NZ FTA had

---

28 They were said to be "special subjects of civil law or quasi-legal persons. See Chen, above n 21, at 467.

29 General Principles, above n 21, arts 29, 34 and 35.

30 Individual Sole Proprietor Enterprise is owned by one individual: Sole Proprietor Enterprise Law 1999 (Chn), art 2.

31 Article 14 (ibid) states that the civil liabilities incurred by a branch of an Individual Sole Proprietor Enterprise shall be borne by the Enterprise. This is somewhat confusing when the Enterprise cannot even bear its own liabilities.

32 Ibid, art 2.

33 The above various types of enterprises and entities are not companies under the Company Law 1993 (Chn). "*Qiye*" ("enterprise") was a pre-Company Law term, but after the enactment of the Company Law 1993, the various types of enterprises and entities still exist, and the relevant laws are still in force.

34 Ibid, art 3.

35 Ibid, arts 14 and 196.

used another expression for the term juridical person. For example, the Singapore FTA, when defining investors, avoids using the term legal person: "investor" means natural person or "any company, firm, association or body, with or without legal personality, whether or not incorporated, established or registered under the applicable laws in force in a Party".[36]

III THE INFILTRATION OF THE TERM JURIDICAL, JURIDIC AND JURISTIC INTO THE COMMON LAW

A The Common Law Terminology: Legal – One Word Fits All

The common law uses the word legal with regard to law in general.[37] This provides the Common Law with a very broad term that can be used concerning all aspects of law.

Different legal terminology had developed even within common law countries, long before the influence of international treaty law. A particularly good example is Scotland, whose legal system is a mixture of common law and civil law. Documents between the English speaking Common Law countries therefore influenced each other, because even if England did not use the terminology that developed in Scotland, it would recognise it until eventually there was active use of those initially alien terms.

B Juridical, Juridic and Juristic – the Romans have Arrived

The China-NZ FTA oddly uses the word juridical in its English version; but the applicability of juridical in various contexts is problematic.

The English term "juridical" first appeared in international treaties in the 19th and 20th century. This terminology sounds alien to the Common Law. On the one hand, attempts have been made artificially to distinguish the terms "juridical" and "legal", but on the other hand they have been used as synonyms. The issue arises whether both terms mean the same or whether there exists a slight but distinct difference.

The origin of the word "juridical" is the Latin word "*juridicus*" which is a combination of "*jur*" ("jus" "juris" meaning "law") and "*dicere*"("to say").

---

36 Agreement between New Zealand and Singapore on a Closer Economic Partnership, New Zealand–Singapore (signed 14 November 2000, entered into force 1 January 2001), art 27.3.

37 Daniel Greenberg (ed) *Jowitt's Dictionary of English Law* (3rd ed, Sweet & Maxwell, London, 2010). The focus in this comment is on treaties. The use of juristic and juridical in other contexts is however without interest for example "juristic" meaning "of jurists" in *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 104B, and "juridical" meaning "legal" in *Fortex Group Ltd v MacIntosh* [1998] 3 NZLR 171 at 171 line 26.

Languages that are based on Latin such as French, Italian and Spanish still show the Latin origin of the word.

Latin has been the language of law, diplomacy and politics for many centuries for European society. Terminology was of little problem then because Latin was the common language of law. Around the 17th century French became the international language of diplomacy and law in place of Latin. By the 19th century, French was used as the universal language in treaties even when France was not a party to the agreement.[38] Treaties and contracts were therefore often agreed in French and then translated into English. The French version of such a document would have therefore used *juridique* (*relatif au droit*) when referring to law in a broad sense.[39] The introduction of the English word juridical could hence be traced to a mistake in translation, if translators were reluctant to use the English word legal, which in English would have had a similarly broad scope to the French *juridique*. This might be explained through the existence of the French word *légal* (*relatif aux lois*) which only relates to statutes. In French that leads to the following categorisation: with regard to *droit* the word *juridique* is the correct term; with regard to courts the word *judiciaire* is appropriate and with regard to *lois* the word *légal* is the correct term. Because of the similar spelling it would have been natural to assume the French *légal* is the same as the English "legal". But this is not the case. Translators might have been reluctant to use the English legal and instead created juridical when translating the French *juridique* with the intention of having a clear and distinct translation corresponding to *juridique*.[40]

Apart from the extraction of French-originated terminology, there was a trend at the beginning of the 19th century to codify adapted national legal principles in national language and terminology. When modern comparative law developed by extracting information on legal developments in other countries, writings by philosophers such as Mittermayer, Feuerbach, Zacharia von Lilienthal and Jhering influenced other legal systems by introducing foreign terminology to the readers. This was especially so when the original writings were translated into English without the care that was necessary to achieve a clear translation and at the same

38 See, for example, the Treaty of Kuchuk Karnadji, Turkey–Russia **(**21 July 1774), an example from von Ingo Kolboom, Thomas Kotschi and Edward Reichel "Das Französische als internationale Verkehrssprache" in *Handbuch Französisch: Studium – Lehre – Praxis* (Erich Schmidt Verlag, Berlin, 1999).

39 For example, *fait juridique*, *avis juridique*, *aspect juridique*.

40 Translation method of borrowing and naturalising when it is believed that no suitable equivalent exists.

time avoid imposing source language terms onto the target language. Other terms such as juristic and juridic might flow from those influences.

Black's Law Dictionary explains juridical as "1. Of or relating to judicial proceedings or to the administration of justice; 2. Of or relating to law; legal; also termed juridic."

Black's Law Dictionary also defines the word juristic as "1. Of or relating to a jurist; 2. of or relating to law; also termed juristical". But a dictionary is only a compilation of words effectively used and is not comprehensive. Neologisms and changes in the use of words update the dictionary. Translations and influences of foreign languages and legal systems are therefore very likely the starting-point for the inclusion of new and alien terminology.

The warning *Traduttore traditore*[41] proves to be valid because translating does not directly transmit the historical, philosophical or sociological ideas which are the basis of the ideas of the word which is to be translated.[42] With the growing number of bilateral and multilateral treaties it becomes apparent that the same legal concepts do not exist in every state that is a party to those agreements.[43] There are also some concepts that seem to be the same because they bear a similar name, but do not correspond and are false cognates.[44] The translating process to spot and overcome these difficulties is called "*transposition juridique*" or in English "legal transposition".[45] Outside the context of the European Union the process is also referred to as meta-legal language which is a new language emerging.[46] One approach that becomes more important in legal transposition is the creation of commonly understood terms. European Union Member States introduce more and more specific European terminology into all languages and where there is no specially created term available, conceptual coincidence is forced upon terms that are not inherently equivalent across language and legal systems.

---

41 To translate is to betray.

42 Ichiro Kitamura "Problems of the Translation of the Law in Japan" (1993) VUWLR Monograph 7 at 36.

43 For example in the civil law: *puissance paternelle*; *dol*; *force majeure*; and in the common law: bail; estoppels; trespas".

44 For example: common law and *diritto commune* and *droit commun.*

45 E Didier "La Common law en français. Etude juridique et linguistique de la Common law en francais au Canada" (1991) 43 R Int DC 1 at 9; Susan Sarcevic *New Approaches to Legal Translation* (Kluwer Law International , the Hague, 1997) at 12–13.

46 John Stanley Gillespie *Transplanting Commercial law reform: developing a 'rule of law' in Vietnam* (Ashgate Publishing Ltd, Aldershot, 2006) at 171.

Legal translation is acknowledged as being difficult but in many cases the translated texts will be as legally binding as the original and will have legal consequences[47] – such as the China-NZ FTA. Translations into the official languages of an international agency or body issuing a convention, a treaty or a protocol are equally authentic and are presumed to have the same meaning.[48] Therefore a wrong translation could lead to irritation and in the worst case to increased divergence of treaty interpretation in the different Member States.

If no specially invented terminology exists, translators have to find equivalents. Only if there is no equivalent can translators get creative.

In law even basic equivalence is hard to achieve due to different legal systems, cultures and languages.[49] A risk is that translators read notions of the source term into the more or less equivalent target language and possibly use distinct terms as near synonyms. Irritating for a non-legal translator is the occurrence of the same term which is used in different senses in different laws or which takes a new meaning as a result of court interpretation.[50] An example would be the word jurisprudence, which in French law means the case law of the courts in France; in England it means the philosophy of law and in German (*Jurisprudenz*) is the theoretical interpretation of the law.[51]

This is also reflected in the difficulty to compile bilingual legal dictionaries. Equivalents are often mere approximations and have to be used consciously carefully as they could be dangerous[52] because of inaccuracy. The challenge for translators is to find an equivalent of the doctrinal meaning invested in the legal terms, without interpreting it. The well-meant approach of dictionaries to string

---

47 *Fothergill v Monarch Airlines* [1981] AC 252 (HL), [1980] All ER 696 (HL), where it was necessary to establish the nature and status of art 26 of the Hague Protocol of 1955, enacted through s 2 of the Carriage by Air and Road Act 1979 (UK**)**. The Warsaw Convention 1929 (opened for signature 12 October 1929 (entered into force 13 February1933), which contained an article 26 in similar form, was agreed to in a single French text, deposited with the government of Poland. It was introduced into English by the Carriage by Air Act 1932 (UK). This set out in the First Schedule a translation of the Convention into English and provided in s 1 that the provisions of the Convention as so set out should have the force of law in the United Kingdom.

48 Vienna Convention on the Law of the Treaties (opened for signature 23 May 1969, entered into force 27 January 1980), art 33(3).

49 Susan Sarcevic "Bilingual and Multilingual Legal Dictionaries: New Standards for the Future" (1988) 19 Rev Gen 961 at 964.

50 WE Weisflog "Problems of legal translation" in *Swiss Reports presented at the XIIth International Congress of Comparative Law* (Zuericj, Schulthess, 1987) at 208–209.

51 Ichiro Kitamura above n 42 at 24.

52 Rene David *Les Grands Systemes de Droit Contemporains* (Dalloz, Paris, 1964) at 346.

potential translations separated by commas, incorrectly implies that the potential equivalents are synonyms and thus proves to be misleading.[53]

A major cause for the development of alien words is thought to be the translation method of borrowing the source term into the target language and naturalising[54] the term by modifying the words phonologically or graphologically in order to be similar to the native words of the target language.[55] This is very likely to be the case with the term juristic, which is probably a borrowing of Germanic origin and naturalised to sound less alien to the English language. Translators probably thought that legal does not express the same notion as the German *juristisch*, creating a term broadly understood because of its Latin origin, but hollow concerning its actual scope and distinctive meaning relative to legal. An example is a translation of a piece of German legal-philosophy from Radbruch:[56]

> adbruch bases the objective theory of meaning on the following reasoning: "Juristic interpretation [german original:[57] *Juristische* Interpretation] is directed toward the objective meaning of positive law, i.e., to the meaning expressed in the rule of law itself, not to the subjective meaning, i.e., the idea of the persons participating in its creation. Therein lies the difference between juristic interpretation and philological interpretation. Philological interpretation is re-thinking of an idea thought before …, juristic interpretation, on the other hand is drawing ultimate inferences from a thought.

Gustav Hugo's writings were translated using the same terminology as the translation of Radbruch to "Juristic Anthropology" (*Juristische Anthropologie*).[58]

Although this borrowed and slightly adapted term seems to have no distinct meaning from legal it is now a word applied even by guardians of justice. In *Commission v Steve Warner and Others* juristic was used:[59]

---

53 Susan Sarcevic, above n 49 at 965.

54 Ibid at 971.

55 Ibid; naturalisations include "*entreplaiderie*" ("interpleader"), "*aviseur legal*" ("legal adviser"), "contravention" (English–French).

56 Translation in English from Helen Silving "A Plea for a Law of Interpretation" (1950) 98 UPLR 4, at 499–529.

57 Gustav Radbruch *Vorschule der Rechtsphilosophie* (Kurt Ziehank, Heidelberg, 1948).

58 Gustav Hugo *Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts* (3rd ed, Mylius, Berlin, 1809).

59 *Commission v Steve Warner and Others* [2010] NZEMPC 90 WRC 41/09 at [19].

> There are three principal elements of the unjust enrichment cause of action. They are, first, proof of the recipient's enrichment by receipt of a benefit. Second, there must be a corresponding deprivation to the donor. Third, there must be an absence of any juristic reason for the enrichment. Absence of juristic reason may include a mistake.

Translators, although competent as generalists, are not always legally specialised and can easily make a bad decision believing that it is up to them to create a new legal term if they cannot find an acceptable equivalent (or at least think so). That situation seems to have been the case in translations from the French *juridique* to juridical instead of to legal, which would have been a sufficient translation.

Whatever the roots of the terminology, from today's perspective it is used inconsistently. Sometimes words such as juridical and legal are used as synonyms; it seems they can be replaced by each other without making any substantial difference. Whether that is the case is debateable but would explain the inconsistent use. On the other hand, the attempts by law dictionaries and various translations to differentiate between the terms indicate that the meaning could be slightly different.

In the Otago University Faculty of Law 2010 Handbook terminology has been used in the course description of LAWS 453 Advanced Legislation which indicates that a distinct meaning of the terms has been recognised:[60]

> The theories, principles, and practice of legislation seen from both *juristic and juridic* view-points. The gross morphology of legislation, studied both in the context of its composition and construction, as well as in the increasingly judicial relevance given to parliamentary history and the rise of juridic fundamentalism. An introduction to the linguistics and logic of legislation with examples of legislative, judicial, or executive failure arising from past and present legislation.

An example for the inconsistent use is the English translation of Danilo Zolo's *Victors' Justice – From Nuremberg to Baghdad*.[61] The source language is Italian and the target language English. It is remarkable that the translator has translated the same Italian phrase into two different English phrases: "*riflessione giuridica occidentale*" has been translated as "*Western jurisprudence*"[62] and "*opere*

---

60 Faculty of Law "Faculty of Law 2010 Handbook" (2010) Otago University <www.otago.ac.nz/law> (emphasis added).

61 Danilo Zolo *La giustizia dei vincitori Da Norimberga a Baghdad* (Editori Laterza, Gius 2006) (translated: Danilo Zolo *Victors' Justice – From Nuremberg to Baghdad* (Verso, London, 2009)).

62 Ibid at 77 (translated at 74).

giuridiche occidentali" as "Western juridical [texts]".[63] But a similar phrase "*formalismo giuridico occidentale*" has been translated as "Western legal formalism",[64] whereas "*formalismo guiridico*" on its own has been translated as "juridical formalism".[65] On two other occasions the Italian "*giuridico*" has been translated as "legal" and "juridical".[66] This could either mean that 'juridical' does not have a meaning distinct from 'legal', or that it does and the translator falsely treated the terms as synonyms.

C Summary

Several sources, original or translations, could be the cause for the co-existence of the terms juridical, juridic, and juristic in the English language. It is recommended that whenever an acceptable equivalent of the source language exists in the target language, naturalised borrowings and neologisms should be avoided.[67]

> First, words are our tools, and, as a minimum, we should use clean tools: we should know what we mean and what we do not … When we exam what words we should use in what situations, we are looking again not merely at words (or 'meanings', whatever that may be) but also at the realities we use the words to talk about.

IV CONCLUSION

The use of terminology such as juridical person in an inconsistent manner leads to confusion about the scope of the words. This makes legal interpretation of documents much harder because language is a lawyer's main tool and clear language is the basis of justice. Although international documents seek to standardise trading practices for example, this comment demonstrates that standardising practices does not necessarily mean that the terminology of the document has been standardised or even been unified throughout a text such as the China-NZ FTA. Translators and drafters of legal documents should be ever vigilant to use correct legal terms or avoid unnecessary neologisms.

---

63 Ibid at 82 (translated at 79).

64 Ibid (translated, ibid).

65 Ibid at 70 (translated at 67).

66 *Legittimità etica e giuridica*: ibid at 51 (translated "juridical legitimacy": ibid, at 48). Also "*un profile giuridico*": ibid, at 94 (translated "*in legal terms*" ibid, at 91).

67 JL Austin "A Plea for Excuses" (1956–57) 57 Proc Artist Soc 1 at 7–8.